

**PROMOTING ACCESSIBILITY THROUGH  
LEGISLATIVE REFORM:  
A REVIEW OF DISABILITY LAWS IN  
CANADA AND THE U.S.**

**June 2017**

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## **EXECUTIVE SUMMARY**

*The Alliance for an Inclusive and Accessible Canada commissioned this report to review the Government of Canada's legislation, regulations and policies in relation to people with disabilities in five key areas: transportation, communications, employment, elections and immigration. Drawing on best practices in Ontario and the United States, this report recommends specific legislative reforms to assist Canada in meeting its obligations under the Canadian Charter of Rights and Freedoms, the Canadian Human Rights Act and the United Nations Convention on the Rights of Persons with Disabilities (CRPD). These reforms should be implemented through the Government of Canada's proposed accessibility legislation.*

### **Transportation**

*Accessible transportation is essential to ensure that people with disabilities have equal opportunities to participate in all aspects of Canadian society. Canada is lagging behind other jurisdictions by relying on voluntary accessibility standards for transportation by air, rail and sea. To ensure a fully accessible transportation system, Canada must adopt accessibility standards in enforceable legislation or regulations. Instead of relying on complaints to address accessibility issues, the Canadian Transportation Agency should have the authority to initiate investigations and issue general orders. Transportation providers should be required to annually report on the number and nature of the accessibility complaints they receive.*

### **Communications**

*The legal and regulatory framework for broadcasting and telecommunications in Canada is inaccessible due to its complexity. No single document contains all of the accessibility requirements in these areas. These requirements are buried in CRTC decisions, policies, regulations, notices and conditions of licence and service. This patchwork of rules should be synthesized into two sets of accessibility regulations: one for broadcasting and one for telecommunications. The CRTC should increase its monitoring and enforcement of existing accessibility requirements. The CRTC should also be given the authority to issue penalties for broadcasters' non-compliance with these requirements.*

## **Employment**

*Canadians with disabilities experience ongoing discrimination in recruitment, hiring, promotions and training. The Employment Equity Act should require the Canadian Human Rights Commission to publish detailed reports on its compliance audits. People with disabilities should be able to file human rights complaints based on information obtained through these audits. Employers covered by the Federal Contractors Program should be subject to the same reporting requirements as the public and the federally-regulated private sectors. The Minister should be able to impose monetary penalties on public-sector employers who breach their reporting requirements.*

## **Elections**

*Voters with disabilities continue to face countless architectural, communicational and legal barriers in Canada's electoral process. The accessibility requirements in the Canada Elections Act should be broadened to require all polling stations to be barrier-free. Polling stations should also be equipped with an array of accessibility tools. Voting assistance should be available to all people with disabilities. Voters with disabilities who are assigned to inaccessible polling stations should also have the option of voting from home. Election officers should be required to report on the use of accessibility tools and voting assistance in each election. They should also report on the measures taken to remove and prevent barriers in each district.*

## **Immigration**

*People with disabilities are routinely deemed inadmissible to Canada under the "excessive demand" clause of the Immigration and Refugee Protection Act. The government's implementation of this clause makes it virtually impossible for people with disabilities and their families to immigrate to Canada. This antiquated and discriminatory clause should be repealed. As an interim measure, the Minister should be required to publicly report on the number of people with disabilities and their relatives who apply for, who obtain and who are refused permanent resident status each year.*

## **Other Jurisdictions**

### **Ontario**

*The Accessibility for Ontarians with Disabilities Act, 2005 (AODA) aims to make the province fully accessible by 2025. The AODA applies to both the public and private sectors. It plans for the development of accessibility standards in different areas. Inspectors and directors monitor compliance with the AODA. Directors can issue orders and impose administrative penalties. Failure to comply with an order can result in a significant fine. To date, the Government has adopted accessibility standards for customer service, information and communications, employment, transportation and public spaces. Accessibility standards for healthcare and education are being developed in 2017.*

### **United States**

*The Americans with Disabilities Act from 1990 prohibits discrimination in employment (Title I), government programs and services, including public transportation (Title II), goods and services from the private sector, including transportation (Title III) and telecommunications (Title IV). The ADA requires state and local governments and private entities to make reasonable modifications to their rules, policies and practices to prevent discrimination and facilitate access for people with disabilities. The ADA is enforced through private lawsuits and complaints filed with government agencies. Several other U.S. laws and regulations also ensure equal access to voting, telecommunications, housing and education.*

### **Conclusion**

*Canada has made significant strides in advancing access to transportation, communications, employment, elections and immigration for people with disabilities over the past few decades. However, many legal and policy changes are still needed to ensure that Canada meets its obligations under domestic and international law. The legislative reforms recommended in this report should be included in the Government of Canada's proposed accessibility legislation. Further research is required to determine necessary reforms in other key areas such as healthcare, education, income supports and access to justice. The disability community must be consulted in the development and implementation of all these reforms.*

## INTRODUCTION

The Government of Canada has committed to adopting a strong federal accessibility law to remove and prevent barriers facing people with disabilities. In 2016, Prime Minister Justin Trudeau gave the Minister of Sport and Persons with Disabilities, the Honourable Carla Qualtrough, the mandate of engaging with provinces, municipalities and stakeholders to seek input on this new law.<sup>1</sup> As part of this engagement process, the Government of Canada funded the Alliance for an Inclusive and Accessible Canada to undertake research and consultations with the disability community.<sup>2</sup>

The Alliance commissioned this report to review federal legislation, regulations and policies in five key areas: transportation, communications, employment, elections and immigration. Drawing on best practices in Ontario and the United States, this report recommends reforms to ensure Canada respects its obligations under the *Canadian Charter of Rights and Freedoms* (the *Charter*), the *Canadian Human Rights Act* (CHRA) and the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD).<sup>3</sup> These recommendations include matters that can be addressed through the federal government's spending power.<sup>4</sup>

The Government of Canada has conducted similar legislative audits in the past. For example, the Government reviewed all federal legislation in 1985 to ensure conformity with section 15 of the *Charter*. In 1990, the Canadian Disability Rights Council (CDRC) proposed several legislative amendments to be included in an omnibus bill.<sup>5</sup> Bill C-78, which was passed in 1992, amended the *Access to Information Act*, the *Privacy Act*, the *Citizenship Act*, the *Criminal Code*, the *Elections Act* and the *National Transportation Act*.<sup>6</sup> Bill S-5, which was passed in

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<sup>1</sup> Prime Minister of Canada, *Minister of Sport and Persons with Disabilities Mandate Letter* (Ottawa: Office of the Prime Minister, November 2015).

<sup>2</sup> The Alliance is funded through the Disability Component of the Government of Canada's Social Development Partnerships Program (SDPP). For information about the Alliance, visit: <http://alliance-canada.org/en/home/>.

<sup>3</sup> *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s.15 [*Charter*]; *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*]; United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006 [*CRPD*].

<sup>4</sup> For a detailed overview of the use of federal spending power, see: Karine Richer, *The Federal Spending Power*, PRB 07-36E (Ottawa: Parliament of Canada, Law and Government Division, 2007).

<sup>5</sup> Rosalind Currie, *Legislative Reform for People with Disabilities: Proposals for Change – An Act to Implement the Equality Rights of People with Disabilities, Phase One 1991* (Winnipeg: Canadian Disability Rights Council, 1991) [*CDRC Proposals*].

<sup>6</sup> Bill C-78, *An Act to amend certain Acts with respect to persons with disabilities*.

1998, made further amendments to the *Criminal Code*, the *Canada Evidence Act* and the *Canadian Human Rights Act*.<sup>7</sup>

Another legislative audit is long overdue to ensure compliance with the *CRPD*. Canada ratified this Convention in 2010. The *CRPD* requires Canada to amend or repeal discriminatory laws, regulations, customs and practices in relation to people with disabilities. Canada must take legislative and administrative measures to eliminate disability discrimination and to implement the rights recognized within the *CRPD*. Canada must also prevent public authorities and institutions from engaging in acts or practices that are inconsistent with the *CRPD*.<sup>8</sup> The recommendations in this report will assist the Government of Canada in meeting these obligations. Drawing on best practices in Ontario and the United States, these recommendations will help ensure the full inclusion of people with disabilities in Canadian society.

### **Ontario**

Ontario's *Human Rights Code* prohibits discrimination on the basis of disability in employment, services and accommodations.<sup>9</sup> People with disabilities who experience discrimination can apply to the Ontario Human Rights Tribunal.<sup>10</sup> In addition to ordering compliance with the *Code*, the Tribunal can order restitution and monetary compensation, including compensation for injury to dignity, feelings and self-respect.<sup>11</sup>

In 2001, the Government of Ontario adopted the *Ontarians with Disabilities Act, 2001 (ODA)*.<sup>12</sup> The *ODA* plans for the removal and prevention of barriers in the public sector. Public-sector organizations, including ministries, municipalities, transportation providers, educational institutions and hospitals must develop annual accessibility plans and report on the measures they've taken to remove and prevent barriers.<sup>13</sup> Municipalities with at least ten thousand inhabitants must establish Accessibility Advisory Committees, the majority of the members of which must be

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<sup>7</sup> Bill S-5, *An Act to amend the Canada Evidence Act and the Criminal Code in respect of persons with disabilities, to amend the Canadian Human Rights Act in respect of persons with disabilities and other matters and to make consequential amendments to other Acts*.

<sup>8</sup> *CRPD*, *supra* note 3, s.1(a)-(e).

<sup>9</sup> RSO 1990, c H19, ss.1, 2 and 5 [*Ontario Code*].

<sup>10</sup> *Ibid*, s.34.

<sup>11</sup> *Ibid*, s.45.2.

<sup>12</sup> SO 2001, c 32 [*ODA*].

<sup>13</sup> *Ibid*, ss.10-11 and 14-15.

people with disabilities.<sup>14</sup> Municipal councils must consult these committees when preparing and implementing their accessibility plans.<sup>15</sup> The *ODA* also includes accessibility requirements for Government buildings and websites, employment and procurement.<sup>16</sup>

In 2005, the Government of Ontario adopted even stronger accessibility legislation. The *Accessibility for Ontarians with Disabilities Act, 2005 (AODA)* aims to make the province fully accessible by 2025.<sup>17</sup> The *AODA* applies to both the public and private sectors, including the Legislative Assembly.<sup>18</sup> It plans for the development of accessibility standards with deadlines for the removal and prevention of barriers in different areas. The standards are developed by committees that include people with disabilities. The public is given the opportunity to comment on the proposed standards before they are adopted by regulation.<sup>19</sup>

Inspectors and directors appointed by the Deputy Minister monitor compliance with the *AODA*.<sup>20</sup> Directors can order compliance and impose administrative penalties.<sup>21</sup> Failure to comply with an order can result in a fine of up to \$100 000 per day.<sup>22</sup> Directors' orders can be appealed to the Licence Appeal Tribunal.<sup>23</sup> The Minister must file an annual report on the *AODA*'s implementation.<sup>24</sup> The law's effectiveness must also be independently reviewed every three years. This review must include consultations with people with disabilities.<sup>25</sup> Two independent reports have been published thus far.<sup>26</sup>

To date, the Government has adopted accessibility standards for customer service, information and communications, employment, transportation and public spaces.<sup>27</sup> The standards also require government entities to incorporate accessibility

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<sup>14</sup> *Ibid*, ss.12(1) and (3).

<sup>15</sup> *Ibid*, s.12(2)

<sup>16</sup> *Ibid*, ss.4(1) and (2), 5-8 and 13.

<sup>17</sup> SO 2005, c 11 [*AODA*], s.1.

<sup>18</sup> *Ibid*, s.4.

<sup>19</sup> *Ibid*, ss.6-12.

<sup>20</sup> *Ibid*, ss.16, 18-20 and 30.

<sup>21</sup> *Ibid*, ss.21(3), (4) and (6).

<sup>22</sup> *Ibid*, s.37.

<sup>23</sup> *Ibid*, s.27.

<sup>24</sup> *Ibid*, s.40.

<sup>25</sup> *Ibid*, s.41.

<sup>26</sup> Charles Beer, *Charting A Path Forward: Report of the Independent Review of the Accessibility for Ontarians with Disabilities Act, 2005* (February 2010); Mayo Moran, *Second Legislative Review of the Accessibility for Ontarians with Disabilities Act, 2005* (November 2014).

<sup>27</sup> *Integrated Accessibility Standards*, Ontario Regulation 191/11 [*Integrated Standards*].

criteria into their procurement policies.<sup>28</sup> The AODA's accessibility standards are gradually being implemented with different timelines based on the type (i.e. public or private) and size of organizations. Accessibility standards for healthcare and education are being developed in 2017.

The AODA's *Customer Service Standards* from 2008 require public and private entities to establish policies for providing goods and services to people with disabilities in a respectful, integrated and equitable manner.<sup>29</sup> Organizations must provide accessibility training for their employees and establish a process for receiving and responding to accessibility-related feedback.<sup>30</sup> They must allow people with disabilities to be accompanied by their service animals and support persons.<sup>31</sup> They must give advance notice of admission fees charged for support persons and of temporary disruptions in their services or facilities used by people with disabilities.<sup>32</sup> The *Design of Public Spaces Standards* from 2012 establish technical requirements for features including ramps, signage and service counters in outdoor spaces such as parks, beaches, sidewalks and parking spaces.<sup>33</sup> The AODA's transportation, communications and employment standards from 2011 will be discussed in the relevant sections of this report.

Other Canadian provinces have been following in Ontario's footsteps. The Government of Manitoba adopted the *Accessibility for Manitobans Act* in 2013 and enacted customer service standards in 2015.<sup>34</sup> Employment standards are being developed in 2017. The Government of British Columbia launched a ten-year action plan in 2014 to make the province more accessible.<sup>35</sup> The Government of Nova Scotia adopted the *Act Respecting Accessibility in Nova Scotia* in April 2017.<sup>36</sup> The disability community is advocating for similar reforms to provincial legislation in Quebec and Saskatchewan.<sup>37</sup> In drafting its new accessibility legislation, the

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<sup>28</sup> *Ibid*, ss.5-6.

<sup>29</sup> *Ibid*, s.80.46.

<sup>30</sup> *Ibid*, ss.80.49-89.50.

<sup>31</sup> *Ibid*, s.80.47.

<sup>32</sup> *Ibid* and s.80.48.

<sup>33</sup> *Ibid*, ss.80.1-80.44.

<sup>34</sup> *Accessibility for Manitobans Act*, CCSM c A1.7; *Customer Service Standard Regulation*, 171/2015.

<sup>35</sup> Government of British Columbia, *Accessibility 2024: Making B.C. the most progressive province in Canada for people with disabilities by 2024* (Victoria: Government of British Columbia, 2014).

<sup>36</sup> *An Act Respecting Accessibility in Nova Scotia*, Chapter 2 Acts of 2017.

<sup>37</sup> Quebec Accessible, *About Us*, website: [www.quebec-accessible.ca/en/index.php/about-us/](http://www.quebec-accessible.ca/en/index.php/about-us/);

Barrier-Free Saskatchewan, *A Barrier Free Saskatchewan for All*, website:

[www.barrierfreesaskatchewan.org/](http://www.barrierfreesaskatchewan.org/).

Government of Canada should draw on the best practices in these jurisdictions to ensure consistency in accessibility across the country.

### ***United States***

The United States adopted the world's first comprehensive disability legislation, the *Americans with Disabilities Act (ADA)*, in 1990.<sup>38</sup> Congress enacted the *ADA* under its power to regulate commerce and to enforce the Fourteenth Amendment of the U.S. Constitution. The *ADA* governs access to employment (Title I), government programs and services, including public transportation (Title II), goods and services from the private sector, including transportation (Title III) and telecommunications (Title IV). The *ADA* requires state and local governments and private entities to make reasonable modifications to their rules, policies and practices to prevent discrimination and facilitate access for people with disabilities. The various titles of the *ADA* will be discussed in the relevant sections of this report. Each title has its own enforcement scheme.

The *ADA* applies to individuals with a physical or mental impairment that substantially limits one or more major life activities as well as individuals with a record of such an impairment or who are regarded as having such an impairment.<sup>39</sup> The U.S. Supreme Court initially interpreted the *ADA*'s definition of disability very narrowly.<sup>40</sup> In response, Congress amended the *ADA* in 2008 to reinstate the law's intended broad scope of protection.<sup>41</sup>

The U.S. Department of Justice proactively reviews state and local government facilities, services and programs across the country to assess their compliance with the *ADA*. Through its Project Civic Access, teams of investigators, attorneys and architects conduct on-site visits of government-owned and leased facilities. The Department then attempts to negotiate settlement agreements to bring governments into compliance.<sup>42</sup>

In addition to the *ADA*, several other laws protect the civil rights of people with disabilities in the U.S. For example, the *Architectural Barriers Act of 1968 (ABA)* mandates the accessibility of facilities designed, built, altered or leased with federal

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<sup>38</sup> *Americans with Disabilities Act of 1990* (Pub L 101-336, 42 USC § 12101) [*ADA*].

<sup>39</sup> *Ibid*, s.12102.

<sup>40</sup> For example, see: *Sutton v United Air Lines Inc*, 527 US 471 (1999) and *Toyota Motor Manufacturing Kentucky Inc v Williams*, 534 US 184 (2002).

<sup>41</sup> *ADA Amendments Act of 2008*, PL 110-325.

<sup>42</sup> Department of Justice, *Project Civic Access Fact Sheet*, website: [www.ada.gov/civicfac.htm](http://www.ada.gov/civicfac.htm).

government funding.<sup>43</sup> The *Rehabilitation Act of 1973* prohibits disability discrimination by agencies and programs receiving federal funding.<sup>44</sup> This law also created an independent federal agency, the Access Board, to develop and enforce accessibility standards under the *ABA*.<sup>45</sup> The *Individuals with Disabilities Education Act (IDEA)* requires public schools to provide children with disabilities with a free education in the least restrictive environment.<sup>46</sup> The *Fair Housing Act* protects people with disabilities from discrimination in the purchase and lease of dwellings.<sup>47</sup> The *Civil Rights of Institutionalized Persons Act of 1980* protects the rights of people with disabilities in institutions such as prisons and mental health facilities.<sup>48</sup> Other U.S. laws will be discussed in the relevant sections of this report.

## TRANSPORTATION

### Background and Legal Framework

Under the *CRPD*, Canada must facilitate the independent and autonomous mobility of people with disabilities and take measures to ensure equal access to transportation.<sup>49</sup> Accessible transportation is essential for people with disabilities to fully participate in all aspects of society, including education and employment as well as social, political and leisure activities. In the *VIA Rail* case in 2007, the Supreme Court of Canada affirmed that people with disabilities have a fundamental human right to access transportation with the same comfort, dignity, safety and security as other members of society.<sup>50</sup> Although Canada was once a world leader in accessible transportation, it now lags behind other jurisdictions in this area.<sup>51</sup>

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<sup>43</sup> *Architectural Barriers Act of 1968*, PL 90–480.

<sup>44</sup> *Rehabilitation Act of 1973*, PL 93–112 [*Rehabilitation Act*].

<sup>45</sup> The Access Board was originally called the Architectural and Transportation Barriers Compliance Board.

<sup>46</sup> PL 108–446. This law was preceded by the *Education for all Handicapped Children Act of 1975*, PL 94–142.

<sup>47</sup> *Civil Rights Act of 1968*, PL 90–284, Title VIII.

<sup>48</sup> *Civil Rights of Institutionalized Persons Act of 1980*, 42 USC § 1997.

<sup>49</sup> *CRPD*, *supra* note 3, arts.9(1), 20 and 21.

<sup>50</sup> *Council of Canadians with Disabilities v VIA Rail Canada Inc*, [2007] 1 SCR 650 at para.162 [*VIA case*].

<sup>51</sup> David Baker, *Moving Backwards: Canada's State of Transportation Accessibility in An International Context* (Winnipeg: Council of Canadians with Disabilities, 2006) at pp.2 and 23 [Baker]; Government of Canada, Minister of Transport, *Pathways: Connecting Canada's Transportation System to the World – Volumes 1 and 2, Canada Transportation Act Review* (Ottawa: Minister of Transport, 2015) at pp.100 and 105 [Pathways Report].

The Canadian Transportation Agency governs travel by rail, air and sea under the *Canada Transportation Act (Transportation Act)*.<sup>52</sup> The Agency is an independent, quasi-judicial administrative tribunal and economic regulator that reports to Parliament through the Minister of Transport. Its members are appointed by the Governor in Council.<sup>53</sup> The Agency's regulatory and oversight functions considerably diminished with the deregulation of the transportation industry that began in the 1980s.<sup>54</sup>

Canada's National Transportation Policy calls for a transportation system that is "accessible without undue obstacle to the mobility of [...] persons with disabilities".<sup>55</sup> Part V of the *Transportation Act* gives the Agency the mandate of removing undue obstacles by making regulations and investigating complaints.<sup>56</sup> To date, the Agency has only adopted two accessibility regulations.

Part VII of the *Air Transportation Regulations (Air Regulations)* from 1994 addresses the transportation of people with disabilities.<sup>57</sup> The accessibility requirements in this section don't apply to aircraft with less than thirty passenger seats.<sup>58</sup> The *Air Regulations* establish a process for assigning accessible passenger seats.<sup>59</sup> They require air carriers to provide certain services free-of-charge to people with disabilities, including assistance with registration, boarding and disembarking, stowing and retrieving luggage and transferring in and out of mobility aids.<sup>60</sup> These services should be requested at least 48 hours before departure.<sup>61</sup> Passengers with disabilities can decide that they don't need any extra services.<sup>62</sup> However, carriers can require people with disabilities to travel with an attendant for safety reasons if an individual assessment has concluded that they are not self-reliant.<sup>63</sup>

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<sup>52</sup> SC 1996, c 10 [*Transportation Act*]. The *Canadian Human Rights Act* also prohibits discrimination on the basis of disability within federally-regulated institutions, including transportation providers. See: *CHRA*, *supra* note 3, s.3(1).

<sup>53</sup> *Ibid*, *Transportation Act*, s.7(2).

<sup>54</sup> Pathways Report, *supra* note 51 at pp. 239-240.

<sup>55</sup> *Transportation Act*, *supra* note 52, s.5(d).

<sup>56</sup> *Ibid*, ss.170(1) and 172(1). The Agency acquired this mandate in 1987. See: *National Transportation Act, 1987*, SC 1987, c 34.

<sup>57</sup> SOR/88-58, ss.145-156 [*Air Regulations*].

<sup>58</sup> *Ibid*, s.146(1).

<sup>59</sup> *Ibid*, s.153.

<sup>60</sup> *Ibid*, s.147(1).

<sup>61</sup> *Ibid*, s.151.

<sup>62</sup> *Ibid*, s.154.

<sup>63</sup> *Morten v Air Canada*, 2009 CHRT 3 (CanLII). For more information, see: Canadian Transportation Agency, *Travelling with an Attendant in the Federal Transportation System - A Resource Tool for Persons with Disabilities and Carriers* (Ottawa: Canadian Transportation Agency, 2014) [Travel Attendants].

Air carriers must periodically inquire about and attend to the needs of passengers with disabilities prior to and during flights and while in transit between flights.<sup>64</sup> Carriers must accept certified service animals on board without charge.<sup>65</sup> They must also accept mobility aids and devices as priority baggage, in addition to the free baggage allowances for passengers with disabilities.<sup>66</sup> Carriers must disassemble, package and reassemble mobility aids and return them promptly to passengers upon arrival.<sup>67</sup> Where space permits, carriers must allow manual wheelchairs to be stored on board.<sup>68</sup> However, certain aircraft with fewer than sixty passenger seats can make alternative arrangements rather than carrying aids on board.<sup>69</sup> Carriers must repair and/or replace lost or damaged aids.<sup>70</sup> They must also inform passengers of their right to file accessibility complaints with the Agency.<sup>71</sup>

The *Personnel Training for the Assistance of Persons with Disabilities Regulations (Training Regulations)* from 1995 require carriers to provide employees and contractors with training on assisting travellers with disabilities.<sup>72</sup> Training is mandatory for personnel who interact with the public or make decisions regarding the transportation of people with disabilities, who provide physical assistance to travellers with disabilities or who handle or assist with mobility aids or equipment.<sup>73</sup> Training must be provided within 60 days of commencing these duties and periodic refresher training is required thereafter.<sup>74</sup> Detailed training records must be available for inspection by the Agency or the public.<sup>75</sup> Like the *Air Regulations*, the *Training Regulations* do not apply to small air carriers and terminal operators.<sup>76</sup>

Unlike other jurisdictions such as the U.S., the European Union, Australia and Japan, Canada's accessibility standards are not enshrined in legislation. Instead, Canada relies on non-binding, voluntary *Codes of Practice*. The Agency has developed accessibility *Codes* for trains, planes, ferries, airports, passenger

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<sup>64</sup> *Air Regulations*, *supra* note 57, ss.147(1)(k) and 150.

<sup>65</sup> *Ibid*, s.149.

<sup>66</sup> *Ibid*, s.148(1).

<sup>67</sup> *Ibid*, s.148(4).

<sup>68</sup> *Ibid*, s.148(5).

<sup>69</sup> *Ibid*, s.148 (2).

<sup>70</sup> *Ibid*, s.155.

<sup>71</sup> *Ibid*, s.156.

<sup>72</sup> SOR/94-42 [*Training Regulations*].

<sup>73</sup> *Ibid*, ss.4-7.

<sup>74</sup> *Ibid*, ss.8-9.

<sup>75</sup> *Ibid*, s.11.

<sup>76</sup> *Ibid*, s.3(1)(a).

terminals and communications.<sup>77</sup> The Minister of Transportation also developed a *Code* for intercity buses.<sup>78</sup> These *Codes* address the physical accessibility of vehicles and equipment, covering elements such as signage, lighting and handrails. The rail and ferry *Codes* also include service standards similar to those in the *Air Regulations*. The aircraft *Code* only applies to planes with thirty or more passenger seats. The Agency has developed accessibility guidelines for smaller planes.<sup>79</sup> The Agency has also developed resource tools to help carriers and passengers understand their rights and responsibilities.<sup>80</sup> The Agency monitors accessibility by conducting site visits, reviewing websites and documents and speaking with transportation providers.<sup>81</sup> It periodically publishes monitoring reports.<sup>82</sup>

Travellers with disabilities who encounter barriers can file complaints with the Agency or the Canadian Human Rights Commission.<sup>83</sup> These two institutions must coordinate their activities, foster complementary policies and practices and avoid jurisdictional conflicts.<sup>84</sup> In handling accessibility complaints, the Agency applies human rights principles, including the duty to accommodate to the point of undue hardship.<sup>85</sup> The Agency gives parties the option of resolving their dispute informally

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<sup>77</sup> Canadian Transportation Agency, *Passenger Rail Car Accessibility and Terms and Conditions of Carriage by Rail of Persons with Disabilities - Code of Practice* (Ottawa: Canadian Transportation Agency, 1998); Canadian Transportation Agency, *Aircraft Accessibility for Persons with Disabilities - Code of Practice for Fixed-wing Aircraft with 30 or More Passenger Seats* (Ottawa: Canadian Transportation Agency, 2016) [*Aircraft Code*]; Canadian Transportation Agency, *Ferry Accessibility for Persons with Disabilities - Code of Practice* (Ottawa: Canadian Transportation Agency, 2014); Canadian Transportation Agency, *Accessibility of Non-National Airports System Air Terminals - Code of Practice* (Ottawa: Canadian Transportation Agency, 2013); Canadian Transportation Agency, *Passenger Terminal Accessibility - Code of Practice* (Ottawa: Canadian Transportation Agency, 2007); Canadian Transportation Agency, *Removing Communication Barriers for Travellers with Disabilities - Code of Practice* (Ottawa: Canadian Transportation Agency, 2016).

<sup>78</sup> Government of Canada, Minister of Transport, *Intercity Bus Code of Practice* (Ottawa: Minister of Transport, 2011).

<sup>79</sup> Canadian Transportation Agency, *Accessibility Guidelines for Small Aircraft - Services for persons with disabilities on aircraft with 29 and fewer passenger seats* (Ottawa: Canadian Transportation Agency, 2005).

<sup>80</sup> For example, see: Canadian Transportation Agency, *Accessible Transportation Complaints - A Resource Tool for Persons with Disabilities* (Ottawa: Canadian Transportation Agency, 2012) [*Accessibility Complaints*]; *Travel Attendants*, *supra* note 63; Canadian Transportation Agency, *Web Accessibility - A Resource Tool for Transportation-Related Websites* (Ottawa: Canadian Transportation Agency, 2016); Canadian Transportation Agency, *Implementation Guide Regarding Automated Self-Service Kiosks* (Ottawa: Canadian Transportation Agency, 2014).

<sup>81</sup> Canadian Transportation Agency, *Monitoring the industry for accessibility*, website: [www.otc-cta.gc.ca/eng/compliance-and-enforcement](http://www.otc-cta.gc.ca/eng/compliance-and-enforcement).

<sup>82</sup> For example, see: Canadian Transportation Agency, *Compliance Report: Accessible Ground Transportation at Airports* (Ottawa: Canadian Transportation Agency, 2017). The compliance data in this report was based on self-reporting through a questionnaire sent to participating airports.

<sup>83</sup> *Transportation Act*, *supra* note 52, s.172(1); *CHRA*, *supra* note 3, ss.43-46.

<sup>84</sup> *Ibid*, *Transportation Act*, s.171.

<sup>85</sup> *Accessibility Complaints*, *supra* note 80 at p.2.

through facilitation or mediation.<sup>86</sup> If parties are unable or unwilling to reach a settlement, the Agency appoints a panel to adjudicate the complaint.

The Agency's adjudication proceedings and decisions are public. Each party has the opportunity to present their case to the panel. Lawyers are not required. Although most cases are decided on written arguments, the Agency can hold a public hearing for complex cases or for cases that have a public interest element or that require expert evidence.<sup>87</sup> The Agency can order transportation providers to take corrective measures and to compensate complainants for expenses incurred as a result of undue obstacles.<sup>88</sup> In exceptional circumstances, the Agency can award costs.<sup>89</sup> Unlike the Canadian Human Rights Tribunal, the Agency cannot order compensation for pain and suffering.<sup>90</sup>

The Agency can review its decision if the facts or circumstances in a case have changed.<sup>91</sup> Parties can appeal Agency decisions to the Federal Court of Appeal on questions of law or jurisdiction.<sup>92</sup> They can also have decisions judicially reviewed in Federal Court.<sup>93</sup>

## **Other Jurisdictions**

### **Ontario**

The AODA's *Transportation Standards* contain detailed technical requirements for regular transportation and paratransit.<sup>94</sup> They also include requirements for ferries and for school boards that provide transportation services and municipalities that license taxicabs.<sup>95</sup> Transportation providers must publicize information on their accessibility services and equipment.<sup>96</sup> They must train their employees on the safe use of this equipment and on emergency procedures for

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<sup>86</sup> *Ibid* at p.6; *Transportation Act*, *supra* note 52, s.36.1(1).

<sup>87</sup> *Accessibility Complaints*, *supra* note 80, p.8.

<sup>88</sup> *Ibid*.

<sup>89</sup> *Ibid* at p.18; *Transportation Act*, *supra* note 52, s.25.1.

<sup>90</sup> The Canadian Human Rights Tribunal can order compensation of up to \$20 000 for the pain and suffering of the victim. See: *CHRA*, *supra* note 3, s.53(2)(e). In addition, the Tribunal can order special compensation of up to 20 000\$ if the discriminatory practice was wilful or reckless: *Ibid*, s.53(3).

<sup>91</sup> *Transportation Act*, *supra* note 52, s.32.

<sup>92</sup> *Ibid*, s.41.

<sup>93</sup> *Federal Courts Act*, RSC 1985, c F-7, s.18.1.

<sup>94</sup> *Integrated Standards*, *supra* note 27, ss.33-80.

<sup>95</sup> *Ibid*, ss.75, 77 and 79-80.

<sup>96</sup> *Ibid*, s.34.

passengers with disabilities.<sup>97</sup> They must also allow support persons to travel for free.<sup>98</sup>

Regular transportation must provide priority seating for passengers with disabilities.<sup>99</sup> Vehicles must have two or more spaces for people using mobility aids.<sup>100</sup> They must also meet technical requirements for lifting devices, steps, handrails, signage, lighting and floor surfaces.<sup>101</sup> All stops must have both audio and visual announcements.<sup>102</sup> Regular transportation providers cannot charge higher fares for passengers with disabilities or for the storage of mobility aids.<sup>103</sup> They must hold at least one public meeting per year with people with disabilities to review their accessibility plans.<sup>104</sup>

Paratransit must provide at least the same hours and days of service as regular transit.<sup>105</sup> Whenever possible, it must provide same-day service.<sup>106</sup> Paratransit providers cannot charge more for their services than regular transit or limit the number of trips that users can request.<sup>107</sup> Eligible visitors from other jurisdictions should have access to paratransit.<sup>108</sup> Children must be allowed to travel with their parents.<sup>109</sup> Users should also be allowed to travel with companions if sufficient space is available.<sup>110</sup> In their accessibility plans, paratransit providers must include a process for estimating service demands and reducing wait times.<sup>111</sup>

### ***United States***

A substantial portion of the *ADA* deals with transportation. Title II governs public entities that provide transportation, including those that don't receive government subsidies. This section of the *ADA* is enforced through private lawsuits and complaints filed with the Department of Transportation's Civil Rights Office. Title III governs private entities that provide transportation. This section is enforced

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<sup>97</sup> *Ibid*, s.36.

<sup>98</sup> *Ibid*, s.38.

<sup>99</sup> *Ibid*, s.49.

<sup>100</sup> *Ibid*, s.55.

<sup>101</sup> *Ibid*, ss.53-62.

<sup>102</sup> *Ibid*, s.52.

<sup>103</sup> *Ibid*, ss.46 and 48.

<sup>104</sup> *Ibid*, s.41.

<sup>105</sup> *Ibid*, s.70.

<sup>106</sup> *Ibid*, s.71.

<sup>107</sup> *Ibid*, ss.66 and 72.

<sup>108</sup> *Ibid*, s.67.

<sup>109</sup> *Ibid*, s.74.

<sup>110</sup> *Ibid*.

<sup>111</sup> *Ibid*, s.42.

through private lawsuits and complaints filed with the Department of Justice. The Attorney General can also file lawsuits under Title III regarding discriminatory patterns or practices and issues of general public importance.<sup>112</sup>

The U.S. Access Board has developed detailed accessibility guidelines and standards that have been enshrined in regulations.<sup>113</sup> All vehicles that are purchased, leased or reconditioned and all newly constructed transportation facilities must be readily accessible and usable by people with disabilities.<sup>114</sup> All intercity rail (i.e. Amtrak) stations and all key stations in subway, streetcar and commuter rail systems must also be accessible.<sup>115</sup> Paratransit must have response times and levels of service comparable to regular transit.<sup>116</sup> Transportation providers must submit accessibility plans to the Secretary of Transportation. When preparing these plans, they must hold public hearings and consult with people with disabilities.<sup>117</sup>

In addition to the *ADA*, the *Air Carrier Access Act* and regulations impose accessibility requirements for aircraft, airlines and airports. For example, new aircraft with thirty or more seats must have movable armrests on half the aisle seats. New twin-aisle aircraft must have accessible washrooms. These rules apply to U.S. airlines and to flights to or from the U.S. on foreign airlines. This *Act* is enforced through complaints filed with the Department of Transportation.<sup>118</sup>

## Gaps and Recommended Reforms

Significant gaps in the Canada's legal and regulatory framework are preventing people with disabilities from having equal access to transportation. Many of these gaps were identified in the Minister of Transportation's 2015 review of the *Transportation Act*.<sup>119</sup> Canada is lagging far behind other jurisdictions by relying on

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<sup>112</sup> *ADA*, *supra* note 38, s.12188(b)(1)(B).

<sup>113</sup> *Americans with Disabilities Act Title II Regulations*, 28 CFR Part 35; *Americans with Disabilities Act Title III Regulations*, 28 CFR Part 36; *Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance*, 49 CFR Part 27; *Transportation Services for Individuals with Disabilities (ADA)*, 49 CFR Part 37; *Accessibility Specifications for Transportation Vehicles*, 49 CFR Part 38; *Transportation for Individuals with Disabilities: Passenger Vessels*, 49 CFR Part 39.

<sup>114</sup> *ADA*, *supra* note 38, ss.12142; 12144, 12146 and 12162.

<sup>115</sup> *Ibid*, ss.12146-12147 and 12162(e).

<sup>116</sup> *Ibid*, s.12143.

<sup>117</sup> *Ibid*, ss.12143(c)(6) and (7) and 12147(3).

<sup>118</sup> *Air Carrier Access Act*, 49 USC 41705; *Nondiscrimination on the Basis of Disability in Air Travel*, 14 CFR Part 382.

<sup>119</sup> Pathways Report, *supra* note 51 at pp.100 and 242; Council of Canadians with Disabilities, *CCD Submission to Canada Transportation Act Review* (Winnipeg: Council of Canadians with Disabilities, 2014).

voluntary accessibility standards. The Canadian Transportation Agency lacks the authority to initiate its own investigations or issue general orders. It tackles accessibility issues on a case-by-case basis through individual complaints. This creates inconsistency in the application of accessibility standards. Without an efficient legal mechanism to proactively ensure compliance, transportation providers in Canada can disregard these standards with few – if any – consequences. The adversarial complaints-based system also puts an undue burden on people with disabilities, pitting them against well-resourced corporate entities.

Recent jurisprudence demonstrates the urgent need for reform. For example, in 2000 CCD filed a complaint with the Agency regarding the inaccessibility of new rail cars purchased by Via Rail. The cars didn't meet the minimal requirements in the rail accessibility *Code of Practice* since they didn't allow passengers to use their own wheelchairs. VIA acquired these vehicles from the U.K. at a reduced price because they didn't meet the U.K.'s accessibility regulations. CCD ultimately won its case at the Supreme Court in 2007.<sup>120</sup> However, the seven-year legal battle nearly bankrupted this non-profit organization.<sup>121</sup>

The “one person, one fare” cases provide another compelling example. In 1993, the Agency ruled that Air Canada's practice of charging passengers for additional seats required due to their disability constituted an undue obstacle to their mobility.<sup>122</sup> Despite this ruling, Air Canada maintained this discriminatory practice.<sup>123</sup> CCD filed another complaint against Air Canada, Air Canada Jazz and Westjet regarding this practice in 2002. In 2008, the Agency finally ordered these airlines to adopt “one person, one fare” policies for their domestic flights.<sup>124</sup> However, this decision doesn't apply to their international flights or to other airlines.

Clearly, Canada's voluntary accessibility standards are ineffective. Like other jurisdictions, Canada should enshrine its standards in enforceable legislation or regulations. The Agency should expand the technical requirements in the existing *Codes of Practice*, drawing on the guidelines developed by the U.S. Access Board.<sup>125</sup> Exemptions for small aircraft and carriers should be removed.<sup>126</sup> Canada's

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<sup>120</sup> VIA case, *supra* note 50.

<sup>121</sup> David Baker and Sarah Godwin, “All Aboard! The Supreme Court of Canada Confirms that Canadians with Disabilities have Substantive Equality Rights” (2008) 71 *Sask L Rev* 39.

<sup>122</sup> *Buchholz v Air Canada*, NTA Decision No 1993-A-252.

<sup>123</sup> Baker, *supra* note 51 at p.15.

<sup>124</sup> Canadian Transportation Agency, Decision No 6-AT-A-2008.

<sup>125</sup> Baker, *supra* note 51 at p.8.

accessibility standards must include deadlines and clear targets for the prevention and removal of barriers. These standards must be periodically reviewed and amended in collaboration with people with disabilities to ensure their effectiveness.

Instead of having to rely on individual complaints, the Agency should have the power to combat systemic barriers by initiating investigations and issuing general orders. It should be able to issue penalties for non-compliance with accessibility requirements. Like the Canadian Human Rights Tribunal, the Agency should have the authority to order compensation for pain and suffering. It should also be able to order interim costs to enable people with disabilities to pursue cases in the public interest. The rules governing the composition of the Agency should be amended to ensure that people with disabilities are adequately represented.

Transportation providers should have to annually report on the number and nature of the accessibility complaints they receive. To ensure transparency and accountability, these reports should be posted on their websites. The Agency should also be required to publicly report on the accessibility complaints it initiates, receives and resolves each year. This report should also detail the number and the amounts of the administrative penalties the Agency imposes on transportation providers.

The Government of Canada must also include accessibility requirements in all of its procurement policies as well as its funding to the provinces for transportation-related projects, including infrastructure investments.<sup>127</sup>

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<sup>126</sup> *Aircraft Code*, *supra* note 77; *Air Regulations*, *supra* note 57, ss.146(1) and 148(2); *Training Regulations*, *supra* note 72, s.3(1)(a).

<sup>127</sup> For example, see: Infrastructure Canada, *Public Transit Infrastructure Fund - Program Overview*, website: [www.infrastructure.gc.ca/plan/ptif-fitc/ptif-program-programme-eng.html](http://www.infrastructure.gc.ca/plan/ptif-fitc/ptif-program-programme-eng.html).

**Proposed legislative amendments include the following:**

➤ ***Canada Transportation Act***

- **Section 7(2)** should be amended to require at least one member of the Agency to be a person with a disability;
- **Section 170(1)** should be amended to require the Agency to make detailed regulations for the purpose of eliminating obstacles to the mobility of people with disabilities;
- **Section 170(3)** should be repealed;
- **Section 172(1)** should be amended to give the Agency the authority to initiate an inquiry where it has reasonable grounds to believe that there is an obstacle to the mobility of people with disabilities;
- **Section 172(3)** should be amended to give the Agency the authority to order compensation for pain and suffering experienced as a result of an obstacle;

➤ ***Air Transportation Regulations***

- **Section 146(1)** should be repealed;
- **Section 148(2)** should be repealed;

➤ ***Personnel Training for the Assistance of Persons with Disabilities Regulations***

- **Sections 3(1)(a) and 3(2)** should be repealed.

## COMMUNICATIONS

### Background and Legal Framework

Under the *CRPD*, Canada must ensure that people with disabilities can seek, receive and impart information on an equal basis with other members of society.<sup>128</sup> People with disabilities must have equal access to information, communications, technology and the media.<sup>129</sup> Canada must facilitate the use of sign language, Braille

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<sup>128</sup> *CRPD*, *supra* note 3, s.21.

<sup>129</sup> *Ibid*, ss.4(1)(f)(g)(h); 9(1)(b); 9(2)(f), (g) and (h); 21 and 30.

and other means of communication.<sup>130</sup> The government and private entities must also provide information in alternative formats at no extra cost.<sup>131</sup> In addition, Canada must promote the research, development and availability of universally designed goods, services and equipment.<sup>132</sup>

This report focuses on the accessibility of broadcasting and telecommunications in Canada. The legal and regulatory framework in these areas is incredibly complex and difficult to navigate. The Canadian Radio-television and Telecommunications Commission (CRTC) oversees these areas under the *Broadcasting Act* and the *Telecommunications Act*.<sup>133</sup> The CRTC has different powers under each of these acts.

Canada's Broadcasting Policy requires that accessible programming be provided for people with disabilities "as resources become available".<sup>134</sup> Although Canada's Telecommunications Policy does not directly address the needs of people with disabilities, the policy's objectives include rendering "reliable and affordable telecommunications services of high quality accessible to Canadians" and responding to users' "economic and social requirements".<sup>135</sup> Regrettably, no single document contains all of the accessibility requirements for broadcasting or telecommunications in Canada. These requirements are contained in countless CRTC decisions, policies, regulations, bulletins, notices and conditions of licence or service. People with disabilities can request documents in alternative formats as well as reasonable accommodations when participating in CRTC hearings.<sup>136</sup>

## **Broadcasting**

The *Broadcasting Act* gives the CRTC the power to issue regulations, guidelines, statements, decisions and orders.<sup>137</sup> The CRTC also oversees broadcasting licenses in Canada. The CRTC can issue and renew broadcasters'

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<sup>130</sup> *Ibid*, s.21(b)

<sup>131</sup> *Ibid*, s.21(a) and (c).

<sup>132</sup> *Ibid*, s.4(1)(f).

<sup>133</sup> *Broadcasting Act*, SC 1991, c 11 [*Broadcasting Act*]; *Telecommunications Act*, SC 1993, c 38 [*Telecommunications Act*]. The CRTC was created under the *Canadian Radio-television and Telecommunications Commission Act*, RSC 1985, c C-22.

<sup>134</sup> *Ibid*, *Broadcasting Act*, s.3(1)(p).

<sup>135</sup> *Telecommunications Act*, *supra* note 133, s.7(b) and (h).

<sup>136</sup> Canadian Radio-television and Telecommunications Commission, *Rules of Practice and Procedure*, SOR/2010-277 [*CRTC Rules*], ss.14 and 26(2)(f).

<sup>137</sup> *Broadcasting Act*, *supra* note 133, ss.6, 10, 12(2) and 17.

licenses for up to seven years at a time.<sup>138</sup> It can also suspend or revoke licenses or subject them to certain conditions.<sup>139</sup> In exercising this mandate, the CRTC must hold public hearings.<sup>140</sup> Consumers, including people with disabilities, can intervene at these hearings.<sup>141</sup> They can apply to have their interim and final costs covered by the Broadcasting Participation Fund.<sup>142</sup>

The CRTC can also inquire into contraventions of the *Broadcasting Act*, regulations, decisions or orders.<sup>143</sup> Contraventions are punishable with a fine.<sup>144</sup> The CRTC can also investigate consumer complaints and grant complainants any relief.<sup>145</sup> Public hearings aren't mandatory for complaints.<sup>146</sup> CRTC decisions and orders can be appealed to the Federal Court of Appeal with leave on questions of law or jurisdiction.<sup>147</sup>

Recognizing television's key role in shaping society, the CRTC has imposed numerous accessibility requirements on Canadian broadcasters. Grants from the Broadcasting Accessibility Fund are available to help broadcasters finance their accessibility-related projects.<sup>148</sup> Broadcasters are also expected to conform to the Canadian Association of Broadcasters' *Equitable Portrayal Code*.<sup>149</sup> The *Code* prohibits negative portrayals and stereotyping of various groups, including people with disabilities. It is enforced by the Canadian Broadcast Standards Council.

### ***Closed Captioning***

Closed captioning is the on-screen textual representation of the audio component of a television program, including on-screen dialog, the identity of speakers and the description of sound effects. It is typically presented as a banner at the bottom of the screen. The CRTC recognizes that closed captioning provides a critical link to televised news, information and entertainment for the Deaf and people

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<sup>138</sup> *Ibid*, s.9(1)(b) and (d).

<sup>139</sup> *Ibid*, s.9(1)(b), (c) and (e).

<sup>140</sup> *Ibid*, s.18(1) and (2).

<sup>141</sup> CRTC *Rules*, *supra* note 136, s.26.

<sup>142</sup> Broadcasting Decision CRTC 2011-163; Broadcasting Regulatory Policy CRTC 2012-181 at para.17. For more information on the BPF, visit: [www.bpf-fpr.ca](http://www.bpf-fpr.ca).

<sup>143</sup> *Broadcasting Act*, *supra* note 133, s.12(1).

<sup>144</sup> *Ibid*, ss.32-34.3.

<sup>145</sup> *Ibid*, s.45; CRTC *Rules*, *supra* note 136, s.11.

<sup>146</sup> *Broadcasting Act*, *supra* note 133, s.18(3).

<sup>147</sup> *Ibid*, s.31(2).

<sup>148</sup> Broadcasting Regulatory Policy CRTC 2012-430 at para.6. For more information on the BAF, visit: [www.baf-far.ca](http://www.baf-far.ca).

<sup>149</sup> Canadian Association of Broadcasters, *Equitable Portrayal Code* (Ottawa: Canadian Association of Broadcasters, 2008); Broadcasting Public Notice CRTC 2008-23.

with hearing impairments.<sup>150</sup> The requirements for closed captioning have evolved over time.

In 1995, the CRTC began requiring large English broadcasters to caption 90% of their programming and 100% of their local news.<sup>151</sup> These requirements became a condition of license in 2001. Around the same time, the CRTC began imposing similar requirements on French broadcasters.<sup>152</sup> In 2007, the CRTC began requiring French and English broadcasters to caption 100% of their programs during the broadcast day (i.e. from 6 am to midnight), with the exception of advertising. The CRTC also established French and English working groups to develop universal quality standards.<sup>153</sup> In 2009, broadcasters began having to caption advertising as well as all programming aired during the overnight period when captions are available.<sup>154</sup>

In 2011, the CRTC approved the quality standards developed by the French Working Group. These mandatory standards cover aspects such as accuracy rates, lag times, error correction, positioning and speed.<sup>155</sup> In 2012, the CRTC began requiring broadcasters to calculate their captioning accuracy rate for two of their programs with live content every month. The CRTC can request a copy of these calculations. The CRTC also began requiring broadcasters to submit annual reports outlining their efforts to improve their accuracy rates.<sup>156</sup> Also in 2012, CRTC also approved quality standards for English closed captioning, which are nearly identical to the French standards.<sup>157</sup> In 2015, the CRTC began requiring broadcasters to annually report on the captioning of their non-linear online platforms such as video on demand.<sup>158</sup>

### ***Described Video***

Described video (also known as “video description”) entails a narrator providing a description of a program's key visual elements such as settings, costumes and body language. The description, which is added during pauses in

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<sup>150</sup> Broadcasting Public Notice CRTC 2007-54 [CRTC 2007-54] at para.1.

<sup>151</sup> Broadcasting Public Notice CRTC 1995-48.

<sup>152</sup> Broadcasting Public Notice CRTC 1999-97.

<sup>153</sup> CRTC 2007-54, *supra* note 150.

<sup>154</sup> Broadcasting and Telecom Regulatory Policy CRTC 2009-430 [CRTC 2009-430] at para.75.

<sup>155</sup> Broadcasting Regulatory Policy CRTC 2011-741.

<sup>156</sup> Broadcasting Regulatory Policy CRTC 2011-741-1.

<sup>157</sup> Broadcasting Regulatory Policy CRTC 2012-362.

<sup>158</sup> Broadcasting Regulatory Policy CRTC 2015-104 [CRTC 2015-104].

dialogue, enables people with vision impairments to form a mental picture of what is happening on the screen.

The CRTC began imposing video description requirements as a condition of licence for major English conventional television broadcasters in 2001. This group was required to broadcast four hours of described video per week during prime time with at least 50% original programming.<sup>159</sup> Described video could consist of dramas, documentaries or children's programming. In 2004, the CRTC imposed a similar condition on certain English pay and specialty services.<sup>160</sup> In 2007, the CRTC required broadcasters to pass through described video for all of their programming.<sup>161</sup>

In 2009, the CRTC imposed described video requirements on French broadcasters and the CBC. It also expanded the categories of programming that broadcasters could use to fulfill their requirements.<sup>162</sup> The CRTC began expecting broadcasters to identify programming with described video through logos and audio announcements, but this is not a condition of license.<sup>163</sup> The CRTC created a working group to improve access and awareness of described video.<sup>164</sup> It also recommended that production funds include described video as a criterion for funding.<sup>165</sup>

In 2015, the CRTC began expecting content with described video to be offered with described video when it is rebroadcasted.<sup>166</sup> However, this not a condition of license. By September 2019, conventional television broadcasters will be required to provide described video for prime-time programming (i.e. 7 pm to 11 pm) seven days a week. In their next licence terms, other types of broadcasters will be required to provide four hours of described video per week.<sup>167</sup> To date, the CRTC has not adopted quality standards for described video.

### ***Audio Description***

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<sup>159</sup> The "original programming" requirement was abolished in 2015. See: *Ibid* at para.43.

<sup>160</sup> Broadcasting Public Notice CRTC 2004-2.

<sup>161</sup> *Broadcasting Distribution Regulations*, SOR/97-555, s.7 [*Broadcasting Regulations*]; Broadcasting Public Notice CRTC 2007-101.

<sup>162</sup> CRTC 2009-430, *supra* note 154 at paras.106 and 108.

<sup>163</sup> *Ibid* at para.122.

<sup>164</sup> *Ibid* at paras.123-125.

<sup>165</sup> *Ibid* at para.111.

<sup>166</sup> CRTC 2015-104, *supra* note 158 at para.45.

<sup>167</sup> *Ibid*.

Audio description entails an announcer reading aloud the textual and graphic information shown on the screen during information programs such as newscasts. It enables people with vision impairments to access this information. The CRTC began including audio description requirements as a condition of licence in 2009.<sup>168</sup>

### ***Equipment***

In 2009, the CRTC encouraged broadcasting distributors to offer at least one accessible set-top box and remote control for people with vision loss or fine motor-skill impairments. It also encouraged them to develop set-top box software that provides increased font sizes and audio prompts.<sup>169</sup> In 2015, the CRTC began requiring broadcasters to make accessible equipment, software and other technology available to subscribers if it is available for purchase and compatible with their distribution systems.<sup>170</sup> Broadcasters must now annually report on the availability and use of accessible set-top boxes and remotes and on the number of accessibility queries they receive and resolve.<sup>171</sup>

### **Telecommunications**

The *Telecommunications Act* gives the CRTC the power to issue regulations, guidelines, statements and orders.<sup>172</sup> It also allows the CRTC to impose conditions of service on telecommunications providers.<sup>173</sup> The CRTC ensures that companies don't charge unreasonable rates or unjustly discriminate.<sup>174</sup> It can investigate compliance in response to complaints or on its own motion and can appoint inspectors for this purpose.<sup>175</sup> The CRTC can grant complainants any relief.<sup>176</sup> It can also impose administrative penalties of up to \$15 000 000 for violations of the *Telecommunications Act*.<sup>177</sup> Contraventions of the *Act*, regulations or CRTC decisions are an offence punishable by summary conviction.<sup>178</sup> The CRTC can also

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<sup>168</sup> CRTC 2009-430, *supra* note 154 at para.127.

<sup>169</sup> *Ibid* at para.120.

<sup>170</sup> *Broadcasting Regulations*, *supra* note 161, s.7.3.

<sup>171</sup> CRTC 2015-104, *supra* note 158 at para.68.

<sup>172</sup> *Telecommunications Act*, *supra* note 133, ss.51 and 57-58.

<sup>173</sup> *Ibid*, s.24.

<sup>174</sup> *Ibid*, ss.25(1) and 27.

<sup>175</sup> *Ibid*, ss.48(1) and 71(1).

<sup>176</sup> *Ibid*, s.60.

<sup>177</sup> *Ibid*, s.72.001

<sup>178</sup> *Ibid*, s.73.

award interim and final costs to encourage the participation of people and groups representing subscriber interests in telecommunications proceedings.<sup>179</sup>

Parties can apply to have CRTC telecommunications decisions internally reviewed.<sup>180</sup> These decisions can also be appealed to the Federal Court of Appeal with leave on a question of law or jurisdiction.<sup>181</sup>

Over the years, the CRTC has imposed the following accessibility requirements on telecommunications service providers:

### ***Telephone Relay Services***

Telephone relay services entail an operator who transmits information between a person with a hearing or speech disability and a person without such a disability. Relay services can be provided by teletypewriter (TTY), internet protocol (IP) or video (VRS). With TTY and IP relay services, the person with the disability communicates with the operator using text; with VRS, they communicate using sign language.

The CRTC began requiring certain phone companies to provide TTY relay services in 1985.<sup>182</sup> It extended these requirements to additional companies in subsequent decisions.<sup>183</sup> In 2009, the CRTC required companies to provide IP relay services at the same rate as TTY.<sup>184</sup> IP services are significantly faster than TTY, they allow for conference calls and they allow users to print and save conversations. Landline service providers must now provide TTY and IP relay services twenty-four hours a day, seven days a week. Wireless service providers generally aren't required to provide these services.

In 2014, the CRTC mandated access to video relay services (VRS).<sup>185</sup> An independent not-for-profit organization was created to administer VRS across the country.<sup>186</sup> The Canadian Administrator of VRS is responsible for designing, implementing and overseeing the delivery of VRS and for promoting public awareness about this service. VRS is funded through phone companies'

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<sup>179</sup> *Ibid*, s.56; CRTC Rules, *supra* note 136, ss.60-70; Telecom Regulatory Policy CRTC 2010-963 [CRTC 2010-963].

<sup>180</sup> *Telecommunications Act*, *supra* note 133, s.62.

<sup>181</sup> *Ibid*, s.64(1).

<sup>182</sup> Telecom Decision CRTC 1985-29.

<sup>183</sup> Telecom Decision CRTC 1997-8; Telecom Order CRTC 1998-1; Telecom Decision CRTC 2005-28.

<sup>184</sup> CRTC 2009-430, *supra* note 154 at paras.17-20.

<sup>185</sup> Telecom Regulatory Policy CRTC 2014-187.

<sup>186</sup> Telecom Regulatory Policy CRTC 2014-659.

contributions to a national fund.<sup>187</sup> “SRV Canada VRS” launched in September 2016. It currently provides VRS in American Sign Language (ASL) and Quebec Sign Language (QSL) seventy-six hours a week.<sup>188</sup> The CRTC will be conducting a comprehensive review of VRS in 2019.

In response to customer complaints, the CRTC launched a consultation in early 2017 to re-examine the regulatory framework for TTY and IP relay services.<sup>189</sup>

### **9-1-1 Emergency Services**

In 2009, the CRTC examined access to 9-1-1 services for people with hearing or speech disabilities.<sup>190</sup> It found that relay service users experience delays in accessing 9-1-1 since their messages are transmitted through a third-party. They can’t benefit from Enhanced 9-1-1, a technology that automatically transmits the caller’s location and phone number. 9-1-1 services are only available through VRS seventy-six hours per week. IP and video relay services can also be interrupted by power and internet outages.

In light of these limitations, the CRTC asked its Emergency Services Working Group to investigate the use of text-based 9-1-1 services.<sup>191</sup> After conducting a technical trial, the Working Group recommended the implementation of text 9-1-1 services across the country for people with hearing and speech impairments.<sup>192</sup> The CRTC directed phone companies to begin providing this service in 2013.<sup>193</sup> The “Text with 9-1-1” service is now available in most provinces.<sup>194</sup> Users must register for this service through their wireless providers.

### **Cell Phones**

In 2009, the CRTC asked phone companies to offer at least one accessible wireless mobile handset for blind people and those with moderate to severe

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<sup>187</sup> Funding is provided by the National Contribution Fund, which was created by virtue of s.46.5 of the *Telecommunications Act*. The Fund is administered by the Canadian Telecommunications Contribution Consortium.

<sup>188</sup> For more information about VRS in Canada, visit: <https://srvcanadavrs.ca/en/>.

<sup>189</sup> Telecom Notice of Consultation CRTC 2017-33.

<sup>190</sup> CRTC 2009-430, *supra* note 154 at paras.30-31.

<sup>191</sup> *Ibid* at paras.33-34.

<sup>192</sup> CRTC Emergency Services Working Group, *Consensus Report ESRE0061: T9-1-1 Trial Results* (Ottawa: CRTC Interconnection Steering Committee, 2012).

<sup>193</sup> Telecom Decision CRTC 2013-22.

<sup>194</sup> This service is not yet available in Newfoundland, Nunavut, the Northwest Territories and the Yukon. For more information on Text with 9-1-1, visit: <http://textwith911.ca/en/home/>.

cognitive disabilities.<sup>195</sup> Companies should consult with people with disabilities on an ongoing basis to determine which accessible handsets to offer and to provide adequate technical support. Recognizing that people with disabilities may require additional time to familiarize themselves with new equipment, in 2013 the CRTC required companies to provide customers with disabilities with a thirty-day trial period for their mobile devices, with a corresponding doubling of the permitted usage.<sup>196</sup>

In 2014, the CRTC commissioned a study to assess compliance with accessible handset requirements. The study concluded that although wireless companies are providing accessible cell phones, the applications, software and third-party assistive technologies that are required to use these handsets are not always accessible. Wireless access also remains very limited for people with severe mobility impairments.<sup>197</sup>

### ***Customer Information and Support***

In 1996, the CRTC began ordering companies to provide billing statements and information in alternative formats for people with vision impairments upon request.<sup>198</sup> This order was extended to all Canadian carriers two years later.<sup>199</sup> In 2001, the CRTC began requiring alternative formats for information about rates, terms and conditions of service.<sup>200</sup> The following year, it ordered companies to include this requirement in their contracts with resellers.<sup>201</sup> In 2010, the CRTC expanded alternative format requirements to include information on matters such as the National Do Not Call List, bill management tools and retail quality of service.<sup>202</sup> The *Wireless Code* from 2013 also requires companies to provide contracts and related documents in alternative formats upon request at no extra charge.<sup>203</sup> Internet service providers must also use plain language in their customer contracts.<sup>204</sup>

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<sup>195</sup> CRTC 2009-430, *supra* note 154 at paras.44-46.

<sup>196</sup> Telecom Regulatory Policy CRTC 2013-271 [CRTC 2013-271] at paras. 251 and 254; *Wireless Code*, s.G(4)(v).

<sup>197</sup> CONNECTUS Consulting Inc., *Assessing the Compliance of Wireless Service Providers with the CRTC Accessibility Policy* (Ottawa: CRTC, 2014).

<sup>198</sup> Telecom Order CRTC 96-1191.

<sup>199</sup> Telecom Order CRTC 98-626.

<sup>200</sup> Telecom Order CRTC 2001-163.

<sup>201</sup> Telecom Decision CRTC 2002-13.

<sup>202</sup> Telecom Regulatory Policy CRTC 2010-132.

<sup>203</sup> CRTC 2013-271, *supra* note 196 at paras.55 and 310: *Wireless Code*, ss.B(1)(iii) and (2)(v).

<sup>204</sup> Telecom Regulatory Policy CRTC 2016-496 [CRTC 2016-496] at paras.235-236.

In 2009, the CRTC required carriers and resellers to improve the accessibility of their call centres by training their customer services representatives.<sup>205</sup> It encouraged companies to adopt the World Wide Web Consortium (W3C)'s Web Content Accessibility Guidelines and test the accessibility of their websites.<sup>206</sup> Websites should meet these Guidelines by June 2017.<sup>207</sup> Companies must promote their accessible products and services on their websites and through other means.<sup>208</sup> Noting that many companies still weren't offering packages tailored to the needs of customers with disabilities, in 2016 the CRTC directed companies to make such packages available within six months.<sup>209</sup> Companies must report on their progress and their planned investments in accessibility in 2017.<sup>210</sup>

## **Other Jurisdictions**

### ***Ontario***

Since provincial governments in Canada don't have jurisdiction over broadcasting and telecommunications, the *AODA* doesn't address these matters. However, the *AODA's Information and Communications Standards* require organizations to provide communication supports and documents in accessible formats upon request at no extra cost.<sup>211</sup> Organizations must also ensure that their websites are accessible.<sup>212</sup> Educational and training institutions must provide materials in accessible formats and provide accessibility training for educators.<sup>213</sup> Libraries must also meet certain accessibility requirements.<sup>214</sup>

### ***United States***

Title IV of the *ADA* contains accessibility requirements for telecommunications. This section of the *ADA* is enforced by the Federal Communications Commission (FCC).<sup>215</sup> Additional requirements are included in the

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<sup>205</sup> CRTC 2009-430, *supra* note 154 at paras.69-70.

<sup>206</sup> *Ibid* at para.65.

<sup>207</sup> CRTC 2016-496, *supra* note 204 at para.217.

<sup>208</sup> *Ibid* at para.214; CRTC 2009-430, *supra* note 154 at para.56.

<sup>209</sup> *Ibid*, CRTC 2016-496 at para.212.

<sup>210</sup> *Ibid* at paras.223 and 237.

<sup>211</sup> *Integrated Standards*, *supra* note 27, ss.12-13.

<sup>212</sup> *Ibid*, s.14. The websites of government and public-sector organizations must conform to the World Wide Web Consortium's *Web Content Accessibility Guidelines (WCAG) 2.0* (2008), Level AA. The websites of large private organizations currently have to conform to Level A. They will have to conform to Level AA by 2021.

<sup>213</sup> *Ibid*, ss.15-16.

<sup>214</sup> *Ibid*, ss.18-19.

<sup>215</sup> 47 USC, c 5, ss.225 and 611.

*Communications Act*, the *Twenty-First Century Communications and Video Accessibility Act of 2010* and various FCC regulations.<sup>216</sup> The FCC has established a clearinghouse of information on the availability of accessible telecommunications products and services in the U.S.<sup>217</sup> This information is available on the FCC's website and is updated annually.<sup>218</sup> The FCC has also developed guides to help companies and consumers understand their accessibility rights and responsibilities.<sup>219</sup>

Telecommunications companies in the U.S. must incorporate "readily achievable" accessibility features in all their products and services. This applies to basic and special telecommunications services such as call waiting, call forwarding, caller identification and voice mail. It also applies to advanced services such as text messaging, e-mail, instant messaging and video communications and to internet browsers built into mobile phones. Equipment such as landline and mobile phones, fax machines and answering machines must also meet accessibility requirements.

The FCC has established minimum standards for relay services, including VRS. These services must be provided twenty-four hours a day, seven days a week. The standards include requirements for operator training, emergency calls, service interruptions, call-answering speeds, consumer complaint logs and public education.<sup>220</sup> In 2010, the definition of relay services was expanded to include deaf-blind users and to allow communication between different types of relay users. The FCC's National Deaf-Blind Equipment Distribution Program also provides low-income deaf-blind people with free accessible communications assessments, equipment, training and technical support.<sup>221</sup>

Televisions, computers, tablets and smartphones must be able to display captions and pass through descriptive video. Set-top boxes must have a mechanism

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<sup>216</sup> *Communications Act of 1934*, 47 USC, c 5; *Twenty-First Century Communications and Video Accessibility Act*, PL 111-260 [2010 *Communications Act*]; *Miscellaneous Rules Relating to Common Carriers*, 47 CFR Part 64 [TRS Rules]; *Access to Advanced Communications Services and Equipment by People with Disabilities*, 47 CFR Part 14 [Equipment Rules]; *Accessibility of Video Programming*, 47 CFR Part 79 [Video Rules].

<sup>217</sup> *2010 Communications Act*, *supra* note 216, s.717(d).

<sup>218</sup> See: Federal Communications Commission, *Accessibility Clearinghouse*, website: <https://ach.fcc.gov/>.

<sup>219</sup> For example, see: Federal Communications Commission, *Consumer Guide: Accessible TV and Set-Top Box Controls, Menus, and Program Guides* (Washington, DC: FCC, 2017); Federal Communications Commission, *Small Entity Compliance Guide Accessibility of User Interfaces, and Video Programming Guides and Menus* (Washington, DC: FCC, 2016).

<sup>220</sup> *TRS Rules*, *supra* note 216.

<sup>221</sup> *Ibid*, s.64.610.

to activate captions and descriptive video. Captioned television programming must be captioned when it is distributed on the Internet.<sup>222</sup> Certain categories of broadcasters must provide at least fifty hours of programming with described video in each quarter.<sup>223</sup> Emergency information must be broadcast in an accessible format. Remote controls, on-screen text menus and program guides must also be accessible. Product information such as user guides, bills and support must be provided in alternative formats upon request. Manufacturers must provide accessibility training for their employees.<sup>224</sup>

Movie theaters are also subject to accessibility requirements. They must provide assistive listening systems and receivers as well as captioning and descriptive video devices. They must train their staff to assist customers with this equipment. Closed captioning and descriptive video must be provided for films that are distributed with these features.<sup>225</sup>

Telecommunications companies must maintain records and annually report to the FCC on their compliance with these requirements.<sup>226</sup> They must also provide contact information for their employees who handle accessibility complaints.<sup>227</sup> This information is posted on the FCC's website. Consumers can contact the FCC's Disability Rights Office to help resolve their accessibility issues. If the Office doesn't resolve their issue within thirty days, they can file a complaint with the FCC's Enforcement Bureau.<sup>228</sup> Complainants can seek damages from telecommunications companies.<sup>229</sup>

## **Gaps and Recommended Reforms**

The regulatory framework for broadcasting and telecommunications in Canada is inaccessible due to its complexity. Accessibility requirements are dispersed in a bureaucratic maze of CRTC policies, decisions, bulletins, orders and conditions of license and service. The CRTC should consolidate this patchwork of rules into two sets of accessibility regulations: one for broadcasting and one for

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<sup>222</sup> *Video Rules*, *supra* note 216, s.79.4.

<sup>223</sup> *Ibid*, s.79.3.

<sup>224</sup> *Ibid*, ss.79.107-109.

<sup>225</sup> *2010 ADA Standards for Accessible Design*, ss.219 and 706; *Nondiscrimination on the Basis of Disability by Public Accommodations - Movie Captioning and Audio Description*, 28 CFR Part 36.

<sup>226</sup> *Equipment Rules*, *supra* note 216, s.14.31.

<sup>227</sup> For example, see: *Video Rules* *supra* note 216, s.79.110 (b).

<sup>228</sup> *Equipment Rules*, *supra* note 216, s.14.32.

<sup>229</sup> *Ibid*, s.14.40.

telecommunications. This would make it easier for companies and consumers to ascertain their rights and obligations. The CRTC rules of procedure should also be provided in plain language.

Like the FCC in the United States, the CRTC should establish a clearinghouse for information about accessible communications products and services in Canada. This information should be posted on an “accessibility page” of the CRTC’s website. This page should serve as a “one-stop-shop” for all accessibility information regarding both broadcasting and telecommunications. It should include notices about upcoming CRTC hearings and public consultations on issues that could have an impact on accessibility. It should also provide information on the CRTC’s monitoring and enforcement of accessibility requirements. The CRTC should have to annually report on the number, the types and the outcomes of the accessibility complaints it receives and the number and the amounts of the penalties it imposes for non-compliance. These reports should be posted on the accessibility page of the CRTC’s website.

Broadcasting and telecommunications companies should be required to provide the CRTC with up-to-date contact information for their employees who handle accessibility complaints. This information should also be included on the CRTC’s website. Companies should have to ensure that their feedback mechanisms are accessible to people with disabilities. Like the CRTC, companies should have to annually report on the number and the types of accessibility complaints they receive and the measures taken to resolve these complaints.

### **Broadcasting**

The *Broadcasting Act* currently only mandates accessible programming “as resources become available.” Given that accessible technologies are now widely available; this outdated restriction should be removed from Canada’s Broadcasting Policy.

Many of the CRTC’s accessibility requirements are imposed as conditions of license. Compliance with these conditions is reviewed upon license renewal, which generally only occurs every five to seven years. To assess compliance, the CRTC relies on consumer complaints and broadcasters’ self-reporting. Instead of suspending or revoking broadcasters’ licences for non-compliance, the CRTC simply imposes additional reporting requirements. Given this weak enforcement regime, it’s

no surprise that disability organizations continue to lament the poor quantity and quality of closed captioning and described video.<sup>230</sup>

Clearly, the CRTC must ramp up its monitoring and enforcement activities. The CRTC should be given the authority to conduct inspections and issue penalties for non-compliance with accessibility requirements. To ensure transparency and accountability, the CRTC should be required to report annually on the number and types of accessibility complaints it receives and the outcomes of these complaints, as well as the number and the amounts of the penalties it imposes for non-compliance.

The CRTC should adopt quality standards for described video as soon as possible, drawing on the standards developed by the International Standard Organization's standards in 2015.<sup>231</sup> The mandated quantity of described video should be incrementally increased on an annual basis. The CRTC should also reinstate the French and English closed-captioning Working Groups to update the quality standards for closed captioning.

The Broadcasting Participation Fund should conduct targeted outreach campaigns to increase awareness about this source of funding among the disability community. Funding and supports should also be made available for disability organizations to continue monitoring accessibility through advocacy and complaints.

### **Telecommunications**

Accessibility for people with disabilities should be explicitly included in the objectives of Canada's Telecommunications Policy. The CRTC must increase its monitoring and enforcement of accessibility requirements. Instead of relying on companies' self-reporting, the CRTC should use its authority to perform inspections and impose administrative penalties for non-compliance.

The CRTC must adopt quality standards for telephone relay services, including VRS. In a recent public consultation, people with disabilities highlighted the

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<sup>230</sup> ReQIS, *Mémoire du Réseau québécois pour l'inclusion sociale des personnes sourdes et malentendantes (ReQIS), Consultation de radiodiffusion CRTC 2016-225 : Renouvellement des licences de télévision détenues par les grands groupes de propriété de langues anglaise et française*. (Montreal: ReQIS, 2016); Media Access Canada, *Intervention of Media Access Canada on behalf of the Access 2020 Coalition, Broadcasting Notice of Consultation CRTC 2016-225: Renewal of television licences held by large English-language ownership groups* (Ottawa: Media Access Canada, 2016).

<sup>231</sup> International Standards Organization, *ISO/IEC TS 20071-21:2015 - Part 21: Guidance on audio descriptions* (Geneva: ISO, 2015).

ongoing barriers they face in accessing TTY and IP relay services.<sup>232</sup> For example, they often experience significant delays in reaching operators. Some operators are unprofessional and disrespectful. Since relay services are increasingly being outsourced to other countries, users raised concerns about privacy and confidentiality. IP interfaces are inaccessible for some users and incompatible with certain devices. TTY repair services and parts are increasingly scarce. The CRTC's quality standards must address these concerns. The operating hours of the new VRS program should also be incrementally increased on an annual basis. Additional outreach is required to improve public awareness about these services.

The CRTC should closely monitor the implementation of the new Text-9-1-1 program to ensure that users are receiving equal and reliable access to emergency services. The CRTC should require that this service be available in all regions of the country as soon as possible. Increased outreach is required to inform eligible consumers about the availability of this service and the registration process.

The CRTC should develop detailed accessibility standards and guidelines for telecommunications equipment, including cell phones. Manufacturers should have to ensure that their products are compatible with third-party accessibility applications and technologies. They must also ensure that accessibility features are maintained in the development of new products and services.

**Proposed legislative amendments include the following:**

➤ ***Broadcasting Act***

- **Section 3(1)(p)** should be amended to remove the phrase “as resources become available for the purpose”;
- **Section 12** should be amended to give the CRTC the authority to conduct inspections to ensure compliance and issue administrative penalties for non-compliance;

➤ ***Telecommunications Act***

- **Section 7** should be amended to include the objective of ensuring accessibility for people with disabilities.

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<sup>232</sup> Deaf Wireless Canada Committee, *Intervention: Review of the regulatory framework for text-based message relay services*, CRTC TNC 2017-33 (Ottawa: DWCC, 2017).

# EMPLOYMENT

## Background and Legal Framework

Under the *CRPD*, Canada must recognize and promote people with disabilities' right to work on an equal basis with others in an open, inclusive and accessible work environment. Canada must prohibit disability discrimination in all aspects of employment, including recruitment, hiring, career advancement and remuneration. It must ensure that people with disabilities are provided with reasonable accommodations and good working conditions. Canada must employ people with disabilities in the public sector and promote their employment in the private sector, including through affirmative action programmes. It must also promote opportunities for self-employment.<sup>233</sup> It goes without saying that equal access to employment cannot be achieved without equal access to transportation, communications and the built environment.<sup>234</sup>

The *Canadian Human Rights Act* prohibits disability discrimination in employment.<sup>235</sup> Discrimination is also prohibited in the *Canada Labour Code*, which governs labour relations and working conditions in federally-regulated industries.<sup>236</sup> In addition, people with disabilities are covered under the *Employment Equity Act*.<sup>237</sup> The *Act* aims to achieve employment equality and correct disadvantage experienced by four designated groups: women, aboriginal peoples, people with disabilities and visible minorities.<sup>238</sup> It imposes obligations on public-sector employers and federally-regulated private-sector employers with at least one hundred employees.<sup>239</sup>

The *Act* requires employers to review their systems, policies and practices to identify employment barriers for the designated groups.<sup>240</sup> Employers must adopt employment equity plans identifying the short-term measures they will take to eliminate these barriers.<sup>241</sup> Plans must include positive policies and practices and reasonable accommodations to address the underrepresentation of the designated

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<sup>233</sup> *CRPD*, *supra* note 3, art.7.

<sup>234</sup> *Ibid*, art.9.

<sup>235</sup> *CHRA*, *supra* note 3, ss.8-10, 12 and 14-16.

<sup>236</sup> *Canada Labour Code*, RSC 1985, c L-2, ss.37, 69(2) and 95(f) and (g).

<sup>237</sup> *Employment Equity Act*, SC 1995, c 44 [*Employment Equity Act*].

<sup>238</sup> *Ibid*, s.2.

<sup>239</sup> *Ibid*, ss.3-4.

<sup>240</sup> *Ibid*, s.9(b).

<sup>241</sup> *Ibid*, s.10(1)(b).

groups.<sup>242</sup> Plans must also include timetables and numerical goals for the hiring and promotion of designated group members.<sup>243</sup> Employers must consult with employee representatives in preparing their plans. They must also periodically review and revise their plans.<sup>244</sup>

Employers must submit annual reports indicating the representation and salary ranges of designated group members.<sup>245</sup> Only employees who self-identify or who agree to be identified as designated group members can be included in these calculations.<sup>246</sup> The Minister of Labor consolidates this data in an annual private-sector report and the Treasury Board prepares an annual public-sector report.<sup>247</sup>

The Canadian Human Rights Commission enforces the *Employment Equity Act* through compliance audits.<sup>248</sup> This process entails reviewing documents and conducting on-site visits and interviews.<sup>249</sup> The *Canadian Human Rights Act* prevents people with disabilities from filing human rights complaints based on information obtained through the administration of the *Employment Equity Act*.<sup>250</sup>

If an employer has not prepared, implemented or revised its employment equity plan or maintained the necessary records, the Commission tries to negotiate written undertakings to bring them into compliance.<sup>251</sup> If this isn't possible, the Commission can issue a direction requiring the employer to take actions to remedy their non-compliance.<sup>252</sup> The Commission can also issue directions if an employer breaches an undertaking or fails to cooperate with an audit.<sup>253</sup> The Commission can apply for an order from an Employment Equity Review Tribunal if an employer fails to comply with a direction.<sup>254</sup> Tribunals are composed of members of the Canadian Human Rights Tribunal.<sup>255</sup> The Commission should only issue directions to employers or apply for Tribunal orders as a last resort.<sup>256</sup>

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<sup>242</sup> *Ibid*, s.10(1)(a).

<sup>243</sup> *Ibid*, s.10(1)(c) and (d).

<sup>244</sup> *Ibid*, ss.13 and 15.

<sup>245</sup> *Ibid*, ss.18 and 21.

<sup>246</sup> *Ibid*, s.18(4).

<sup>247</sup> *Ibid*, ss.20-21.

<sup>248</sup> *Ibid*, s.22.

<sup>249</sup> Canadian Human Rights Commission, *Framework for Compliance Audits Under the Employment Equity Act* (Ottawa: Canadian Human Rights Commission, 2010) at p.10.

<sup>250</sup> *CHRA*, *supra* note 3, ss.40(3.1) and 40.1(2)(b).

<sup>251</sup> *Employment Equity Act*, *supra* note 237, s.25(1).

<sup>252</sup> *Ibid*, s.25(2).

<sup>253</sup> *Ibid*, ss.25(3) and 26(1).

<sup>254</sup> *Ibid*, s.27(2).

<sup>255</sup> *Ibid*, s.28.

<sup>256</sup> *Ibid*, s.22(2).

Employers can request that a Tribunal review a direction they received from the Commission.<sup>257</sup> After holding a public hearing, a Tribunal can confirm, vary or rescind a Commission's direction or make any other reasonable and appropriate order.<sup>258</sup> Tribunals must provide written reasons for their decisions.<sup>259</sup> Directions and orders must not cause undue hardship, impose quotas or require that employers hire or promote unqualified candidates or create new positions.<sup>260</sup> Although Tribunal decisions cannot be appealed, they are subject to judicial review.<sup>261</sup>

The Minister of Labor can also impose monetary penalties on private-sector employers who don't submit an annual employment equity report or who provide false or misleading information.<sup>262</sup> These penalties cannot exceed \$10 000 per violation.<sup>263</sup> Employers can apply to have their penalties reviewed by a Tribunal.<sup>264</sup> The Tribunal can uphold or dismiss the penalty.<sup>265</sup>

The Minister also administers the Federal Contractors Program for Employment Equity (FCP).<sup>266</sup> This program was created in 1986. The FCP applies to provincially-regulated contractors with at least one hundred employees who receive federal contracts for goods and services of one million dollars or more.<sup>267</sup> Employers bidding on these contracts must sign agreements to implement employment equity. Once they've been awarded a contract, they must identify workforce gaps in the representation of the four designated groups and establish short- and long-term goals to address these gaps. Employers must make "reasonable efforts to ensure reasonable progress" towards full representation of the designated groups.<sup>268</sup> They must keep records of their initiatives, but they aren't required to submit annual reports.

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<sup>257</sup> *Ibid*, s.27(1).

<sup>258</sup> *Ibid*, s.30(1).

<sup>259</sup> *Ibid*, s.29(5).

<sup>260</sup> *Ibid*, s.33(1).

<sup>261</sup> *Ibid*, s.30(3).

<sup>262</sup> *Ibid*, ss.35-36.

<sup>263</sup> *Ibid*, s.36(2).

<sup>264</sup> *Ibid*, s.38(1)(b).

<sup>265</sup> *Ibid*, s.39(4).

<sup>266</sup> *Ibid*, s.42(2).

<sup>267</sup> Treasury Board Secretariat, *Government of Canada's Contracting Policy, Appendix D: The Federal Contractors Program for Employment Equity* (Ottawa: Treasury Board Secretariat, 2017), s.1.3 [Contracting Policy].

<sup>268</sup> Employment and Social Development Canada, Federal Contractors Program, website: [www.canada.ca/en/employment-social-development/programs/employment-equity/federal-contractor-program.html#s2\\_1](http://www.canada.ca/en/employment-social-development/programs/employment-equity/federal-contractor-program.html#s2_1).

Government officers periodically assess the compliance of FCP employers. Officers can issue warnings to non-complying employers. These warnings can be appealed to the Minister and reviewed by an independent assessor. Employers who don't meet the FCP requirements lose their right to bid on federal government contracts of any value and risk having their contracts terminated.<sup>269</sup>

The Treasury Board has adopted an *Employment Equity Policy* for the public service. This policy, which came into effect in 1999, requires departments and agencies to integrate employment equity into their evaluations and internal audits. Deputy heads must hold all levels of management accountable by integrating equity objectives into their performance assessments. The policy's guidelines provide best practices for implementing these initiatives. The Treasury Board Secretariat and the Public Service Commission of Canada monitor responses to compliance audits.<sup>270</sup>

The Treasury Board has also adopted a *Policy on the Duty to Accommodate Persons with Disabilities*. This policy came into effect in 2002. It aims to create and maintain an inclusive, barrier-free environment in the federal public service. Accommodations must be built into workplace standards, systems and facilities. Employees with disabilities must be consulted when designing or altering facilities or practices and when planning events. The Government must provide, pay for and repair technical aids, equipment and services for employees with disabilities. Employees can retain this equipment when they transfer jobs or departments. Job opportunities must be advertised in accessible formats. Assessment methods, including tests and interviews, should be adapted to the needs of candidates with disabilities. The accommodation process should be as simple as possible and should respect peoples' dignity and privacy.<sup>271</sup>

The Treasury Board has also adopted an *Accessibility Standard for Real Property*.<sup>272</sup> This standard aims to provide barrier-free access and use of facilities owned or leased by the Government. It includes minimum requirements for elements such as entrances, signs, washrooms and parking.<sup>273</sup> Property acquired or

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<sup>269</sup> *Contracting Policy*, *supra* note 267, ss.4-5.

<sup>270</sup> Treasury Board Secretariat, *Employment Equity Policy* (Ottawa: Treasury Board Secretariat, 1999).

<sup>271</sup> Treasury Board Secretariat, *Policy on the Duty to Accommodate Persons with Disabilities* (Ottawa: Treasury Board Secretariat, 2002).

<sup>272</sup> Treasury Board Secretariat, *Accessibility Standard for Real Property* (Ottawa: Treasury Board Secretariat, 2006) [*Property Standard*].

<sup>273</sup> *Ibid*, s.5.1.

undergoing major renovations must adhere to the Canadian Standard Association's 2004 *Accessible Design for the Built Environment* standard.<sup>274</sup> Certain exemptions and variations to these requirements are permitted if they don't affect the general accessibility of the property.<sup>275</sup> If adequately enforced, this standard could improve people with disabilities' access to employment opportunities within the public service.

The Government of Canada also provides funding to provinces through Labour Market Agreements for Persons with Disabilities. Provinces use this funding to design and deliver services aimed at improving employment among people with disabilities. Provinces set their own program priorities and approaches. Funding can support activities such as career counselling, skills training, wage subsidies and technical aids. Provinces must report annually on their progress in reaching performance goals.<sup>276</sup> The current set of Agreements will expire in March 2018.

The Opportunities Fund for Persons with Disabilities also provides funding for organizations to help people with disabilities prepare for, obtain and maintain employment. This program is open to non-profit and for-profit organizations as well as municipal and provincial governments. Funding can be used for training and skill development, wage subsidies, employment assistance services, employer awareness and self-employment. Funded projects can be local, regional or national in scope. Funding recipients must leverage at least twenty percent of their project costs. The Fund prioritizes projects that target youth or that include work placements in the private sector or with small or medium-sized employers.<sup>277</sup>

People with disabilities in Western Canada can also apply to the Entrepreneurs with Disabilities Program. This program provides business information, training, mentoring, counseling and loans.<sup>278</sup>

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<sup>274</sup> *Ibid*, s.5.2; Canadian Standards Association, *Accessible Design for the Built Environment Standard*, CAN/CSA-B651-04 (Toronto: Canadian Standards Association, 2004).

<sup>275</sup> *Property Standard*, *supra* note 272, ss.5.5-5.8.

<sup>276</sup> Employment and Social Development Canada, *Labour Market Agreements for Persons with Disabilities*, website: [www.canada.ca/en/employment-social-development/programs/training-agreements/lma-disabilities.html](http://www.canada.ca/en/employment-social-development/programs/training-agreements/lma-disabilities.html).

<sup>277</sup> Employment and Social Development Canada, *Opportunities Fund for Persons with Disabilities*, website: [www.canada.ca/en/employment-social-development/services/funding/disability-opportunity.html](http://www.canada.ca/en/employment-social-development/services/funding/disability-opportunity.html).

<sup>278</sup> Western Economic Diversification Canada, *Entrepreneurs with Disabilities Program*, website: [www.wd-deo.gc.ca/eng/13643.asp](http://www.wd-deo.gc.ca/eng/13643.asp).

## Other Jurisdictions

### **Ontario**

Ontario's *Human Rights Code* prohibits disability discrimination in employment.<sup>279</sup> This prohibition applies to public-and private-sector organizations as well as government contractors and subcontractors, trade unions and professional associations.<sup>280</sup> People with disabilities who experience discrimination can file an application with the Human Rights Tribunal.<sup>281</sup>

In addition to abiding by the *Employment Standards Act*, employers in Ontario must meet the requirements in the AODA's *Employment Standards*.<sup>282</sup> They must inform the public that accommodations are available in their recruitment process.<sup>283</sup> They must also inform their staff about their policies for supporting employees with disabilities.<sup>284</sup> Employers must provide information in alternate formats and communication supports upon request.<sup>285</sup> They must provide individualized workplace emergency response information to employees with disabilities.<sup>286</sup> They must consider accessibility needs when assessing employee performance, providing career development opportunities or deploying employees.<sup>287</sup> Employers with at least fifty employees must document their process for developing individual accommodation plans for employees with disabilities.<sup>288</sup> They must also develop a return-to-work process for employees who have been absent due to disability.<sup>289</sup>

### **United States**

Employment is regulated under Title I of the *ADA*.<sup>290</sup> This section of the *ADA* applies to employers with fifteen or more employees, including state and local governments, as well as employment agencies and labor organizations.<sup>291</sup> These

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<sup>279</sup> *Ontario Code*, *supra* note 9, ss.5 and 23-26.

<sup>280</sup> *Ibid*, ss.6 and 26.

<sup>281</sup> *Ibid*, s.34.

<sup>282</sup> *Employment Standards Act*, 2000, SO 2000, c 41; *Integrated Standards*, *supra* note 27, ss.20-32

<sup>283</sup> *Ibid*, ss.22-23.

<sup>284</sup> *Ibid*, s.25.

<sup>285</sup> *Ibid*, s.26.

<sup>286</sup> *Ibid*, s.27.

<sup>287</sup> *Ibid*, ss.30-32.

<sup>288</sup> *Ibid*, s.28.

<sup>289</sup> *Ibid*, s.29.

<sup>290</sup> *ADA*, *supra* note 38, ss.12111-12117.

<sup>291</sup> *Ibid*, ss.12111(2) and (5).

entities must post notices about the *ADA*'s requirements in an accessible format for job applicants and employees to read.<sup>292</sup>

The *ADA* prohibits disability discrimination against qualified individuals in recruitment, hiring, firing, advancement, compensation, training and other terms, conditions and privileges of employment.<sup>293</sup> Discrimination includes limiting, segregating or classifying people with disabilities in a manner that adversely affects their opportunities or status, failing to make reasonable accommodations to the point of undue hardship and using standards or administration methods that have the effect of discriminating on the basis of disability.<sup>294</sup> It also includes participating in a contract that has the effect of discriminating against people with disabilities.<sup>295</sup> The *ADA* also prevents employment discrimination on the basis of one's relationship with a person with a disability.<sup>296</sup>

Employers may not subject job applicants to medical examinations or disability-related inquiries. They can, however, assess applicants' ability to perform job-related functions.<sup>297</sup> Once an offer of employment has been made, employers can require job-related medical examinations as long as all new employees are subject to these examinations.<sup>298</sup>

Title I of the *ADA* and its regulations are enforced through complaints filed with the Equal Employment Opportunity Commission (EEOC) and through private lawsuits.<sup>299</sup> The majority of *ADA* litigation has been brought under this section of the *ADA*.<sup>300</sup> Employees must file a complaint with the EEOC before filing a lawsuit. The EEOC offers mediation and investigates complaints. If the EEOC dismisses a complaint, it provides the complainant with a document that allows them to file a lawsuit.

If an investigation reveals discrimination, the EEOC attempts to reach a voluntary settlement with the employer. If this isn't possible, the EEOC can file a lawsuit against the employer. The EEOC chooses its cases based on factors such as

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<sup>292</sup> *Ibid*, s.12115.

<sup>293</sup> *Ibid*, s.12112.

<sup>294</sup> *Ibid*, ss.12112(b)(1), (3) and (5).

<sup>295</sup> *Ibid*, s.12112(b)(2).

<sup>296</sup> *Ibid*, s.12112(b)(4).

<sup>297</sup> *Ibid*, s.12112(d)(2).

<sup>298</sup> *Ibid*, ss.12112(d)(3) and (4).

<sup>299</sup> *Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act*, 29 CFR Part 1630.

<sup>300</sup> Ruth Colker, *The Disability Pendulum: The First Decade of the Americans With Disabilities Act* (New York: NYU Press, 2005) at p.72.

the seriousness of the violation and the type of legal issues at stake. If the EEOC decides not to file a lawsuit, it gives the complainant a document that allows them to file a lawsuit. Courts can order employers to stop discriminatory practices and to take steps to prevent future discrimination. In cases of intentional discrimination, victims can also obtain compensation, including damages for emotional harm, and punitive damages.<sup>301</sup>

The *Rehabilitation Act of 1973* provides similar protections for federal employees and job applicants with disabilities.<sup>302</sup> This *Act* and its regulations also require federal agencies to take affirmative action (i.e. positive measures) to increase the number of employees with disabilities.<sup>303</sup> The EEOC sets employment targets for employers. Before filing a lawsuit, federal employees must file a complaint with their government agency. After the agency investigates the complaint, the employee can request a decision or a hearing before an EEOC administrative judge.<sup>304</sup> Federal contractors and subcontractors must also take affirmative action to recruit, hire, retain and promote people with disabilities.<sup>305</sup> Employees of government contractors can enforce their rights by filing a complaint with the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).<sup>306</sup>

## Gaps and Recommended Reforms

Under the current legal framework, Canadians with disabilities continue to experience low levels of employment. The Minister of Labor's 2016 Annual Report on employment equity documented the underrepresentation of people with disabilities in the private sector.<sup>307</sup> People with disabilities are the designated group with the lowest employment attainment rate.<sup>308</sup> Their termination rate continues to

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<sup>301</sup> For more information, see: Equal Employment Opportunities Commission, *Filing A Charge of Discrimination*, website: [www.eeoc.gov/employees/charge.cfm](http://www.eeoc.gov/employees/charge.cfm).

<sup>302</sup> *Rehabilitation Act*, *supra* note 44.

<sup>303</sup> *Ibid*, s.501; *Final Rule on Affirmative Action for People with Disabilities in Federal Employment*, 29 CFR 1614.

<sup>304</sup> For more information, see: Equal Employment Opportunity Commission, *Overview of Federal Sector EEO Complaint Process*, website: [www.eeoc.gov/federal/fed\\_employees/complaint\\_overview.cfm](http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm).

<sup>305</sup> *Rehabilitation Act*, *supra* note 44, s.503; *Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities*, 41 CFR 60.

<sup>306</sup> For more information, visit: United States Department of Labor, *Office of Federal Contract Compliance Programs (OFCCP): How to File a Complaint*, website: [www.dol.gov/ofccp/regs/compliance/pdf/pdfstart.htm](http://www.dol.gov/ofccp/regs/compliance/pdf/pdfstart.htm).

<sup>307</sup> Employment and Social Development Canada, *Employment Equity Act – Annual Report 2016* (Ottawa: Employment and Social Development Canada, 2016) at p.7.

<sup>308</sup> *Ibid* at p.18.

exceed their hiring rate and their share of promotions remains below their rate of representation.<sup>309</sup> Women with disabilities remain much less likely to earn salaries of \$60 000 or more than men with disabilities or women without disabilities.<sup>310</sup>

The Canadian Human Rights Commission's 2016 Annual Report also reveals persistent inequalities. The Commission produced forty-two employment equity audit reports in 2016 and negotiated compliance agreements with thirty employers.<sup>311</sup> The CHRC's audits revealed that people with disabilities are still vastly under-represented in the federally-regulated private sector. Very limited progress has been made in this area over the past decade.<sup>312</sup> Disability-based employment discrimination also continues to be the most common category of complaints received by the Commission.<sup>313</sup>

A House of Commons committee is supposed to review the *Employment Equity Act* every five years.<sup>314</sup> The last review was conducted in 2002.<sup>315</sup> Many of the review's recommendations still haven't been implemented by the Government.<sup>316</sup> The Treasury Board was also supposed to review its *Policy on the Duty to Accommodate Persons with Disabilities* within five years. If this review has been conducted, its data is not available online. The Government is therefore far behind schedule in respecting its legal obligations. These two instruments must be reviewed as soon as possible with the participation of people with disabilities.

To promote transparency and accountability, the CHRC should be required to publish summaries of all its employment equity audits.<sup>317</sup> The CHRC should also include more detailed audit information in its annual reports, including the types of organizations that were audited, the types of non-compliance that were detected, the undertakings that were negotiated and the directions that were issued. People with disabilities should be able to file human rights complaints based on information

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<sup>309</sup> *Ibid* at p.20.

<sup>310</sup> *Ibid* at p.21.

<sup>311</sup> Canadian Human Rights Commission, *People First - The Canadian Human Rights Commission's 2016 Annual Report to Parliament* (Ottawa: Minister of Public Works and Government Services, 2017) at p.58.

<sup>312</sup> *Ibid* at pp.62-53

<sup>313</sup> *Ibid* at pp.51-57.

<sup>314</sup> *Employment Equity Act*, *supra* note 237, s.44.

<sup>315</sup> Standing Committee on Human Resources Development and the Status of Persons with Disabilities, *Promoting Equality in the Federal Jurisdiction: Review of the Employment Equity Act* (Ottawa: Public Works and Government Services Canada, 2002).

<sup>316</sup> *Ibid* at pp.76-77 (Recommendations 24, 25 and 27).

<sup>317</sup> These reports must respect the terms of the *Privacy Act*, RSC 1985, c P-21 and the *Access to Information Act*, RSC 1985, c A-1.

obtained through the CHRC's audits. The Minister should also be able to impose monetary penalties on public-sector employers for breaching their reporting requirements.

A previous version of the *Employment Equity Act* required obligations under the Federal Contractors Program (FCP) to be equivalent to those under the *Act*. This requirement should be reinserted in the *Act*. Employers covered by this FCP should have to submit annual employment equity reports to the Minister of Labor. The Minister should consolidate this information in an annual report. The scope of the FCP should also be expanded to include contracts with a value below one million dollars.

The Government of Canada must lead by example by ensuring the accessibility of all its worksites. The Treasury Board used to require federal departments to submit annual reports on the accessibility of their facilities.<sup>318</sup> This obligation should be included in the government's *Accessibility Standard for Real Property*.<sup>319</sup> Compliance with this standard should be monitored through audits and on-site inspections. Non-complying departments should be issued penalties.

**Proposed legislative amendments include the following:**

➤ ***Employment Equity Act:***

- **Sections 35(1) and 36(1)** should be amended to allow the Minister to impose monetary penalties on public-sector employers who breach their reporting requirements;
- **Section 42(2)** should be amended to require that the obligations under the Federal Contractors Program be equivalent to the obligations imposed on public and private-sector employers under the *Act* and to require the Minister to table an annual report on the overall performance of employers covered by the program;

➤ ***Canadian Human Rights Act:***

- **Sections 40(3.1) and 40.1(2)(b)** should be repealed;
- **Section 61(1)** should be amended to require the CHRC to include

<sup>318</sup> Treasury Board Secretariat, *Treasury Board Real Property Accessibility Policy* (Ottawa: Treasury Board Secretariat, 1998), s.5(h).

<sup>319</sup> *Property Standard*, *supra* note 272.

detailed information on its *Employment Equity Act* compliance audits in its annual reports.

## ELECTIONS

### Background and Legal Framework

Under the *CRPD*, Canada must ensure that people with disabilities can fully and effectively participate in political and public life on an equal basis. This includes exercising the right to vote and being elected for public office.<sup>320</sup> Canada must ensure that voting procedures, facilities and materials are accessible. In doing so, it must facilitate the use of assistive technologies. People with disabilities must be able to vote by secret ballot with the assistance of a person of their choice.<sup>321</sup> Canada must also actively promote the participation of people with disabilities in public affairs and political parties.<sup>322</sup>

The *Canadian Charter* guarantees all citizens the right to vote.<sup>323</sup> Federal elections are governed by the *Canada Elections Act*.<sup>324</sup> The Commissioner of Canada Elections ensures compliance and enforcement of the *Act*.<sup>325</sup> The Chief Electoral Officer (CEO) is responsible for directing and supervising federal elections.

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<sup>320</sup> *CRPD*, *supra* note 3, art.29(a).

<sup>321</sup> *Ibid*, art.29(a)(i)-(iii).

<sup>322</sup> *Ibid*, art.29(b)(i).

<sup>323</sup> *Charter*, *supra* note 3, s.3

<sup>324</sup> *Canada Elections Act*, SC 2000, c 9 [*Elections Act*].

<sup>325</sup> *Ibid*, ss.509-509.2.

The CEO issues instructions to elections officers, ensuring that they comply with the *Elections Act* and that they act with fairness and impartiality.<sup>326</sup> The CEO fulfills this mandate through Elections Canada, an independent, non-partisan agency that reports directly to Parliament.<sup>327</sup> After each election, the CEO must publish a report and issue recommendations for amendments to the *Elections Act*.<sup>328</sup>

The CEO can inform voters of their democratic rights through advertisements. These ads must be accessible to people with disabilities. They can include information on the measures available to assist people with disabilities in exercising their right to vote.<sup>329</sup> The CEO can also conduct studies and test alternative voting processes.<sup>330</sup>

The CEO appoints one returning officer for each electoral district in Canada.<sup>331</sup> These permanent employees are responsible for preparing and overseeing elections in their districts.<sup>332</sup> Once an election is called, returning officers open an office in their district and establish polling and advance polling stations. These locations should all have level access.<sup>333</sup> However, the CEO can allow stations in inaccessible locations if suitable premises with level access are not available.<sup>334</sup> Prior to an election, returning officers send electors a notice confirming their registration on the list of electors. These notices include the address of the elector's polling station, indicating whether the location has level access.<sup>335</sup> People with physical disabilities who are assigned to inaccessible polling stations can apply for a transfer certificate to vote at another station within their district.<sup>336</sup>

People with disabilities have several options for exercising their right to vote. They can vote on election day alone or with the assistance of a friend, spouse or relative.<sup>337</sup> They can also request the assistance of an election officer.<sup>338</sup> Officers

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<sup>326</sup> *Ibid*, s.16.

<sup>327</sup> Elections Canada, *Our Mission, Mandate, Values*, website: [www.elections.ca/content.aspx?section=abo&dir=mis&document=index&lang=e](http://www.elections.ca/content.aspx?section=abo&dir=mis&document=index&lang=e).

<sup>328</sup> *Elections Act*, *supra* note 324, ss.533 and 535.

<sup>329</sup> *Ibid*, ss.18(1) and (2).

<sup>330</sup> *Ibid*, s.18.1.

<sup>331</sup> *Ibid*, s.24(1).

<sup>332</sup> *Ibid*, s.24(2).

<sup>333</sup> *Ibid*, ss.60(1), 98, 120, 121(1); 168(1) and (6).

<sup>334</sup> *Ibid*, ss.121(2) and 168(7).

<sup>335</sup> *Ibid*, s.95.

<sup>336</sup> *Ibid*, s.159.

<sup>337</sup> *Ibid*, ss.135(1)(e) and 155.

<sup>338</sup> *Ibid*, s.154(1).

can appoint sign language interpreters to facilitate communication.<sup>339</sup> People with vision impairments can request a template to mark their ballot autonomously.<sup>340</sup> People with disabilities can also vote by mail by special ballot.<sup>341</sup> People with physical disabilities and those who can't read can choose to vote at the office of the returning officer.<sup>342</sup> If this isn't possible, they can apply to vote from home.<sup>343</sup> Elections Canada also offers mobile polling stations for people in long-term care facilities, hospitalized members of the military and prisoners in infirmaries.<sup>344</sup> Officers at these stations can assist voters with physical disabilities and those who cannot read.<sup>345</sup>

In 2010, the Canadian Human Rights Tribunal ruled that the failure to provide barrier-free access to voting in federal elections constituted discrimination.<sup>346</sup> In addition to ordering compensation of the complainant, the Tribunal issued several systemic remedies. Elections Canada had to stop putting polling stations in inaccessible locations. It had to insert a clause in its standard lease requiring barrier-free access. Elections Canada had to review its accessibility standards, policies and training materials in consultation with people with disabilities. It also had to implement a procedure for receiving, processing and publicly reporting on accessibility-related complaints. Going forward, Elections Canada must verify the accessibility of facilities on election day, including accessibility-related signage at polling stations.<sup>347</sup>

In consultation with people with disabilities, Elections Canada updated its accessibility checklist for potential polling sites.<sup>348</sup> The new checklist contains thirty-five accessibility criteria, fifteen of which are mandatory. Using this checklist, Elections Canada conducted a survey of potential polling stations for the 2015 general election. It found that 96% of potential stations met the fifteen mandatory

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<sup>339</sup> *Ibid*, s.156.

<sup>340</sup> *Ibid*, ss.119(1)(d) and 154(2)3.

<sup>341</sup> *Ibid*, ss.231-233.

<sup>342</sup> *Ibid*, s.243(1).

<sup>343</sup> *Ibid*, s.243.1(1).

<sup>344</sup> *Ibid*, ss.157, 217 and 255(1).

<sup>345</sup> *Ibid*, ss.154(1), 157(2), 216, 243, 243.1 and 259.

<sup>346</sup> *Hughes v Elections Canada*, 2010 CHRT 4 [*Hughes*]. The Tribunal issued a similar ruling nearly two decades earlier. See: *Canadian Paraplegic Association v Canada (Elections Canada)*, 1992 CanLII 284 (CHRT).

<sup>347</sup> *Ibid*, *Hughes* at para.100.

<sup>348</sup> Elections Canada, *Polling Locations Accessibility Checklist* (Ottawa: Elections Canada, 2015).

accessibility criteria.<sup>349</sup> Polling station accessibility information is available on the Elections Canada website and on voters' information cards.<sup>350</sup>

In 2014, Elections Canada launched an Advisory Group for Disability Issues.<sup>351</sup> In consultation with this group, it developed an Accessibility Policy.<sup>352</sup> The policy's principles include providing choice and flexibility, removing barriers, supporting independence and respecting the dignity of people with disabilities. Election officers now receive accessibility and disability sensitivity training. Accessibility Community Relations Officers have also been hired to engage with the disability community. Elections Canada has committed to having officers periodically check the accessibility of polling stations on election and advance polling days. Officers should also be available for assistance at polling stations that lack automatic door openers. Voters with disabilities can be accompanied by service animals and request sign language interpreters. They can use mobile devices to read their ballots. Polling stations should also be equipped with tools such as magnifiers and materials in large print and Braille.<sup>353</sup>

In a 2010 by-election, Elections Canada conducted a pilot project on the use of an assistive voting device to enable people with disabilities to vote independently. Although the CEO ultimately concluded that this was not a practical solution, Elections Canada committed to continue studying new voting methods, including Internet voting.<sup>354</sup>

In addition to governing voting rights, the *Elections Act* governs the financial activities of political parties and candidates.<sup>355</sup> It imposes limits on candidates' campaign expenses and allows limits to be placed on their personal expenses. The latter category includes costs related to a candidate's disability as well as costs for the care of a person with a disability.<sup>356</sup>

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<sup>349</sup> Elections Canada, *Report on the National Survey on the Accessibility of Potential Polling Locations For the 42nd General Election* (Ottawa: Elections Canada, 2015).

<sup>350</sup> Elections Canada, *Voter Information Service*, website: [www.elections.ca/scripts/vis/FindED?L=e&PAGEID=20](http://www.elections.ca/scripts/vis/FindED?L=e&PAGEID=20).

<sup>351</sup> Elections Canada, *Advisory Group for Disability Issues – Terms of Reference* (Ottawa: Elections Canada, 2014).

<sup>352</sup> Elections Canada, *Accessibility Policy and Service Offering for People with Disabilities* (Ottawa: Elections Canada, 2015).

<sup>353</sup> *Ibid.*

<sup>354</sup> Chief Electoral Officer, *Report of the Chief Electoral Officer of Canada Following the Pilot Project on the Use of an Assistive Voting Device in the November 29, 2010, By-election Held in Winnipeg North* (Ottawa: Office of the Chief Electoral Officer, 2011) at pp.5 and 23.

<sup>355</sup> *Elections Act*, *supra* note 324, ss.363-478.97.

<sup>356</sup> *Ibid.*, s.378.

## Other Jurisdictions

### Ontario

Ontario's *Election Act* contains several provisions governing accessibility.<sup>357</sup> The *Act* requires polling and advance polling stations to be accessible.<sup>358</sup> At least six months before election day, accessibility information about potential polling stations must be posted online for public comment.<sup>359</sup> People with mobility impairments can apply to be transferred to another division in order to vote more conveniently.<sup>360</sup> People with disabilities can also vote by mail or in person at the office of the returning officer.<sup>361</sup> If the latter option is impossible or unreasonably difficult, they can ask to vote from home.<sup>362</sup> Mobile polling stations are also provided in hospitals and long-term care facilities.<sup>363</sup>

Election officers receive accessibility training before each election.<sup>364</sup> Accessible voting and vote-counting equipment must be available to enable people with disabilities to vote privately and independently.<sup>365</sup> Officers can facilitate voting for people with disabilities by guiding them to their polling stations or moving ballot boxes.<sup>366</sup> Voters with disabilities can be assisted by an interpreter.<sup>367</sup> If they take an oath affirming their inability to vote independently, they can also be assisted to mark their ballot by an election officer or a friend.<sup>368</sup> The friend must take an oath of secrecy.<sup>369</sup> Election officers must keep records of ballots marked with assistance.<sup>370</sup>

After each election, returning officers must provide the Chief Electoral Officer (CEO) with a report on the measures taken to improve accessibility.<sup>371</sup> These reports are available on the Elections Ontario website.<sup>372</sup> After each general election, the

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<sup>357</sup> RSO 1990, c E-6 [*Election Act – ON*].

<sup>358</sup> *Ibid*, ss.13.1, 13(3.3) and 44(5).

<sup>359</sup> *Ibid*, s.13.1.

<sup>360</sup> *Ibid*, ss.24(1) and (1.1).

<sup>361</sup> *Ibid*, s.45.2.

<sup>362</sup> *Ibid*, s.45.4.

<sup>363</sup> *Ibid*, s.14.

<sup>364</sup> *Ibid*, s.55.0.1.

<sup>365</sup> *Ibid*, s.44.1.

<sup>366</sup> *Ibid*, ss.55(1) and 46(5).

<sup>367</sup> *Ibid*, s.56.

<sup>368</sup> *Ibid*, ss.55(1) and (2).

<sup>369</sup> *Ibid*, s.55(3).

<sup>370</sup> *Ibid*, s.55(5).

<sup>371</sup> *Ibid*, s.55.1.

<sup>372</sup> Elections Ontario, *Accessibility Reports*, website: [www.elections.on.ca/en/resource-centre/reports-and-publications.html](http://www.elections.on.ca/en/resource-centre/reports-and-publications.html).

CEO must conduct a survey and report on the barriers encountered by electors.<sup>373</sup> The CEO must also report on the use of accessible voting equipment and the steps taken to remove barriers and respond to accessibility-related feedback.<sup>374</sup> This report can include recommendations aimed at improving accessibility.<sup>375</sup> All of the CEO's reports, directions and notices must be published in accessible formats.<sup>376</sup>

The *Election Act* allows the CEO to test and mandate the use of alternative voting methods, including electronic voting.<sup>377</sup> It requires the CEO to review and report on alternative voting technologies.<sup>378</sup> Several communities in Ontario have used internet voting technologies in municipal elections.<sup>379</sup>

The accessibility requirements under the *Election Act*, the *Ontario Human Rights Code* and the *AODA* cannot be diminished.<sup>380</sup> To meet its *AODA* requirements, Elections Ontario has developed multi-year accessibility plans to identify, prevent and remove barriers in the voting process.<sup>381</sup> Elections Ontario established an Accessibility Advisory Committee in 2011.<sup>382</sup>

### ***United States***

Several U.S. laws protect the voting rights of people with disabilities. Titles II and III of the *ADA* prohibit discrimination in state and federal elections. Under Title III, privately-operated facilities that are used as polling stations must make reasonable modifications to facilitate access for people with disabilities.<sup>383</sup> These *ADA* requirements are enforced through complaints filed with the Civil Rights Division of the Department of Justice.

The *Voting Accessibility for the Elderly and Handicapped Act* mandates the accessibility of polling places in federal elections. Exceptions are permitted in emergencies or if it is impossible to find an accessible location.<sup>384</sup> Voters with

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<sup>373</sup> *Election Act* – ON, *supra* note 357, s.67.1.

<sup>374</sup> *Ibid*, ss.44.1(9) and 67.2.

<sup>375</sup> *Ibid*, s.67.2(1)(e).

<sup>376</sup> *Ibid*, s.114.4.

<sup>377</sup> *Ibid*, s.44.2.

<sup>378</sup> *Ibid*, s.44.3.

<sup>379</sup> A list of some of the municipalities that have implemented internet voting can be found online. See: Internet Voting Project, *Ontario Municipal Study*, website: [www.internetvotingproject.com/learn/](http://www.internetvotingproject.com/learn/).

<sup>380</sup> *Election Act* – ON, *supra* note 357, s.4.4(5).

<sup>381</sup> Elections Ontario, *Multi-Year Accessibility Plan 2011-12 to 2015-16* (Toronto: Elections Ontario, 2011) at p.11; Elections Ontario, *Elections Ontario's Multi-Year Accessibility Plan 2017-2021* (Toronto: Elections Ontario, 2017).

<sup>382</sup> *Ibid*.

<sup>383</sup> *ADA*, *supra* note 38, s.12182(b)(2)(A)(ii) and (iv).

<sup>384</sup> *Voting Accessibility for the Elderly and Handicapped Act*, 42 USC § 1973ee.

disabilities who are assigned to inaccessible polling stations can request to be transferred to a different station. The *Act* also contains provisions to make absentee voting more accessible.<sup>385</sup> The *Voting Rights Act* guarantees people with disabilities the right to voting assistance by a person of their choice.<sup>386</sup> The *National Voter Registration Act* requires state-funded agencies serving people with disabilities to provide their clients with voter registration forms and to assist them in completing and submitting their forms. It also requires states to provide voter registration forms in alternative formats.<sup>387</sup>

The *Help America Vote Act* from 2002 established standards to ensure that people with disabilities can vote privately and independently.<sup>388</sup> It made grants available to state and local governments to improve the accessibility of the electoral process. It also provided funding for research on accessible voting technologies. States must collaborate with people with disabilities in developing plans to comply with the *Act*.<sup>389</sup> The Administration on Intellectual and Developmental Disabilities oversees HAVA's disability-related provisions.<sup>390</sup>

## **Gaps and Recommended Reforms**

According to a 2012 report commissioned by Elections Canada, Canadians with disabilities continue to face countless architectural, communicational, legal, attitudinal and socio-economic barriers in the electoral process.<sup>391</sup> In the federal election in 2015, Elections Canada received over 3000 accessibility-related complaints. Only forty-four percent of polling stations had automatic door openers.<sup>392</sup> The CEO's post-election report included several recommendations aimed at

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<sup>385</sup> *Ibid*, ss.3(a) and (c).

<sup>386</sup> *Voting Rights Act*, 42 USC § 1973aa-6. The person assisting cannot be the employer or an agent of the employer or union of the voter with the disability.

<sup>387</sup> 52 USC § 20501.

<sup>388</sup> 42 USC § 15301.

<sup>389</sup> *Ibid*, ss.15405, 15421, 15451, 15461 and 15481.

<sup>390</sup> For more information on HAVA, see: National Council on Disability, *Experience of Voters with Disabilities in the 2012 Election Cycle* (Washington, DC: National Council on Disability, 2013) at pp.39-49.

<sup>391</sup> Michael Prince, *Electoral Participation of Electors with Disabilities: Canadian Practices in a Comparative Context* (Ottawa: Elections Canada, 2012) at p.24.

<sup>392</sup> Chief Electoral Officer, *Report on the 42nd General Election of October 19, 2015* (Ottawa: Office of the Chief Electoral Officer, 2016) at pp.34 and 59

improving accessibility for voters with disabilities, many of which are included below.<sup>393</sup>

All documentation referenced or required by the *Elections Act*, including notices, applications, declarations and reports should be available in alternative formats upon request at no additional cost. This should be expressly mandated by the *Act*.

The *Act's* accessibility requirements are far too narrow in scope. While the “level access” requirements improve access for people with mobility impairments, they fail to address the countless other barriers facing voters with various disabilities. Instead of focusing on level access, the *Act* should mandate “barrier-free access” for people with disabilities. This broad requirement encompasses elements such as automatic door openers, adequate lighting, handrails, obstacle-free pathways and reserved parking spaces. Many of these elements are already included in Elections Canada’s polling station Accessibility Checklist.

The *Act* should also require polling stations, advance polling stations and offices of returning officers to be equipped with an array of tools and equipment to facilitate voting by people with disabilities. Although Elections Canada’s Accessibility Policy mentions tools such as magnifiers and Braille candidates lists, the *Elections Act* only requires templates for voters with vision impairments.<sup>394</sup>

Elections officers are currently allowed to provide voting assistance at polling stations for people with physical disabilities and people who cannot read.<sup>395</sup> This accommodation should be available to all people with disabilities, regardless of their type of impairment. It should also be available for people with disabilities who vote by special ballot at the office of a returning officer.<sup>396</sup>

The *Elections Act* allows people to vote from home if they have a physical disability that prevents them from voting at a polling station or at the office of the returning officer.<sup>397</sup> This accommodation should also be available to people with disabilities who are assigned to inaccessible polling stations. Voters with disabilities who are unable to enter their polling stations due to a lack of accessibility should

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<sup>393</sup> Chief Electoral Officer, *An Electoral Framework for the 21st Century: Recommendations from the Chief Electoral Officer of Canada Following the 42nd General Election* (Ottawa: Office of the Chief Electoral Officer, 2016) at pp.16-17 (Recommendations A10 to A15) [CEO 2016 Report].

<sup>394</sup> *Elections Act*, *supra* note 324, ss.119(1)(d).

<sup>395</sup> *Ibid*, s.154(1).

<sup>396</sup> *Ibid*, s.243.

<sup>397</sup> *Ibid*, s.243.1

also have the option of “curbside voting”. Election officers must therefore be authorized to provide ballots outside polling stations in these exceptional circumstances.<sup>398</sup>

After each election, returning officers should be required to report on the use of accessibility tools and voting assistance by electors with disabilities. They should also be required to report on the measures taken to prevent and remove barriers within their districts. These reports should be available to the public and this information should be included in the CEO’s post-election reports.

Given the vast advances in technologies in recent years, the CEO should be required to test and report on electronic voting systems and equipment in upcoming elections. These technical innovations, which have already been tested in other jurisdictions like Ontario, could make voting much more accessible to people with disabilities.

In addition to experiencing barriers at the polls, electors with disabilities continue to face barriers in accessing campaign information and events. Political parties and candidates produce campaign videos without captions, provide documentation in accessible formats and hold events in inaccessible venues without sign language interpreters.<sup>399</sup> Elections Canada should promote accessibility awareness among political parties by inviting candidates and party leaders to attend meetings of the Advisory Group on Disability Issues. As an incentive to prioritize accessibility, the *Elections Act* should allow a higher level of reimbursement for election expenses incurred to accommodate electors with disabilities.

The *Elections Act* currently allows candidates to use campaign funds to cover their disability-related expenses and to seek partial reimbursement of these expenses. If candidates decide to cover these costs using their own funds, they are subject to the statutory limitations on their campaign contributions. To ensure that disability-related costs are not a barrier to running for political office, candidates should not be required to use regulated funds to cover these expenses.<sup>400</sup>

Finally, the Advisory Group on Disability Issues should be given a permanent mandate under the *Elections Act*. This Group should be consulted in the

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<sup>398</sup> *Ibid.*

<sup>399</sup> CEO 2016 Report, *supra* note 393 at p.34.

<sup>400</sup> *Ibid.*

implementation of all the aforementioned reforms. As many of these reforms as possible should be implemented before the next general elections.

**Proposed legislative amendments include the following:**

➤ **Canada Elections Act**

- **Section 18.1** should be amended to require the Chief Electoral Officer to study, test and report on electronic voting methods;
- References to “level access” should be replaced with “barrier-free access” in **sections 60(1), 95(2)(a) and (3)(b), 98, 121(1) and (2), 159(1), 168(6) and (7)**;
- **Sections 119(d) and 154(2)** should be amended to include other accessible voting tools such as magnifiers and Braille candidate lists;
- **Sections 154(1) and 243(1)** should be amended to allow voting assistance for people with all types of disabilities;
- **Section 243.1** should be amended to allow people with disabilities who are assigned to inaccessible polling stations to vote from home;
- **Section 533** should be amended to include a requirement to report on the use of accessible voting equipment and assisted voting and on measures taken to prevent and remove barriers to accessibility.

## **IMMIGRATION**

### **Background and Legal Framework**

The *CRPD* requires Canada to recognize people with disabilities’ right to a nationality. This includes the right to acquire and change their nationality. People with disabilities must not be deprived of their nationality arbitrarily or on the basis of their disability. Canada must recognize their liberty of movement and their freedom to choose their residence.<sup>401</sup>

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<sup>401</sup> *CRPD*, *supra* note 3, art.18(1)(a).

Canadian citizenship is governed by the *Citizenship Act*.<sup>402</sup> Canada's Constitution gives the federal and provincial governments shared jurisdiction over immigration.<sup>403</sup> However, the federal government ultimately decides who gets admitted to Canada under the *Immigration and Refugee Protection Act (Immigration Act)*.<sup>404</sup> The Minister of Immigration, Refugees and Citizenship and the Minister of Public Safety share responsibility for the *Act*. The *Act's* objectives include allowing Canada to pursue the maximum social, cultural and economic benefits of immigration, enriching the social and cultural fabric of Canadian society, supporting the development of a strong economy, allowing families to be reunited, protecting health and safety and maintaining security.<sup>405</sup>

The first step to becoming a Canadian citizen is applying to become a permanent resident. Permanent residents have the right to live, work or study in Canada. They must pay taxes. They can access most social benefits that are available to Canadian citizens, including health care. Permanent residents are protected under the *Canadian Charter of Rights and Freedoms*.<sup>406</sup> However, they are not allowed to vote or run for political office.

There are several ways of becoming a permanent resident. For example, people can apply through the "business class" as skilled workers, investors or entrepreneurs, through the "family class" as sponsored relatives or through the "refugee class".<sup>407</sup> Most provinces can also nominate immigrants with relevant skills, education and work experience.<sup>408</sup>

Applicants must undergo a medical examination with a government approved physician.<sup>409</sup> This entails a physical and mental exam, laboratory and diagnostic tests and a review of the person's medical history and records.<sup>410</sup> Family members accompanying the applicant must also undergo a medical examination. Immigration officers determine applicants' admissibility based on a medical officer's assessment of their examination results.

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<sup>402</sup> *Citizenship Act*, RSC 1985, c C-29.

<sup>403</sup> *Constitution Act*, 1867, 30 & 31 Victoria, c 3 (UK).

<sup>404</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Immigration Act*].

<sup>405</sup> *Ibid*, ss.3(1)(a)-(d) and (h).

<sup>406</sup> *Charter*, *supra* note 3.

<sup>407</sup> *Immigration Act*, *supra* note 404, s.12.

<sup>408</sup> *Ibid*, ss.8-9. With the exception of Quebec, all provinces have a Provincial Nominee Program.

<sup>409</sup> *Ibid*, s.16(2)(b).

<sup>410</sup> *Immigration and Refugee Protection Regulations*, SOR/2002-227, s.29 [*Immigration Regulations*].

Certain groups are deemed inadmissible to Canada under the *Immigration Act*.<sup>411</sup> For example, applicants are inadmissible if they pose a threat to national security, have committed certain crimes or are unable or unwilling to support themselves. People can also be deemed inadmissible on health grounds if they will likely be a danger to public health or safety or they can reasonably be expected to cause excessive demand on health or social services.<sup>412</sup> The families of inadmissible applicants are also inadmissible.<sup>413</sup> In exceptional circumstances, the Minister can grant entry to people who would otherwise be inadmissible on humanitarian and compassionate grounds.<sup>414</sup> Immigration officers can also grant temporary resident permits to inadmissible applicants. These permits can be revoked at any time.<sup>415</sup>

In assessing risks to public health, medical officers consider the communicability and the potential impact of a disease carried by or affecting an applicant.<sup>416</sup> Applicants whose conditions pose a potential risk to public health must report to a provincial public health authority for follow-up (i.e. “medical surveillance”) upon their arrival to Canada.<sup>417</sup> Inactive tuberculosis is the only condition for which medical surveillance is currently required.<sup>418</sup>

In assessing risks to public safety, medical officers consider the risk of unpredictable or violent behavior that would be dangerous to the public’s health or safety.<sup>419</sup> Certain health conditions are considered likely to cause a danger to public safety. These include serious uncontrolled mental health problems and organic brain syndromes associated with violence, substance abuse causing violence or impaired driving, certain impulsive sociopathic behaviour disorders, certain sexual disorders such as pedophilia and other types of hostile and disruptive behavior.<sup>420</sup>

People with disabilities and their families are routinely denied entry to Canada under the *Immigration Act*’s “excessive demand” clause.<sup>421</sup> This restriction doesn’t

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<sup>411</sup> *Immigration Act*, *supra* note 404, ss.33-43.

<sup>412</sup> *Ibid*, s.38(1); *Immigration Regulations*, *supra* note 410, s.20.

<sup>413</sup> *Immigration Act*, *supra* note 404, s.42.

<sup>414</sup> *Ibid*, s.25.

<sup>415</sup> *Ibid*, s.24.

<sup>416</sup> *Immigration Regulations*, *supra* note 410, s.31.

<sup>417</sup> *Ibid*, s.32.

<sup>418</sup> Immigration, Refugees and Citizenship Canada, *Medical Surveillance and notifications*, website: [www.cic.gc.ca/english/resources/tools/medic/surveillance/index.asp](http://www.cic.gc.ca/english/resources/tools/medic/surveillance/index.asp).

<sup>419</sup> *Immigration Regulations*, *supra* note 410, s.33.

<sup>420</sup> Immigration, Refugees and Citizenship Canada, *Danger to Public Health or Public Safety*, website: [www.cic.gc.ca/english/resources/tools/medic/admiss/health.asp](http://www.cic.gc.ca/english/resources/tools/medic/admiss/health.asp).

<sup>421</sup> *Immigration Act*, *supra* note 404, s.38(1)(c).

apply to those sponsored by a relative.<sup>422</sup> Regulations define “excessive demand” as:

- “(a) a demand on health services or social services for which the anticipated costs would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive years [...], unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than 10 consecutive years; or
- (b) a demand on health services or social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of an inability to provide timely services to Canadian citizens or permanent residents.”<sup>423</sup>

In 2017, the average cost of Canadian per capita health and social services is \$6655 per year. Based on this figure, an applicant’s anticipated health and social services over a five-year period would constitute an excessive demand if they exceeded \$33,275.<sup>424</sup>

Health services are defined as medical services that are primarily publicly-funded, including services provided by physicians and other health care professionals, laboratory services, medication and hospital care.<sup>425</sup> An applicant’s willingness or ability to pay is not a relevant factor in assessing excessive demand on health services.<sup>426</sup> However, since outpatient medication is not always publicly-funded, medical officers must consider whether an applicant has private insurance or can opt-out of a publicly-funded drug plan.<sup>427</sup> Social services are defined as:

“services, such as home care, specialized residence and residential services, special education services, social and vocational rehabilitation services, personal support services and the provision of devices related to those services

- (a) that are intended to assist a person in functioning physically, emotionally, socially, psychologically or vocationally; and
- (b) for which the majority of the funding, including funding that provides direct or indirect financial support to an

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<sup>422</sup> *Ibid*, s.38(2).

<sup>423</sup> *Immigration Regulations*, *supra* note 410, s.1(1).

<sup>424</sup> Immigration, Refugees and Citizenship Canada, *Medical Refusals and Inadmissibility*, website: [www.cic.gc.ca/english/resources/tools/medic/admiss/index.asp](http://www.cic.gc.ca/english/resources/tools/medic/admiss/index.asp) [Medical Refusals].

<sup>425</sup> *Immigration Regulations*, *supra* note 410, s.1(1).

<sup>426</sup> *Deol v Canada (MCI)*, 2002 FCA 271.

<sup>427</sup> *Companiononi v Canada (MCI)*, 2009 FC 1315.

assisted person, is contributed by governments, either directly or through publicly-funded agencies.”<sup>428</sup>

In assessing excessive demand on social services, officers must consider both medical and non-medical factors, such as the availability and cost of publicly-funded services and the applicant’s ability and willingness to pay for these services. Applicants should not automatically be deemed inadmissible based on their type of disability.<sup>429</sup>

If an applicant requires special education services, the medical officer should conduct a qualitative assessment rather than a cost assessment. The officer should consider diagnostic and behavioral indicators compared to the baseline education needs of other students. Quantitative indicators should also be considered if they are available.<sup>430</sup>

Immigration applicants are entitled to procedural fairness. Immigration officers must review all information in a fair and impartial manner and must document their decision-making process. When denying admission under the “excessive demand” clause, officers must send applicants a “procedural fairness letter” informing them of the diagnosis and the health and social services that formed the basis for the decision. Applicants must be given at least sixty days to respond and provide additional information. They can challenge the diagnosis or the list of health and social services. They can also submit a declaration of their ability and intent to pay for any required social services, accompanied by a detailed plan for acquiring these services (i.e. a cost-mitigation strategy).

Officers must review all new information provided by the applicant. They must assess the authenticity, validity, credibility and viability of the applicant’s cost-mitigation strategy. In their analysis, officers can consider whether the applicant has relied on publicly-funded services in the past. After reviewing all the evidence, officers can maintain or withdraw their finding of inadmissibility.<sup>431</sup>

Health-related inadmissibility decisions can only be appealed to the Immigration and Refugee Board if the applicant is sponsored by a relative.<sup>432</sup> However, applicants can apply for leave to have these decisions judicially reviewed

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<sup>428</sup> *Immigration Regulations*, *supra* note 410, s.1(1).

<sup>429</sup> *Hilewitz v Canada* [2005] 2 SCR 706.

<sup>430</sup> *Medical Refusals*, *supra* note 424.

<sup>431</sup> *Ibid.*

<sup>432</sup> *Immigration Act*, *supra* note 404, s.63.

in Federal Court.<sup>433</sup> Judges generally decide such cases on the basis of existing records without hearing applicants testify.<sup>434</sup>

The Minister of Immigration must annually report on the selection of immigration applicants. This report must indicate the number of people who gained permanent resident status and the number anticipated for the upcoming year, with a breakdown by province. The report must also include a gender-based analysis of the impact of the *Immigration Act*.<sup>435</sup>

## Other Jurisdictions

### *Ontario*

Canada's Minister of Immigration must consult with provincial governments regarding the number of people who are granted permanent resident status each year, their distribution across the country and the measures to facilitate their integration.<sup>436</sup> The Minister can also facilitate cooperation and enter into agreements with provincial governments regarding immigration.<sup>437</sup>

Currently, half of all new immigrants to Canada live in Ontario.<sup>438</sup> The *Canada-Ontario Agreement on Provincial Nominees* from 2015 governs the Ontario Immigrant Nominee Program.<sup>439</sup> This economic immigration program is designed to help the province meet its labour market and economic development priorities. The program facilitates the immigration of professional and skilled foreign workers and international students to meet employers' human resource needs.<sup>440</sup> The Government of Ontario recruits and nominates candidates for permanent residence on the basis of their ability to economically establish and settle in the province.<sup>441</sup> Nominated candidates then apply for permanent residence through Immigration, Refugees and Citizenship Canada (IRCC). The Government of Canada makes the final decision regarding their admissibility.<sup>442</sup> Just like other applicants, nominated

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<sup>433</sup> *Ibid*, s.72.

<sup>434</sup> *Ibid*, s.72(2)(d).

<sup>435</sup> *Ibid*, s.94.

<sup>436</sup> *Ibid*, s.10(2).

<sup>437</sup> *Ibid*, ss.8 and 10(1).

<sup>438</sup> Government of Ontario, *Welcome to Ontario*, website: [www.ontarioimmigration.ca/en/](http://www.ontarioimmigration.ca/en/)

<sup>439</sup> Government of Canada and Government of Ontario, *Canada-Ontario Agreement on Provincial Nominees* (May 27, 2015) [*Canada-Ontario Agreement*].

<sup>440</sup> Government of Ontario, *About Ontario Immigrant Nominee Program (OINP)*, website: [www.ontarioimmigration.ca/en/pnp/OI\\_PNPABOUT.html](http://www.ontarioimmigration.ca/en/pnp/OI_PNPABOUT.html).

<sup>441</sup> *Canada-Ontario Agreement*, *supra* note 439, s.3.3.3(b)(ii).

<sup>442</sup> *Ibid*, s.3.3.3(a)(i).

candidates can be deemed inadmissible if they are likely to be a danger to public health or safety or they might reasonably be expected to cause excessive demand on health or social services.<sup>443</sup>

### ***United States***

Immigration to the United States is governed by the *Immigration and Nationality Act*.<sup>444</sup> The first step to becoming a permanent resident (i.e. a Green Card holder) is to apply for an immigrant visa. All visa applicants must undergo a mental and physical medical examination by an authorized or designated physician.<sup>445</sup> Examinations include a review of the applicant's medical history, a physical examination, a chest X-ray and blood tests for syphilis. Physicians follow the regulations and guidelines issued by The Centers for Disease Control and Prevention.<sup>446</sup>

Like in Canada, applicants can be deemed inadmissible to the United States on health grounds. Applicants are inadmissible if they have a communicable disease of public health significance.<sup>447</sup> The Attorney General can waive this restriction if the applicant is the spouse, child or parent of a U.S. citizen, permanent resident or visa holder.<sup>448</sup> Applicants are also inadmissible if they haven't received a prescribed set of vaccinations.<sup>449</sup> The Attorney General can waive this restriction if the vaccination would not be medically appropriate or if it would be contrary to the applicant's religious beliefs or moral convictions.<sup>450</sup>

Applicants are also inadmissible if they have, or have had, a physical or mental disorder and associated behavior that may pose, or has posed, a threat to the property, safety or welfare of themselves or others.<sup>451</sup> Physical and mental disorders are not in and of themselves grounds for exclusion. To render an applicant inadmissible, they must be associated with harmful behavior that causes serious psychological or physical injury, serious threats to health or safety or major property

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<sup>443</sup> *Immigration Act*, *supra* note 404, s.38(1).

<sup>444</sup> *Immigration and Nationality Act of 1952*, PL 82-414 [INA].

<sup>445</sup> *Ibid*, s.221(d).

<sup>446</sup> Medical Examination of Aliens - Revisions to Medical Screening Process, 42 CFR Part 34.

<sup>447</sup> INA, *supra* note 444, s.212(a)(1)(A)(i).

<sup>448</sup> *Ibid*, s.212(g)(1).

<sup>449</sup> *Ibid*, s.212(a)(1)(A)(ii).

<sup>450</sup> *Ibid*, s.212(g)(2)(B) and (C).

<sup>451</sup> *Ibid*, s.212(a)(1)(A)(iii).

damage. Physicians assess the likelihood of such behavior recurring.<sup>452</sup> The Attorney General can waive this restriction subject to certain terms, conditions or controls.<sup>453</sup>

Drug abusers and addicts are also inadmissible to the U.S. Physicians assess the applicant's pattern of substance use and its behavioral, physical and psychological effects.<sup>454</sup> This restriction is not subject to a waiver.<sup>455</sup> Physicians also assess whether applicants have a "physical or mental abnormality, disease or disability serious in degree or nature amounting to a substantial departure from well-being."<sup>456</sup> However, such medical conditions do not render the applicant inadmissible.

In addition to these health-related grounds, applicants are inadmissible if they are likely to become a public charge at any time.<sup>457</sup> Public charge is defined as a person who is likely to become "primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance, or institutionalization for long-term care at government expense."<sup>458</sup> This determination is based on factors including the applicant's age, health, family status, financial resources, education and skills.<sup>459</sup>

## Gaps and Recommended Reforms

The "excessive demand" clause in Canada's *Immigration Act* must be repealed. This discriminatory clause violates the rights of people with disabilities under the *Charter* and the *CRPD*.<sup>460</sup> The disability community has been calling for its repeal for over twenty years.<sup>461</sup> The government's implementation of this clause makes it virtually impossible for people with disabilities to immigrate to Canada. Entire families are denied admission based on one person's disability. Although some families are eventually admitted on humanitarian and compassionate grounds

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<sup>452</sup> Centers for Disease Control, *CDC Immigration Requirements: Technical Instructions for Physical or Mental Disorders with Associated Harmful Behaviors and Substance-Related Disorders* (Atlanta: CDC, 2013) at p.4 [CDC Instructions].

<sup>453</sup> *INA*, *supra* note 444, s.212(g)(3).

<sup>454</sup> CDC Instructions, *supra* note 452 at p.6.

<sup>455</sup> *INA*, *supra* note 444, s.212(a)(1)(A)(iv).

<sup>456</sup> CDC Instructions, *supra* note 452 at p.8.

<sup>457</sup> *INA*, *supra* note 444, s.212(A)(4).

<sup>458</sup> Department of Justice, *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 FR 28689.

<sup>459</sup> *INA*, *supra* note 444, s.212(B).

<sup>460</sup> *Charter*, *supra* note 3, s.15; *CRPD*, *supra* note 3, s.18.

<sup>461</sup> *CDRC Proposals*, *supra* note 5 at pp.60-71.

after their cases receive widespread media attention, countless others lack the resources to contest their refusal. As the father of a child with Down syndrome recently put it: “The disability community doesn't deserve compassionate and humanitarian considerations, but rather justice and means of inclusion into society.”<sup>462</sup>

The excessive demand clause perpetuates the stereotype that people with disabilities are burdensome and inherently less valuable than other members of society. This ableist assumption fails to recognize the important contributions that people with disabilities and their families bring to Canadian society. Immigration medical assessments continue to be based on the outdated medical model of disability. For example, Deaf people and those with Down syndrome are inaccurately classified as having medical conditions even though they are perfectly healthy.<sup>463</sup> Assessments of excessive demand also fail to acknowledge that like Canadian citizens, permanent residents with disabilities would help defray the costs of their care by paying taxes.

While preparing to repeal the excessive demand clause, the Government of Canada should implement several interim measures. The Minister's annual report should have to include information on the number of people with disabilities and their relatives who applied for permanent resident status, who were denied admission on the basis of disability and who succeeded in becoming permanent residents. This would enable a more accurate assessment of the scale and impact of these restrictions. Currently, the Minister only reports on the number of people deemed inadmissible on health grounds who were granted temporary resident permits.<sup>464</sup>

Applicants who are deemed inadmissible on health grounds must be given more time to respond to procedural fairness letters and submit supplementary evidence. The current timeframe of sixty days is insufficient to allow applicants to

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<sup>462</sup> Canadian Press, “York University prof denied residency over son with Down syndrome returning to Canada”, *CBC News* (10 August 2016), online: [www.cbc.ca/news/canada/toronto/professor-granted-permanent-residency-1.3715416](http://www.cbc.ca/news/canada/toronto/professor-granted-permanent-residency-1.3715416).

<sup>463</sup> For example, see: *Ibid*; CBC News, “York University prof denied permanent residency over son's Down syndrome”, *CBC News* (14 March 2016), online: [www.cbc.ca/news/canada/toronto/programs/metromorning/costa-rica-down-syndrome-1.3489120](http://www.cbc.ca/news/canada/toronto/programs/metromorning/costa-rica-down-syndrome-1.3489120); Steven Meurrens, “Providing a right of appeal to medically inadmissible immigrants”, *Policy Options* (7 April 2016), online: <http://policyoptions.irpp.org/2016/04/07/providing-a-right-of-appeal-to-medically-inadmissible-immigrants/>; Jenni Sheppard, “Karen Talosig heartbroken over 4-year wait to bring deaf daughter to Canada”, *CBC News* (29 May 2014), online: [www.cbc.ca/news/canada/british-columbia/karen-talosig-heartbroken-over-4-year-wait-to-bring-deaf-daughter-to-canada-1.2658635](http://www.cbc.ca/news/canada/british-columbia/karen-talosig-heartbroken-over-4-year-wait-to-bring-deaf-daughter-to-canada-1.2658635).

<sup>464</sup> Minister of Immigration, *Refugees and Citizenship, 2016 Annual Report to Parliament on Immigration* (Ottawa: Minister of Immigration, Refugees and Citizenship, 2016), section 2.

mount a full defense by obtaining medical opinions and developing detailed cost-mitigation strategies. These arrangements require considerable time and energy, especially for people living outside the country.

In addition to having the right to apply for judicial review, applicants who are deemed inadmissible on health grounds should have the right to appeal to the Immigration and Refugee Board. However, they should not be required to exhaust this right of appeal before applying for judicial review.<sup>465</sup> Unlike in judicial review cases, applicants can actively participate and call witnesses at Board hearings.<sup>466</sup> In rendering decisions, the Board is not limited to the evidence on file; it can consider any credible and trustworthy new evidence presented at the hearing.<sup>467</sup> Applicants should have this additional opportunity to present their case.

**Proposed legislative amendments include the following:**

➤ ***Immigration and Refugee Act:***

- **Section 38(1)(c)** should be repealed.

**Interim measures:**

- **Section 63** should be amended to grant applicants who are deemed inadmissible on health grounds a right of appeal to the IRB;
- **Section 72(2)(a)** should be amended to remove the requirement to exhaust all rights of appeal before applying for judicial review;
- **Section 94(2)** should be amended to require the Minister's annual report to include the number of people with disabilities who became permanent residents and the number of people who were deemed inadmissible on health grounds, including family members of people with disabilities.

## CONCLUSION

Although Canada has made important strides in advancing disability rights over the past few decades, many legal and policy changes are still needed to ensure

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<sup>465</sup> *Immigration Act*, *supra* note 404, s.72(2)(a).

<sup>466</sup> *Ibid*, ss.164 and 167.

<sup>467</sup> *Ibid*, s.175(1)(c).

the full inclusion of people with disabilities in all aspects of Canadian society. Canada is lagging behind other jurisdictions in providing equal access to transportation, communications, employment, elections and immigration for people with disabilities. The Government of Canada's proposed accessibility law should amend or repeal the discriminatory provisions in existing legislation identified in this report. The report's recommendations should be implemented as soon as possible to bring Canada into compliance with the *Charter*, the *CHRA* and the *CRPD*. The disability community must be consulted in the development and implementation of these reforms.

In addition to the five key areas addressed in this report, the proposed federal accessibility law should address other areas that have a direct or indirect impact on the lives of Canadians with disabilities. Additional research is required to recommend reforms, including ways of using the federal government's spending power, to improve access in areas such as healthcare, education, income supports and justice.

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**United States:**

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