***XIV th INTERNATIONAL SYMPOSIUM ON THE LAW AND GOVERNANCE OF THE INFORMATION SOCIETY***

***«Citizen Participation and Collaboration in Promoting Open Government»***

**Institut de Recherche Juridique de la Sorbonne**

**Université Paris 1 Panthéon Sorbonne**
**(Paris, France)**
**March 8, 2016**

# 'Humanizing' Disability Law: Citizen Participation in the Development of Accessibility Regulations in Canada

**By Laverne Jacobs***

## Abstract

*This paper examines one of the most recent and most widespread cases of consultation to occur in the development of lawmaking in Canada: citizen participation in the enactment of accessibility standards for persons with disabilities. Canadian provinces are attempting a new politico-legal experiment to combat disability discrimination. Through consultation processes leading to binding regulations, they are enacting mandatory standards of accessibility under legislation such as the* Accessibility for Ontarians with Disabilities Act, 2005 *(AODA). These statutes create an antidiscrimination regulatory process designed to offer participatory rights to persons with disabilities and other interested stakeholders in the development of accessibility standards. The standards address conditions of social inclusion in areas such as customer service, employment, transportation, and information and communication, and aim to break down a host of barriers including architectural and attitudinal ones. Collaborative standard development is a new and proactive approach to addressing disability barriers in society. The first part of the paper presents a comparative overview of Canadian accessibility legislation with a focus on citizen participation.*

*Consultation with citizens to create accessibility standards is a trend that is now being picked up by the federal government and other provincial governments across Canada. But, how well does it work? Using the theoretical framework created by Cass Sunstein in his recent work,* Valuing Life: Humanizing the Regulatory State*, the second part of this paper illustrates that the Canadian regulatory legislation and consultative processes succeed, to varying degrees, in: i) capturing qualitatively diverse goods and promoting sensible trade-offs among them, ii) taking account of values that are difficult or impossible to quantify, and iii) attempting to benefit from the dispersed*

* Associate Professor of Law, University of Windsor, Canada; email: ljacobs@uwindsor.ca; www.uwindsor.ca/ljacobs ; lawdisabilitysocialchange.com . This paper is forthcoming in Irène Bouhadana, William Gilles, and Russell Weaver (eds.), *Citizen Participation and Collaboration in Promoting Open Government* (Carolina Academic Press, 2017). Thanks to the Social Sciences and Humanities Research Council of Canada for its generous support and to Shanae Soor for her superb research assistance.

*information of a wide variety of human beings. However, this paper argues for an approach to humanizing the regulatory process that depends on deepening dialogue rather than relying on monetary valuation. To foster regulation grounded in disciplinary analysis instead of intuition, extended respectful dialogue on points that need clarification is most appropriate in the context of regulating for the equality rights of persons with disabilities. This evaluation of the Canadian experience is offered in an attempt to fill a gap in the literature relating to how accessibility law consultation processes are designed and may be assessed.*

**"We are hoping that through discussions, through dialogue, through comments we've received from the general public, we can come to a more general agreement of what everyone sees as the best interest of Manitoba"[1]**

# 1. Introduction

Consultation is becoming increasingly popular among the federal and provincial/territorial governments in Canada.[2] This paper examines one of the most recent and most widespread cases of consultation to occur in the development of lawmaking in Canada: citizen participation in the enactment of accessibility standards for persons with disabilities. The first attempt at legislation designed to enable this form of participatory governance came about in Ontario with the *Ontarians with Disabilities Act, 2001* (ODA).[3] Systematic discontent and a grassroots movement by the disability community eventually pushed for the development of legislation with more enforcement potential –namely, the *Accessibility for Ontarians with Disabilities Act, 2005* (AODA).[4] Both statutes, but especially the AODA, show a radical shift in the process of developing laws in terms of incorporating citizen participation. Under the AODA, regulations are created by the responsible Minister, after the content of those regulations have been agreed upon and put forward by committees comprised of persons with disabilities, industry, government and other affected stakeholders. The legislation therefore adds a new dynamic to the creation of regulations in Canada. The degree of citizen participation is much more extensive, more formal, and lengthier than what is typically used for the development of regulations.[5] More importantly, the new form of consultation process seeks to bring together opposing views in a deliberative democratic battleground with the reality of regulations built on consensus or compromise. In addition to the two Ontario statutes mentioned above, the ODA and the AODA, accessible standards legislation has now also been enacted in the province of Manitoba.[6]

---

[1] Member of the head table hosting the Manitoba Customer Service Standard Public Consultation-June 14, 2014.

[2] Canada's 2007 *Cabinet Directive on Streamlining Regulation* (available online at: http://publications.gc.ca/collections/Collection/BT22-110-2007E.pdf), specifies that federal regulations will be made in an inclusive and transparent manner and that all departments and agencies are responsible for ensuring that there are "open, meaningful, and balanced consultations at all stages of the regulatory process". The federal government currently runs a consultation website where the public can view which consultations are taking place: http://www1.canada.ca/consultingcanadians/. Some provinces run similar websites. See, for example, the province of Ontario's *Consultations Directory* website: https://www.ontario.ca/page/consultations-directory .

[3] S.O. 2001, CHAPTER 32.

[4] Though there are indications that an earlier and much less widespread instance of using consultation to develop standards existed several decades earlier in Toronto municipal government. (Interview with person with disability and former official of Toronto municipal government, notes on file with author.)

[5] See France Houle, *Analyses d'impact et consultations réglementaires au Canada* (Éditions Yvon Blais, 2012).

[6] The first standard (customer service) came into effect on November 1, 2015. The Employment Standard Committee met between October 2015 to March 2016 to prepare the draft of the second standard under the AMA.

The move to this consultation model was prompted by dissatisfaction in the existing approach to remedying disability discrimination. Prior to the enactment of the ODA and the AODA, persons who suffered disability discrimination had, as their only source of redress, the option of filing a complaint before an administrative body or the court.[7] With respect to administrative bodies, a collection of human rights commissions and tribunals exists in every province and territory and at the federal level. The aim of these statutory administrative bodies is to achieve remedial and transformative change in society by remedying disputes in which discrimination has been alleged. Statutory human rights bodies fit within a swath of administrative actors in Canada and elsewhere that can be described as *reactive regulatory bodies*. I use the term *reactive regulation* to represent the idea that regulation by these administrative actors is triggered only in response to a complaint by an aggrieved party. These bodies are not inquisitorial or investigative. They do not rely on the initiative of the administrative actor to initiate a search for wrongs and to remedy them. More importantly, they are also not forward-looking beyond the parties in the dispute. For example, a human rights commission or tribunal may provide systemic remedies when a workplace has been found to have violated the right to be free of discrimination held by an employee or group of employees. In such a case, a systemic remedy may involve training at the workplace about discrimination and a requirement that the training be ongoing over a period of time. However, although this remedy is systemic (in that it aims to address an underlying repeated behaviour of discrimination in the workplace) and forward-looking (in that it takes place over time and hopes to prevent future occurrences), it is rooted in the unique circumstances of the conflict that prompted the human rights commission or tribunal's involvement. It is also confined to the workplace where the incident occurred. In other words, reactive regulation, as established by the statutes enabling human rights bodies in Canada, provide remedies only in discrete situations as opposed to setting blanket standards.[8]

In addition to the limited scope of the remedy, members of the disability community were also concerned about the costs of bringing forward complaints over disability discrimination within the reactive regulatory human rights system. In many instances, human rights statutes may not allow for the complainants to be awarded the costs of their litigation.[9] Moreover, persons with disabilities

---

[7] The constitutional and statutory legal tools protecting human rights and freedoms in Canada, including equality rights for persons with disabilities include the Canadian *Charter of Rights and Freedoms* and statutory human rights codes. The UN *Convention on the Rights of Persons with Disabilities* has also been signed and ratified by Canada and is said to be reflected in many of the laws already existing. A concise overview of these laws as they relate to persons with disabilities may be found in *Second Legislative Review of the Accessibility for Ontarians with Disabilities Act, 2005* (Mayo Moran, Reviewer) (Queen's Printer for Ontario: 2014) [Moran Review] at 4-8.

[8] But, note that, even if the goal of the AODA is to provide accessibility standards that apply across the province, those who are bound by the standard still have an obligation to provide the highest level of human rights protection (See section 38, AODA). Most notably, this means deferring to the duty to accommodate to the point of undue hardship, which is the standard under statutory human rights law. For an interesting account of discontent and confusion caused by the existence of the two standards see Moran Review *ibid*. at 51-53.

[9] See *Canada (Canadian Human Rights Commission) v Canada (Attorney General)* 2011 SCC 53 (*Mowat)* which held that very strict interpretation of the legislative wording allowing for the awarding of costs should be followed by human rights tribunals in Canada.

often represent a large proportion of society that lives below the poverty line.[10] The costs of bringing forward litigation can be quite high and therefore out of reach for many persons with disabilities. Finally, many of the complaints that are brought through the reactive human rights process are settled due to an emphasis on alternative dispute resolution, particularly mediation, that has blossomed in the past two decades.[11] Mediated files result in settlements that are generally sealed. This means that the resolution may not be known beyond the two parties and certainly cannot be used as a precedent in later similar cases. In short, despite the existence of human rights codes and the administrative actors mandated to implement them, their impact on persons with disabilities was not significant. This is because of inherent barriers posed by the remedial nature of the system, costs, and the increase of closed mediated settlements.

As mentioned earlier, in Canada, it is also possible to file an action in court under the *Canadian Charter of Rights and Freedoms* (*Charter*) for disability discrimination.[12] In such cases, the remedy sought must be against the government (actions against private parties for human rights violations are not possible under the *Charter*), and would be under the equality section, which provides for freedom from discrimination.[13] Concerns about the limited scope of remedies, costs and alternative dispute resolution equally existed with respect to the *Charter*. There was also an additional concern over past governmental delay in implementing *Charter* remedies to rectify disability discrimination.[14]

Persons with disabilities therefore sought a new method through which the eradication of disability discrimination and the concomitant goal of social transformation could be achieved. In contrast to the complaint-triggered human rights system, regulations setting standards of accessibility were seen as a desirable complementary tool to assist in lowering instances of disability discrimination and developing a society will more inclusive of persons with disabilities. I use the term *proactive regulation* to describe this approach as it aims to break down discriminatory barriers before it becomes necessary for individuals to suffer discrimination. In this way, the proactive regulatory system should skirt the need for at least a portion of disability discrimination claims to be brought to human rights agencies and the courts.

One question that arises with the new proactive regulatory system is how well it works – both from a perspective based on regulatory theory and from the perspectives of persons with disabilities and

---

[10] See Council of Canadians with Disabilities, "As a Matter of Fact: Poverty and Disability in Canada", online at: http://www.ccdonline.ca/en/socialpolicy/poverty-citizenship/demographic-profile/poverty-disability-canada

[11] See Julie MacFarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (University of British Columbia Press, 2008).

[12] Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. [*Charter*]

[13] *Charter ibid* s 15.

[14] In particular, the federal government delayed considerably in implementing mandatory interpreter services for the Deaf despite the Supreme Court of Canada decision requiring that this be done. See *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624. See the concise review of events in Sarah Armstrong, "Disability Advocacy in the Charter Era" (2003) 2 Journal of Law & Equality 33 at 62-65.

others whom the change affects. In this paper, I seek to address only the first question.[15] In order to examine the efficacy and shortfalls of the proactive regulatory system, I analyze the legislation and consultation processes of the standard-setting regulations through the framework of Cass Sunstein's *Valuing Life: Humanizing the Regulatory State*[16].

In Part II of the paper, I present a detailed and comparative description of the statutes in Canada providing for citizen participation in the development of disability access standards. In Part III, I set out Sunstein's framework of analysis for humanizing the regulatory state. I then apply the analysis to demonstrate that the Canadian regulatory legislation and consultative processes succeed, to varying degrees, in: i) capturing qualitatively diverse goods and promoting sensible trade-offs among them, ii) taking account of values that are difficult or impossible to quantify, and iii) attempting to benefit from the dispersed information of a wide variety of human beings. The legislative wording and consultation documents reveal that there may be room for intuition rather than a disciplined analysis to inform the ultimate development of the regulations. Lastly, using empirical examples primarily drawn from Manitoba's consultations during the development of its Customer Service Standard, I argue that any unclear aspects of the legislation can and should be clarified through further consultative dialogue rather than analysis based on monetary valuation.

## 2. Accessibility Standards Legislation in Canada – Comparative Overview

Canadian federalism divides legislative jurisdiction between the federal government and the provinces. The provincial governments that have decided to enact disability access legislation have chosen areas that fall within the provincial legislative authority of the Constitution. These areas are: customer service, employment, information and communication, and the built environment. The current legislation aims to counteract attitudinal barriers as well, such as stigmas surrounding mental illness.

In addition to Ontario and Manitoba, which have already enacted accessibility standards legislation, the province of Nova Scotia has presented plans to create similar accessibility legislation.[17] British Columbia has adopted an approach of inclusion, which involves engaging citizens in disability related policy discussions. The province has also committed to consider options for a "made-in-B.C." approach to accessibility-related legislation.[18] Even more recently, there has been literature from

---

[15] The second question is addressed in the qualitative empirical data and analysis of my forthcoming book, Laverne JACOBS, *Do Disabled Voices Make a Difference? Exploring Equality and Fairness in the Enactment of Accessibility Standards* (in progress).

[16] Cass Sunstein, *Valuing Life: Humanizing the Regulatory State* (Chicago: University of Chicago Press, 2014) [*Valuing Life*].

[17] With respect to Nova Scotia, the Minister of Community Services' Advisory Panel on Accessibility Legislation was established on June 24, 2014. Its report and recommendations for accessibility legislation was published in 2015. See: "Access and Fairness for All Nova Scotians: The Minister's Advisory Panel on Accessibility Legislation. Report and Recommendations", online: http://novascotia.ca/coms/accessibility/docs/Accessibility-Leg_Eng_Accessible.pdf

[18] See Government of British Columbia, "Accessibility 2024: Making B.C. the most progressive province in Canada for people with disabilities by 2024" at 6, online: http://www2.gov.bc.ca/assets/gov/government/about-the-bc-government/accessible-bc/accessibility-2024/docs/accessibility2024_update_web.pdf

the federal government indicating that it is contemplating the creation of a federal statute to be called the *Canadians with Disabilities Act.*[19] Although the precise issues that the federal statute would address have not yet been revealed, given the nature of Canadian federalism, the statute could serve to support initiatives taken by the provinces or address slightly different concerns such as employment of federal employees, trans-provincial transportation, and health care.

The purpose of the following section is to provide background on the issues addressed by existing Canadian accessibility legislation and the means by which it contemplates citizen participation. The section first presents a comparative overview of the two Ontario statutes-the ODA and the AODA, and then a comparison between those statutes and the accessibility legislation in Manitoba, *The Accessibility for Manitobans Act* (AMA)[20].

## a) Ontario

### *§ 1 – Ontarians with Disabilities Act, 2001 (ODA)*

This section presents an analysis of the *Ontarians with Disabilities Act, 2001* (ODA) as it existed between its enactment on December 14, 2001 and December 1, 2015. During that time, only one section was modified: the provision establishing offences under the Act and prescribing monetary penalties was repealed. Interestingly, this provision was repealed before it was even brought into effect, reinforcing the commonly held perception that the statute had very weak enforcement teeth.[21] On December 1, 2015, a number of additional provisions were repealed. [22] These sections of the ODA were deemed to be redundant once the AODA came into effect in 2005. They were not repealed immediately, though, due to a sentiment that it would be wisest to wait until the AODA's standards had been firmly put in place before repealing seemingly duplicative legislative provisions. Today, many of the provisions no longer exist but it is useful to have knowledge of them in order to have a historical and complete understanding of citizen participation in the enactment of disability access legislation.

#### *A) Underlying Philosophy and Guiding Principles of the Statute*

The *Ontarians with Disabilities Act, 2001* (ODA) opens with a lengthy preamble that is not found in the later Ontario accessibility statute. As with most legislation, the preamble is suggestive, providing baseline principles for understanding and interpreting the rest of the statute. The ODA preamble begins by emphasizing the nature of the equality rights that it seeks to promote. Specifically, the ODA was designed to support the rights of persons with disabilities to equal opportunity and full participation within the life of the province of Ontario.

---

[19] Shortly after being elected to office in October, 2015, Prime Minister Justin Trudeau stated that one of the "top priorities" of the newly established Minister of Sport and Persons with Disabilities would be to "lead an engagement process with provinces, territories, municipalities, and stakeholders that will lead to the passage of a Canadians with Disabilities Act". See Prime Minister of Canada, "Minister of Sport and Persons with Disabilities Mandate Letter" (letter to Minister Carla Qualtrough) (2015): http://pm.gc.ca/eng/minister-sport-and-persons-disabilities-mandate-letter#sthash.ZH3rG4cy.dpuf

[20] C.C.S.M. c. A1.7.

[21] Section 21 was repealed on December 31, 2011.

[22] Sections 3, 5, 6, 7, 10, 11, 12, 13, 16, 18, 20 and 22 were repealed (see S.O., 2005, c 11, s 42).

Barriers experienced by persons with disabilities in Ontario are also acknowledged in the preamble. The preamble affirms that persons with disabilities experience barriers and recognizes that the number of persons with disabilities "is expected to increase as the population ages"[23] as the incidence of disability increases with age. The connection between aging and disability has been highlighted consistently since the time that the province began developing accessibility standards.[24]

There is only one strong and clear statement of the government of Ontario's commitment to improving the situation of persons with disabilities in the preamble. The rest of the statements in the preamble are supportive of this statement. The statement asserts that the Government of Ontario is committed to moving towards "a province in which no new barriers are created and existing ones are removed"[25]. In order to reach this goal, the Government will work with every sector of society to build on what it has already achieved. Moreover, the preamble indicates that the government sees the work of removing existing barriers and avoiding the perpetuation of new ones as a widely shared responsibility among all geographic regions, institutions, and individuals in the province. It is a responsibility that "rests with every social and economic sector, every region, every government, every organization, institution and association, and every person in Ontario".[26]

An unusual aspect of the preamble that is not seen in the other Canadian provincial legislation on disability access is its emphasis on the Government's own past leadership. One sees a list of six Ontario statutes, which, the preamble boasts have already been designed or amended to further the equality rights of persons with disabilities. No rights that have been granted to persons with disabilities under other statutes or regulations are to be diminished in any way by the ODA.[27] Finally, the preamble asserts the government's support for other jurisdictions in Canada to identify, remove and prevent barriers to persons with disabilities.

The underlying philosophy of the legislation rests on the idea of bringing persons with disabilities into the public policy realm to discuss the barriers that need to be addressed. This philosophy becomes evident when one reads the purpose statement of the ODA which indicates that "the purpose of this Act is to improve opportunities for persons with disabilities and to provide for their involvement in the identification, removal and prevention of barriers to their full participation in the life of the province". [28] This purpose statement brings together the ideas of the preamble.

---

[23] ODA, Preamble.
[24] See, for example, the website of the Ministry of Economic Development, Trade and Employment as preserved in the web archives for January 13, 2014: https://web.archive.org/web/20140113141224/http://www.mcss.gov.on.ca/en/mcss/programs/accessibility/index.aspx
[25] *Ibid*
[26] *Ibid*
[27] See ODA, s 3, which read:
"3. Nothing in this Act, the regulations or the standards or guidelines made under this Act diminishes in any way the existing legal obligations of the Government of Ontario or any person or organization with respect to persons with disabilities."
[28] ODA, s 1.

### *B) Obligations and Consultation Under the ODA*

#### 1. Obligations

The bulk of the ODA as it existed until 2015, set out the access obligations of the various levels of government. In doing so, it also identified the instances in which these levels of government must consult with persons with disabilities and prescribed how the consultations must be completed. In comparison to the statutes later enacted, the duty to consult is limited and the guidance provided minimal.

Obligations were owed by three sectors of the provincial government: the Government of Ontario itself, municipalities and "other organizations, agencies and persons". The last category captures organizations that provide transportation to the public, educational institutions, hospitals and administrative agencies[29].

In all cases, the nature of the obligation was to provide accessibility but the essence of the obligation and the manner in which the obligation was to be carried out varied within the sector depending on the subject matter. For example, the Government of Ontario was responsible for ensuring accessibility with respect to the built environment (building structures and premises), goods and services, Internet sites, employees, capital programs and accessibility plans within all government ministries.[30] In relation to the built environment, the government's obligation was to ensure that *guidelines* were created in order to provide barrier free access to buildings, structures and premises.[31] The guidelines were to be created in consultation with persons with disabilities and others. The guidelines had to ensure that the level of accessibility was at least the same as what was provided under the province's *Building Code*. The ODA allowed the government to set up a time frame by which the building etc. must meet the guidelines, although it does not set out any sanction for failure to comply. There was therefore a very detailed set of steps that formed the collection of the Government's obligations. By contrast, when it came to the purchase of goods and services, the government simply had an obligation to "have regard to the accessibility for persons with disabilities to the goods or services."[32] Unlike its responsibilities with respect to the built environment, there was no duty to consult with persons with disabilities, to set guidelines, etc. One sees a similar pattern within the other governmental sectors.

#### 2. The Duty to Consult with Persons with Disabilities

The words "consult" or "consultation" come up only 10 times in the ODA as it existed between 2001-2015, which is rather surprising in light of the proactive orientation of the statute reflected in

---

[29] See ODA, s 2 and ss 14-16.
[30] *Ibid* ss 4-10.
[31] The provision indicates that the barrier free design is for buildings that the Government of Ontario " has purchased, leased, or significantly renovated". Common criticism of the ODA which found itself reproduced with the AODA later on, is that there is no obligation on the government to retrofit buildings to ensure their accessibility. See ODA section 4 and P Gordon et al, "An Analysis of the *Ontarians with Disabilities Act, 2001*" (2002) 17 Journal of Law and Social Policy 15 [Gordon] at 24-25.
[32] ODA s 5.

its purpose statement. Many have criticized the ODA for not having sufficient enforcement teeth.[33] In my opinion, the Act may also be criticized for failing to provide a significant number of consultation opportunities. Moreover, the consultation opportunities that were available were inconsistent in their engagement with the disability community itself, suggesting reticence on the part of the government to fully engage in citizen participation. Much fuller opportunities for consultation appear later in the AODA and in Manitoba's AMA.

As regards the ODA, the consultation opportunities designed by the statute can be classified into four categories. These categories represent situations in which the government sector was obliged to participate in: i) direct consultation, ii) indirect consultation, iii) no consultation or iv) consultation on direction or through request. *Direct consultation* refers to instances under the Act where a government sector must consult with persons with disabilities under the Act in order to complete the statutorily required task relating to accessibility. The Government of Ontario's responsibility to develop barrier free design guidelines for building structures and premises (discussed above) provides an illustration. The relevant ODA provision reads:

> 4. (1) In consultation with persons with disabilities and others, the Government of Ontario shall develop barrier-free design guidelines to promote accessibility for persons with disabilities to buildings, structures and premises, or parts of buildings, structures and premises, that the Government purchases, enters into a lease for, constructs or significantly renovates after this section comes into force. [34]

In keeping with the rest of the statute, there was no administrative sanction or means for redress if this consultation did not take place. There are four occurrences of direct consultation under the Act. Outside of barrier-free design guidelines for buildings etc., public transportation organizations, educational institutions and hospitals were required to consult directly with persons with disabilities and others in preparing an accessibility plan.

*Indirect consultation* denotes circumstances where the Act requires the government sector to consult with a committee or other body established to represent the interests of persons with disabilities. For example, every government ministry was required to consult with the Accessibility Directorate of Ontario while creating its annual accessibility plan.[35] The Accessibility Directorate of Ontario is an office of civil servants established by legislation to support the administration of the statute under the direction of the responsible Minister. There is no requirement that persons with disabilities be among the employees appointed to this office. Indirect consultation may also signify an obligation imposed on the government sector to consult with persons with disabilities because a representative committee has not been established under the Act for legitimate reason. For example, in preparing its annual accessibility plan, every municipal council was required to seek the advice of the municipality's accessibility advisory committee. However, municipalities were exempt from establishing accessibility advisory committees if they had a population of less than

---

[33] See e.g. Gordon *ibid*, D Lepofsky, "The Long, Arduous Road to a Barrier-Free Ontario for People with Disabilities: The History of the *Ontarians with Disabilities Act* -- The First Chapter" (2004) 15 Nat'l J. Const. L. 125 [Lepofsky, "Arduous"].
[34] ODA s 4(1).
[35] ODA s 10(1)(b).

10,000 people.[36] In such cases, a municipality without an accessibility advisory committee would be required by default to consult with persons with disabilities directly.[37]

In many instances, *no consultation* was required. For example, the Government of Ontario could make decisions respecting the purchase of goods or services without having to consult with persons with disabilities or a representative committee. The government was required only to "have regard" to access for persons with disabilities in relation to the goods and services procured. Moving even further along the spectrum of consultation, it was possible for a government sector to avoid the obligation of providing access in certain cases such as where it determined that it was not technically feasible to create accessible Internet sites.[38]

Finally, with respect to *consultation on direction or through request*, situations existed under the statute where consultation would only take place on direction of the responsible minister. The situation could occur with respect to the Accessibility Directorate of Ontario. At his or her discretion, the Minister could direct the Directorate to consult with persons with disabilities in order to develop codes, standards guidelines etc.[39] There is one final situation in which a similarly weak form of consultation would take place. This is where a person with a disability could request access and the government sector would be obliged by the statute to consider the request. There is only one instance of this type of circumstance in the statute. It deals with government publications and obliges the Ontario government to make a publication available in a format that is accessible to the person who has made the request "unless it is not technically feasible to do so".[40]

In conclusion, the underlying philosophy of the ODA is to bring persons with disabilities into decision-making processes for the creation of guidelines etc. to provide accessibility. The statute aims, ultimately, to concretize the equality rights guaranteed under the human rights statutes of each province and territory and the constitutional right to equality for persons with disabilities under the Constitution. However, the obligations imposed on the government vary according to the circumstance. Moreover, the right to consultation itself comprised four categories on a spectrum with only a few instances of direct consultation with persons with disabilities themselves. There was also no enforcement mechanism to ensure that government complied with the outcomes (whether they be accessibility guidelines, plans, or barrier free design) once they have been established. Some of these issues were addressed by another Ontario statute developed later and which will be discussed next, the *Accessibility for Ontarians with Disabilities Act, 2005* (AODA).

---

[36] ODA s 12.
[37] ODA s 11(1)(b).
[38] ODA s 12.
[39] ODA s 20(1)(f). This section also provides that, in addition to consulting with persons with disabilities, the Accessibility Directorate of Ontario may also be directed by the Minister to consult with the Accessibility Advisory Council of Ontario. [See earlier version of the statute where this Council was established and defined at the now repealed section 19].
[40] ODA S 7.

## *§ 2 – The Accessibility for Ontarians with Disabilities Act, 2005 (AODA)*

Four years after the ODA was enacted, the *Accessibility for Ontarians with Disabilities Act, 2005* (AODA) received royal assent. The AODA provides stronger tools than the ODA for enforcing the obligations it sets out. It also places obligations on for-profit businesses and organizations — a move that is more in keeping with the statutory human rights codes. The human rights codes exist in every province and territory and apply in both the public and private sectors. Surprisingly, the AODA was passed during the term of the conservative government as opposed to the earlier statute which had been passed by the more progressive New Democratic Party.

### *A) Underlying Philosophy and Guiding Principles of the Statute*

Similar to the ODA, the AODA shares an underlying philosophy of engaging citizens in the development of laws, policies and programs that affect them. There is no distinct preamble in the statute. Instead, there is a short and precise statement of purpose that recognizes the "history of discrimination against persons with disabilities in Ontario".[41] The statement specifies further that the purpose of the statute "is to benefit all Ontarians" through the development, implementation and enforcement of accessibility standards, and to involve persons with disabilities, government and industry in the process of developing the standards. It is worth setting out the purpose statement in full as it lays the foundation and underlying theory for the statute, the terms of reference for the standard development committees and other committees related to the AODA, and for all other regulations and delegated legislation authorized by the statute. The purpose statement reads:

> Purpose
>
> 1. Recognizing the history of discrimination against persons with disabilities in Ontario, the purpose of this Act is to benefit all Ontarians by,
>
> (a) developing, implementing and enforcing accessibility standards in order to achieve accessibility for Ontarians with disabilities with respect to goods, services, facilities, accommodation, employment, buildings, structures and premises on or before January 1, 2025; and
>
> (b) providing for the involvement of persons with disabilities, of the Government of Ontario and of representatives of industries and of various sectors of the economy in the development of the accessibility standards.[42]

"Accessibility standards" are a central tool in this legislation. They are legal instruments designed to set out measures, policies, practices etc. for the eradication and prevention of barriers affecting persons with disabilities in prescribed areas of society.[43] The social areas that are prescribed in the statute mirror the areas of protection in the Ontario *Human Rights Code*. [44] These areas are: goods, services, facilities, accommodation, employment, buildings, structures, premises. However, the AODA offers the opportunity for additional social areas to be identified and protected as well, by

---

[41] AODA s 1.
[42] *Ibid.*
[43] AODA ss 2, 6(a).
[44] R.S.O. 1990, CHAPTER H.19.

indicating that "such other things as may be prescribed" may also be the subject of accessibility standards.[45]

Like accessibility standards, barriers are also at the heart of the legislation. Under the AODA, a "barrier" means anything that prevents a person with a disability from fully participating in all aspects of society because of their disability, including a physical barrier, an architectural barrier, an information or communications barrier, an attitudinal barrier, a technological barrier, a policy or a practice.[46] Barriers have a wide-reaching scope, the removal of which aims to facilitate the inclusion of persons with disabilities in society. Although the concept of a "barrier" had been mentioned in the earlier ODA, it is developed in detail for the first time in the AODA. The AODA highlights the concept of a barrier for the first time in the legislative sphere of laws affecting persons with disabilities in Ontario.

### *B) Obligations and Consultation Under the AODA*

#### 1. Obligations

Obligations are imposed on the persons or organizations named or described in each accessibility standard. These persons or organizations are required to implement the measures, policies, practices or other requirements set out in the standard within the time periods it specifies.[47] Unlike the ODA, which had varying obligations depending on the issue, the AODA simply obliges those subject to a standard to follow its requirements. The standards in turn have been developed with theinput of stakeholders representing persons with disabilities, government and industry. They may have variety or unevenness depending on the topic or issue but the lack of consistency is sanctioned by stakeholder committee approval.

To date, standard development committees have created standards in each of the five areas identified by the Minister shortly after the AODA came into force: customer service, transportation, information and communications, employment, and the built environment. [48]A current and significant challenge, though, concerns enforcing the obligations under the standards that have been created. The statute indicates that the obligations are binding and that the goal of the legislation is to make the province accessible by 2025.[49] However, on the ground, there are lapses in compliance caused in part by recognized weaknesses in enforcing inspections and other oversight tools that are at the disposal of the government.[50] The ability to order inspections of

---

[45] AODA s 6(a).
[46] AODA s 2 ("barrier").
[47] AODA s 6(b).
[48] See *Charting A Path Forward: Report of the Independent Review of the Accessibility for Ontarians with Disabilities Act, 2005* (Charles Beer, Reviewer) (Toronto: Queen's Printer for Ontario, 2010) at 13.
[49] AODA s 1(a). The minister may create standards in additional areas under the Act.
[50] See Laurie Monsebraaten, "Ontario vows to enforce accessibility law: Businesses flout requirements to report on how they are meeting needs of customers with disabilities, while enforcement strategy lags" Toronto Star, February 20, 2014. The AODA provides for a director to order an administrative penalty if there is a lack of compliance (s 21(6)). There are also fines for offences. Offences represent more serious actions

businesses that have not complied with the statute lies within the discretion of the government's ministry and, in particular with the Accessibility Directorate of Ontario. Two years after the first filing due date, 70% of companies had not filed a report, representing 36,000 businesses across the province. They also have not been audited. As of 2016, only four violations have been brought before the responsible tribunal.[51] Clearly, if the legislation is to have an impact, the enforcement and/or incentive piece needs to be rethought.

### 2. The Duty to Consult with Persons with Disabilities

The duty to consult is extensive under the AODA. The instances in which affected citizens may participate are more numerous, rigorous, consistent than they were under the ODA. In particular, every standard is developed by a standard development committee. The standard development committees put together the first version of the regulations. The statute states: "the Minister shall establish standards development committees to develop proposed accessibility standards which shall be considered for adoption by regulation".[52]

The standard development committees are composed of persons with disabilities, representatives from government and from the industries that will be affected, and any other person or organization that the Minister deems to be advisable.[53] The deliberations leading to the development of the standards under the AODA, then, are based on consultative dialogue within the committees that occurs not only between persons with disabilities and government, but also with representatives from industry. The draft of the proposed standard is also put out for public consultation before being given to the Minister for his or her final approval. [54] The members of the public who may be involved in consultation under the AODA therefore represent a much wider cross-section of the general public than was found under the earlier statute, the ODA.

Both the Chair and the standard development committee members are selected by the responsible minister after an open process of application through the public appointments secretariat. As with many other areas of government and administrative law, the minister's selections may have a profound influence on the outcome of the consultation processes.

Outside of who is to participate, the process by which the consultations take place can be found in the terms of reference for each of the standard development committees. The terms of reference are soft law documents, created by ministerial discretion. They are now in the archives but at the

---

such as filing false or misleading information, or failing to comply with an order made by a director or the License Appeal Tribunal on review. A person found guilty of an offence under the AODA may be required to pay a maximum fine of $50,000 a day or, if the person is a corporation, a maximum fine of $100,000 a day during the time over which the offence occurs or continues to occur (s 37).

[51] The responsible tribunal is the Licensing Appeal Tribunal. For the decisions, see *8750 v Director under the Accessibility for Ontarians with Disabilities Act, 2005*, 2014 CanLII 46587 (ON LAT); *8635 v Director under the Accessibility for Ontarians with Disabilities Act, 2005*, 2014 CanLII 53673 (ON LAT); the other two cases are unreported.

[52] AODA, s 8.

[53] AODA s 8(4).

[54] AODA s 9(6).

time that each committee started its work, the terms of reference were posted on a government website dedicated to the AODA.[55]

Consensus is required on committee decisions. However consensus is defined in a way that does not require unanimity. The terms of reference indicates that consensus means "substantial agreement of members, without persistent opposition, by a process taking into account the views of all members in the resolution of disputes".[56] On the ground, determining if this this malleable standard has been satisfied is likely challenging.

In addition, the terms of reference indicate under "Member Rules and Responsibilities" that every member of the committee has an obligation to present their views and interests and those of the organizations that have endorsed them, to the best of their ability at all committee meetings.[57] The Chair, by contrast, has an obligation to "encourage the balanced analysis of all relevant issues and questions from a variety of perspectives".[58] The Chair's duties are to be completed in a nonpartisan and impartial manner.

In conclusion, the AODA's language presents a strong commitment to citizen participation in the development of an accessible province. In comparison to the ODA, the AODA has more expansive and rigorous obligations, and expressly provides for persons with disabilities, representatives of government and industry to have a principal role in standard development committees. Moreover, the general public has a chance to participate through a notice and comment type review of the draft regulations prepared by the stakeholders in the standard development committees. Challenges on the ground have related to enforcing compliance through governmental discretion. The use of a soft consensus standard and ministerial discretion to choose the heads of the committees may also prove challenging.

---

[55] See e.g. *Accessibility for Ontarians with Disabilities Act, 2005* Customer Service Accessibility Standards Development Committee Terms of Reference, October 14, 2005, archived at: https://web.archive.org/web/20060513201642/http://www.mcss.gov.on.ca/accessibility/en/news/reference/customerService.htm [Customer Service Terms of Reference]

[56] See Customer Service Terms of Reference*, ibid.* Section 2 states:
"All standards development committees will be required to achieve consensus on committee decisions that fulfill the Terms of Reference for each committee.
Consensus means substantial agreement of members, without persistent opposition, by a process taking into account the views of all members in the resolution of disputes. Unanimous decisions are not necessarily required to achieve consensus."

[57] *Ibid*. s 7. The section reads in part: "7. Member Roles and Responsibilities
In addition to contributing to the fulfillment of the roles and responsibilities assigned to the committee as a whole, individual members will:
[…]
c) during all committee meetings and activities, present their respective views and interests and, to the best of their abilities, present the views and interests of those organizations, industries, sectors of the economy or other classes of individuals or organizations or communities of interest which have endorsed members for the purpose of representing or presenting such views or interests;[…]".

[58] *Ibid* at s 9.

## b) Manitoba

### *§ 1 – The Accessibility for Manitobans Act (AMA)*

#### *A) Underlying Philosophy and Guiding Principles of the Statute*

The purpose of the *Accessibility for Manitobans Act* (AMA) is to achieve accessibility in five main areas of social interaction: employment, accommodation, the built environment, the delivery and receipt of goods, services and information, and prescribed activities or undertakings. There are three distinct differences from the AODA with respect to this list of areas. First, while the purpose section of the AODA specifies that one of the goals of the Act is to achieve accessibility in relation to "buildings, structures and premises", it does not mention transportation in the statute itself. The fact that accessibility standards were created in Ontario with respect to transportation is a result of ministerial discretion. By contrast, the AMA specifies that the concept of the built environment includes public transportation and transportation infrastructure[59], placing a clear, positive responsibility on government to ensure that transportation accessibility is addressed through regulatory standards.

A second difference from the AODA is that the AMA explicitly refers to the delivery and receipt of *information* within its purpose section, bringing attention to the importance of communication and information sharing with the disability community.[60] "Information and communication" is repeated in the section of the Act identifying examples of barriers.[61] By contrast, the purpose section of the AODA does not include information, though it is included in the list of examples of barriers. [62] The list of barriers is virtually identical in the three statutes (the ODA, AODA and AMA). The only difference is that the AMA speaks of barriers established by enactment in addition to those caused by policy or practice.[63]

Finally, the notion of preventing and removing barriers with respect to "a prescribed activity or undertaking" is new. It is not present in the earlier accessibility laws. This is a useful phrase that captures well the idea that the additional activities and undertakings may be the subject of accessibility standards at any time.

With respect to its underlying philosophy, the AMA presents a distinctively modern understanding of the experience of inaccessibility faced by persons with disabilities. The statute uses the expression "persons disabled by barriers" throughout. This description highlights that it is social and environmental barriers that prevent persons with disabilities from achieving equality. "Persons disabled by barriers" is not an expression used by any of the preceding accessibility statutes in Canada but one that is firmly anchored in the social model of disability as it locates the source of disablement in the sociopolitical environment as opposed to within the medical impairment of the

[59] AMA, section 2 (1) (c)(ii).
[60] AMA, section 2(1)(d).
[61] AMA, section 3 (2)(c).
[62] The ODA does not have a purpose section, making comparison with the ODA's purpose section not possible.
[63] See ODA, s. 2 ("barrier"); AODA, s. 2 ("barrier") and AMA, ss. 3(2).

individual.[64] The more standard, "persons with disabilities" has generally been adopted by legislators in the provinces and territories across Canada. "Persons disabled by barriers" takes this progressive persons-first language a step further.

In addition to the use of progressive language, the AMA presents broader, more humanistic reasons for achieving accessibility in the province than what is seen in the ODA and AODA. For example, the preamble of the AMA asserts that achieving accessibility will result in improvements to the health, independence and well-being of individuals disabled by barriers and that the wide range of obstacles prevents the attainment of equal opportunities, independence and full economic and social integration. The preamble also draws attention to the familiar idea that for the most part we are all temporarily able-bodied by recognizing that "most Manitobans will confront barriers to accessibility at some point in their lives"[65] . Finally, there is an emphasis on the costs of inaccessibility which is not seen in any of the previous accessibility statutes in Canada. The AMA articulates a concern that accessibility barriers create considerable costs to people disabled by them, as well as to their families, friends, communities and the general economy. The underlying philosophy of the AMA is therefore deeply rooted in the well-being of persons disabled by barriers, emphasizing that the persistence of these barriers has an impact not only on persons disabled by barriers but also on the general community.

Statutory interpretation of the AMA and the development of standards are to be guided by the respect of four essential principles namely, access, equality, universal design and systemic responsibility.[66] The concept of access incorporates barrier-free access to places and events and to other functions generally available in the community. Although there are a few key conceptions of equality in human rights law, [67] equality of opportunity and outcome are those on which the statute rest. The statute further emphasizes the importance of providing accessibility based on universal design. Finally, the AMA focuses on systemic responsibility which is the idea that the person or organization responsible for establishing or perpetuating the barrier also has the responsibility to

---

[64] On the theory of the social model and for critiques of it, see, generally, Tom Shakespeare, "The Family of Social Approaches" in *Disability Rights and Wrongs* ( New York: Routledge, 2006), 9-28 and Anita Silvers, "An Essay on Modeling: The Social Model of Disability" in Christopher D. Ralston, and Justin Ho, (eds.), *Philosophical Reflections on Disability* (New York: Springer, 2010), 19-36.

[65] AMA, preamble.

[66] See AMA s. 2(2) which reads:

Principles

2(2) In achieving accessibility, regard must be had for the following principles:

**Access**: Persons should have barrier-free access to places, events and other functions that are generally available in the community;

**Equality**: Persons should have barrier-free access to those things that will give them equality of opportunity and outcome;

**Universal design**: Access should be provided in a manner that does not establish or perpetuate differences based on a person's disability;

**Systemic responsibility:** The responsibility to prevent and remove barriers rests with the person or organization that is responsible for establishing or perpetuating the barrier.

[67] *Charter, supra* at s 15, for example, provides that:

"Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination…" .

remove and prevent those barriers. Again, as with the use of progressive descriptors, and the emphasis on humanistic reasons for eradicating barriers and improving accessibility, the AMA's guiding principles also add a new element to the accessibility laws in the country that is not seen in the other main accessibility statutes.[68]

It is clear that the policymakers wanted equally to ensure that the enactment of this accessibility legislation did not excuse obligations that already exist under other legislation (such as the provincial *Human Rights Code*), and that the legislation is in keeping with the UN *Convention on the Rights of Persons with Disabilities*[69]. Finally, there is a strong commitment to have a "Made-in-Manitoba" perspective engrained in the legislation and the standards created under the AMA. This idea was clearly and repeatedly stressed in the discussion papers and other documents leading up to the creation of the statute and to the development of the customer service standard.[70] Although its depths and limits are not fully delineated, at least two ideas emerge from this material as to the meaning of this phrase. First, Manitobans want to ensure that the legislation addresses problems that are prevalent to Manitobans with disabilities. This means that even if a similarly described problem existed at the time when Ontario created its accessibility legislation, the response in Manitoba will be tailored to ensure that it is the Manitoba experience that is being addressed. The second idea is that the legislation should complement the family of legislation that already exists in Manitoba to address issues of social inclusion. The discussion paper leading to the creation of the AMA outlines, for example, the province's experience of developing a consultative strategy to create an Age-Friendly initiative in Manitoba.[71] The AMA will expand on this initiative, partly by ensuring that seniors are involved in the consultation so that there is recognition of access issues concerning seniors as well.

### *B) Obligations and Consultation Under the AMA*

#### 1. Obligations

Under the AMA, accessibility standards are established by regulation and identify the persons or organizations that are subject to them. The AMA indicates that each standard will also set out the requirements and any applicable time frames.[72] In keeping with the purpose section, which outlines

---

[68] The use of lists of guiding principles does exist in at least one accessibility standard. See Ontario's Customer Service Regulation, O. Reg. 429/07, ss. 3(2) which indicates that the provider of goods and services must provide them in an integrated fashion unless that is not possible, a manner that respects the dignity and independence of persons with disabilities, and provide an equal opportunity to obtain use or benefit from the goods or services.

[69] See *Convention on the Rights of Persons with Disabilities,* United Nations, *Treaty Series*, vol. 2515, p. 3; New York, December 13, 2006, archived at; http://www.un.org/disabilities/convention/conventionfull.shtml

[70] See "Discussion Paper for Made in Manitoba Accessibility Legislation" (2010), available online at: http://www.gov.mb.ca/dio/discussionpaper/pdf/discussionpaper.docx [Manitoba 2010 Discussion Paper] ; and "Government Response to Recommendations of the Accessibility Advisory Council for a Made-in-Manitoba Accessibility Act", at: http://www.gov.mb.ca/dio/pdf/white_paper-january8final.pdf

[71] Manitoba 2010 Discussion Paper *supra* at 6.

[72] See AMA, ss 6(1) and 6(2).

the areas where accessibility is to be achieved, the statute also specifies that an accessibility standard may apply to a person or organization that employs; offers accommodation, owns, operates, maintains or controls an aspect of the built environment; provides goods, services or information; is engaged in a prescribed activity or undertaking; or meets other prescribed requirements. The AMA's scope of application is very similar to the AODA in Ontario with the exception that owners and occupiers of residential premises with two or more dwelling units are expressly exempted from application of the Manitoba statute.

Those subject to the Act are persons and organizations, including public sector bodies. Persons and organizations have an obligation to prepare and keep records in accordance with the requirements of the standards, to make those records available for inspection and examination if called upon to do so, to comply with accessibility standards within the time period specified if there is one, and generally to cooperate with directors and inspectors, refraining from making false or misleading statements and records, reports or otherwise.[73] Failure to fulfill these obligations can lead to a finding of guilty of an offence under the AMA and a maximum fine of $250,000.[74]

The responsible minister also has a duty to raise awareness about disabling barriers, to promote and encourage the prevention and removal of barriers and, generally, to ensure that accessibility standards are developed and implemented smoothly.[75] These are strong positive obligations wisely placed within the text of the statute itself. Equivalent responsibilities for the responsible minister do not appear explicitly in either of the two Ontario accessibility statutes. However, the responsible minister who decides to carry out such functions may delegate them to the Accessibility Directorate of Ontario.[76]

### 2. The Duty to Consult with Persons with Disabilities

In Manitoba, the process for creating accessibility standards starts with the responsible minister's terms of reference. Significant emphasis is placed on the terms of reference. Unlike the terms of reference under the AODA which do not require much detail outside of the deadlines by which various stages of the standard development process must be completed, the terms of reference under the AMA must specify the sector, persons or organizations that may be made subject to the Act.[77] This is a questionable development. It may save time but it eclipses democratic deliberation over a fundamental element of any standard: who will be subject to it.

The Accessibility Advisory Council has the authority to create the standard development committees. Unlike the process set up under the AODA which gives this power to the minister. Consultation must take place between the Accessibility Advisory Council, persons disabled by barriers or representatives of their organizations, members of the sectors and government that may be made subject to the proposed standard and anyone else that the minister considers advisable.

---

[73] See AMA, s. 34
[74] *Ibid*.
[75] See AMA, s. 5(1).
[76] See AODA 32(3)
[77] Contrast AODA, s. 8(6) to AMA s. 8(2).

The process for creating the standards is very similar that of the AODA, including the requirement of substantial consensus and the notice and comment period for the draft standard.[78]

## 3. Humanizing Disability Law? Applying Sunstein's Framework of Analysis

We have now seen a detailed and comparative overview of the accessibility legislation in Canada. How well does this regulatory process featuring citizen participation work? One way to examine the effectiveness of the legislation is to do so through a framework of analysis based on regulatory theory.

In his 2014 book, *Valuing Life: Humanizing the Regulatory State*[79], Harvard law professor, Cass Sunstein asserts that governments should focus on the human consequences of their actions. In creating regulations, they should consider factors such as the effects of their actions or inaction; the number of lives that would be saved, if any; whether people will be burdened and, if so, the extent to which they will be burdened; and who exactly will be helped and/or hurt.[80] Sunstein suggests that governments "seek a method to allow them to make sensible comparisons and to facilitate choices among values that are difficult or impossible to quantify, or that seem incommensurable."[81] Furthermore, a wide breadth of knowledge should be brought into the decision-making process. It is important for governments to go beyond the knowledge that they acquire from their public officials. Humanizing the regulatory state requires them to seek knowledge from citizens as well.[82]

The question, of course, is how to go about achieving these objectives. When it comes to determining the consequences of regulations made, evaluating factors such as the effects of actions or the number of lives that would be saved may impose significant information-gathering obligations on government officials. Moreover, how does one value certain benefits or losses? By what method could one assess the value of preventing prison rape, protecting privacy or — an example provided by Sunstein but that fits rather aptly in the context of accessibility standards — providing wheelchair users independent access to public washrooms? Sunstein argues for the use of a breakeven monetary analysis. While he accepts that goods may be qualitatively diverse in the same transaction (for example, money and the dignity of avoiding prison rape; or money compared to the dignity and equality of social inclusion for persons with disabilities), Sunstein contends that pinpointing some sort of monetary value will provide transparency to the government's decision-making process in creating regulations. He proposes that it should be possible to determine upper and lower bounds for non-quantifiable goods and that these upper and lower boundaries will help to promote sensible trade-offs.[83] For example, it might be possible to determine the lowest and

---

[78] The process has been laid out by the Manitoba government at: http://www.accessibilitymb.ca/how-standards-are-created.html

[79] See *Valuing Life supra.*

[80] *Valuing Life supra* at 1.

[81] *Ibid.*

[82] *Ibid.*

[83] *Ibid* at chapter 3.

highest amount that a person with a mobility disability would be willing to pay to have access to washroom facilities.

At the same time, Sunstein recognizes that there may be questions about the appropriateness (including the morality) of such comparisons and that there may be broader social goals such as distributive justice or the recognition of equality that motivate a government to regulate. Nevertheless, Sunstein suggests, in sum, that even in such circumstances, an economic breakeven analysis should be performed because it helps to explain why the case is difficult and what information is missing. Sunstein writes:

> In some cases, however, agencies will not be able to identify lower and upper bounds in any way, and breakeven analysis will be helpful largely insofar as it explains what information is missing and why some cases are especially difficult.[84]

Overall, Sunstein argues that to humanize the regulatory state, it is necessary for governments to: i) take account of values that are difficult or impossible to quantify; ii) capture qualitatively diverse goods and promote sensible trade-offs among them; and iii) attempt to benefit from the dispersed information of a wide variety of human beings. [85] In his opinion, if these steps are taken, the result will be regulations based less on intuition and more on disciplined analysis as to what is justifiable.

I argue that Sunstein's proposal to value life through monetary means poses significant problems on-the-ground in the context of disability access standards. In the final last part of this paper, I primarily use empirical qualitative data gathered on-the-ground from the *Accessibility for Manitobans Act* customer service standard consultation process to illustrate that there are circumstances where quantification would be impossible, inappropriate and/or would prove unhelpful to the regulatory process. In doing so, I work within the three-part framework of Sunstein's proposal for humanizing the regulatory state. Finally, I observe that there are instances where regulations within AODA standard-setting and similar processes appear to be based on intuition. Nevertheless, I argue that providing a process for clarification and the space for further dialogue among stakeholders provide equally, if not more, appropriate advancement than attempting to quantify the issues.

## a) Taking Account of Values That Are Difficult or Impossible to Quantify

Cass Sunstein asserts that in order for governments to focus on the human consequences of their regulatory actions, they must take into account values that are difficult or impossible to quantify. There is no doubt that the accessibility standard-setting processes set up by the Canadian provincial governments take account of such values. In essence, they deal with equality rights–specifically equal access, equal opportunity and equality of well-being. Disability scholars would argue that these equality rights also represent a move towards true citizenship within the

[84] *Ibid* at 67.
[85] This is nicely summarized in the Epilogue of *Valuing Life*.

community for persons with disabilities.[86] The areas set out by the government in which standards are to be developed (customer service, transportation, information and communications, employment, and the built environment) all inherently deal with qualitative values such as respect, dignity, time, appreciation and safety, that are difficult to quantify or escape quantification altogether.

In the development of the customer service standard in Manitoba, a discussion ensued during the public hearings relating to whether training materials for customer service representatives in retail stores should simply be adopted from Ontario where a regulation had already been made.[87] The representative from the Retail Council of Canada was of the opinion that adopting the material from another province was an opportunity for store owners with chain stores across the country to have one uniform training standard. The implication was that it would therefore be easier in terms of the time taken to train customer service representatives, especially if done collectively. By contrast, a representative of a prominent national disabled women's network spoke up to indicate that the Ontario standard had not been tested fully at and that she had experienced a lot of insensitivity on the part of retail store clerks. Her point was that she did not want the perpetuation of this type of insensitivity to be spread across the country when it could be stopped by reassessing and evaluating what was done in Ontario and possibly developing a more effective standard, if necessary.

The ultimate determination by the Manitoba Customer Service Standard Development Committee will have to take into account both the time it takes to train employees nationally, which is possibly quantifiable, and the "insensitivity" (indignity) that the disabled population would like to escape and denounce. The second of these is certainly beyond quantification as it deals with a complex interrelation of values such as social interaction, protection of dignity and degradation. This example illustrates not only Sunstein's humanizing approach in action but also some of the finer details of valuing non-quantifiable goods.

## b) Capturing Qualitatively Diverse Goods and Promoting Sensible Trade-Offs Among Them

Cass Sunstein emphasizes the importance of transparency and accountability within the regulatory process. To make sensible trade-offs among qualitatively diverse goods in a transparent and accountable fashion, he asserts that quantification is the most useful tool. He also asserts that quantification should not be an unfamiliar tool to the everyday person as this sort of economic balancing is used often in everyday life. Sunstein writes:

---

[86] See e.g. Marcia H. Rioux, "Towards a Concept of Equality of Well-Being: Overcoming the Social and Legal Construction of Inequality" (1994) 7 Can. J.L. & Juris. 127.

[87] These observations are taken from observations of the public hearing relating to the proposed Customer Service Standard held in Winnipeg, Manitoba on June 17, 2014, video archive available online: http://archive.isiglobal.ca/govmb/2014-06-17-live.html

> Quantification helps to promote accountability, transparency, and consistency, and it can also counteract both excessive and insufficient stringency. When regulators quantify and monetize relevant goods, the goal is to promote sensible choices, not to erase differences among qualitatively distinct goods. Nor should this point be unfamiliar from daily life. People decide how much to spend to educate their children, on health insurance, to reduce risks on the highway (as, for example, by purchasing especially safe cars), on food, on housing, and on vacations. When they make trade-offs among these and countless other diverse goods, they do not pretend that they are qualitatively identical.[88]

In the disability context, however, qualitatively distinct goods can invite manifold answers as to what a "sensible" trade-off might be. Quantification may be one possibility for determining the best outcome. However, it would appear that asserting that one outcome is more "sensible" than another really requires a more thorough canvassing of what "sensible" possibly means. A discussion of this nature would be wise to explore questions such as: Whose concept of sensible is most appropriate and why? What power dynamics are at play? And will any regulatory avenue promote and preserve dynamics that counter the pursuit of equality for persons with disabilities? I argue that it is more effective to capture qualitatively diverse goods and then to focus on the deeper foundational question of why any one choice or preference may be the most appropriate. Promoting further discussion on the very nature of why any one preference should be chosen over another should be at the heart of the regulatory process.

To provide an example, consider another discussion that took place at the public consultation hearings over the proposed Manitoba customer service standard. An individual from a postsecondary institution raised the question of who should fall within the definition of "customer" in the context of educational institutions. She indicated that it was quite clear that customer service is offered to the students being taught in class. She did not have an issue with that. She wondered, though, whether the definition of "customer" had a particular geographic reach. For instance, would the definition apply to students using gym facilities? She also wondered equally whether the standard would regulate the post-secondary institution's interaction with any person who entered the campus (a connection *in personam*).

An approach based on *Valuing Life* would strive to assign an economic value to each of what I have termed the geographic and *in personam* options. The valuation may be based on a percentage of the total wages of staff at the post-secondary institution who would serve persons with disabilities in these two contexts. It may also bring into account any extra time that assisting might take, translating that extra time into a monetary value as well.

By contrast, the approach that I suggest would invite all stakeholders to a further discussion over what an appropriate interpretation of "customer" should be. Already, a couple of key concepts can be seen in the hearing. For instance, another member of the public who was at the hearing spoke up

---

[88] *Ibid* at 70.

in order to emphasize that the customer service standard was about equal access. A second individual shared a story illustrating the barrier presented by inaccessible recreation facilities for parents with disabilities who want to participate in watching their children play sports so that they can support their children along with the other parents. An argument that favours a broader view of equal access, particularly one that allows children at the school to receive support from their parents with disabilities as visitors to the campus should be promoted. A monetary approach would not have caught or addressed these nuances, leading to a result that may not resonate with those affected.

### c) Attempting to Benefit From the Dispersed Information of a Wide Variety of Human Beings

Sunstein's theory highlights the importance of having a broad range of views that extends past the public service in form regulatory choices. There is no doubt that the regulatory processes for the development of accessible legislation in Canada reflected this approach. The terms of reference for the AODA Customer Service Accessibility Standards Development Committee, for example, shows an attempt to benefit from the dispersed information of a wide variety of individuals. The terms of reference state, for example, that the committee must:

> • Consider the full range of disabilities in identifying barriers in the provision of customer service in Ontario and develop a proposed Customer Service Accessibility Standard to address those barriers.
> • Appreciate and advance, in a balanced and fair way, the views and interests of the diverse Ontario sectors, industries, organizations, groups, communities and persons with disabilities. […]
> • Accommodate persons with disabilities on the committee in all parts of the committee process. […][89]

A similar approach has been taken with respect to the reviews of the AODA required to take place every four years.[90] These reviews have come with terms of reference that allow the appointed reviewer to decide on the method of consultation. The most recent reviewer paid attention to ensuring that there was regional diversity and made a place for tools such as webinars in order to enable persons with disabilities, and those in remote areas etc. to attend.[91]

---

[89] See Customer Service Accessibility Standards Development Committee *supra* note 55 at s 5.
[90] See AODA, s 41.
[91] Interview with 2014 AODA Reviewer, Mayo Moran, July 3, 2015 (notes on file with author).

## d) Intuition Rather Than Disciplined Analysis?

Sunstein argues that the above-mentioned regulatory approach (namely, i) taking account of values that are difficult or impossible to quantify; ii) capturing qualitatively diverse goods and promoting sensible trade-offs among them; and iii) attempting to benefit from the dispersed information of a wide variety of human beings) will provide a disciplined analysis and sensible regulatory choices, so long as economic valuation is incorporated in the balancing equation. It will also limit regulatory choices that are based on intuitive responses as to what is most appropriate, moral or just.[92]

The Manitoba public hearing on the proposed customer service standard presents a number of illustrations where the regulatory standard had been founded on some level of intuition. In these examples, further dialogue led to the disciplined analysis sought in much the same way as it can serve to promote sensible trade-offs among qualitatively diverse goods, as discussed above.

For example, an intuitive aspect of the proposed customer service standard dealt with disruptions of service. The proposed standard indicated that disruptions should be brought to the attention of persons with disabilities. One might assume intuitively that both disruptions in disability access to the actual goods and services (for example, a store is shut down temporarily) and disruptions in services on which persons with disabilities rely (for example elevators) would trigger action under this provision. However, discussions at the public hearings revealed that only the disruption of services that are relied on the persons with disabilities seemed to be caught by the literal words of the standard. Again, this is an area that requires clarification, a discussion of what the trade-offs are and how they should be made. Some clarification began at the hearing with discussions that highlighted some of the central values for the stakeholders. With respect to disruptions of service, again the concept of equal access was raised. The discussion of service disruption also brought in the perspectives of elevator service technicians and store owners discussing the on-the-ground practicality of putting up notices when such disruptions can sometimes be very quickly fixed. Quantification would have put a very different spin on the discussion – one that would have moved the discussion to a more utilitarian realm, eclipsing the equality debate.

In conclusion, Sunstein offers a useful framework for beginning to understand whether regulatory process has been efficient, especially when dealing with qualitative, and intangible human values that profoundly affect people's lives. The development of disability access standards to concretize, protect and, frankly, to act as a vehicle for persons with disabilities to have fuller connections to society are precisely the types of issues that fit within Sunstein's theoretical framework. However, in considering on-the-ground experiences, one sees that there are still very large concrete questions that require more guidance before the effectiveness of any such initiative can be fully determined. These are the harder questions such as how to establish what a "sensible" trade-off might be when one considers qualitatively diverse goods. Whose definition of sensible should count and what if a blended compromise is not possible? Equally, this Canadian case study has illustrated that even when values that are difficult or impossible to quantify are taken into account, there must be an additional way of determining which path is appropriate. In such cases, I suggest furthering

[92] See Epilogue of *Valuing Life*.

and deepening dialogue to consider questions that relate to issues such as the power dynamics and implicit negative repercussions to equality.

## 4. Conclusion

*– "I was aware of the fact that this issue touches people's lives so profoundly and yet there are very few venues for input."*[93]

In conclusion, how does one legislate for social change? This is been the central preoccupation of the movement towards disability access standards legislation. It is also still a concern as Canadian federal and sub-national governments move forward through the consultation processes and development of the actual standards.

It is clear that citizen participation has a significant and important role in gathering the perspectives of stakeholders who will be affected by the legislation. This is a positive step as it allows for greater deliberation in the development of regulations. The move in Canada is towards having stakeholders deliberate and then prepare the first proposed draft regulation. Further and broader public input is brought through the notice and comment period.

Challenges certainly exist on the ground with respect to the regulatory process of the deliberation process itself – for example, in determining when adequate consensus has been reached and the connected concern of ensuring that the regulations present a balanced view not just amongst the stakeholders but also in terms of the equality rights to be realized. Additional challenges have also been manifest in the enforcement of the standards in Ontario. However, from the time of the first standards legislation in 2001 to the *Accessibility for Manitobans Act* enacted in 2013, one sees a consistent strengthening in the legislative language in terms of guaranteeing citizen participation, ensuring more consultation and with respect to the very concepts of what it means to be a person with a disability and the humanistic reasons for providing accessibility.

Finally, the Canadian case study shows that Sunstein's approach to humanizing the regulatory process bears some resonance. However, the approach to the qualitatively distinct social goods relating to disability access have not manifestly shown themselves to be related to economic analysis. Instead, there are hints of two using dialogue to ensure disciplined analysis and I argue for deepening the dialogue instead of a reversion to economic valuation in such cases. Legislating for social change may be challenging but the Canadian case study shows promise in terms of equality and citizen inclusion to all involved in the long run.

[93] Interview with 2014 AODA Reviewer, Mayo Moran, July 3, 2015 (notes on file with author).