# EQUAL ACCESS TO CANADA'S JUDICIAL SYSTEM FOR PERSONS WITH DISABILITIES - A TIME FOR REFORM

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## Introduction

Public debate on the controversial subject of equality often emphasizes the need of disadvantaged groups to be able to fully participate in the economic realm. At the forefront of these discussions is concern over unequal access to employment, housing, goods and services. In public dialogue over the struggle to secure equality for all, it is usually considered axiomatic that the courts bear ultimate responsibility to firmly and effectively enforce both statutory and constitutional bans on discrimination. With the enforcement of human rights statutes now primarily consigned to administrative agencies including human rights commissions and tribunals, the enactment of the *Canadian Charter of Rights and Freedoms* in 1982 re-amplified the judiciary's primacy as the institution with final responsibility to ensure compliance with both the spirit and letter of the legal requirement of equality.

Reflecting back over our legal history, the Canadian judicial approach to the enforcement of equality rights appears at best to be uneven. Rather than following a progressive, gradual ascension towards equality, the Canadian judicial approach to equality has seemed over the long term more like a roller coaster ride.[1]

Little attention has historically been devoted to the question of whether the judicial system itself complies with the requirements of equality when it administers justice. Yet recent years have witnessed a dramatic change in this traditional trend. Growing public and governmental attention has focused upon problems of inequality of treatment and opportunity in the judicial system itself. Initially, the thrust of this scrutiny was on judicial gender bias. More recently, endemic problems of discrimination in the courts based on race, ethnic or aboriginal status have come to the fore.

Although this new concern about discriminatory barriers and attitudes in the courts is very laudable, the attention which has been directed to this problem has unfortunately been rather selective. Instead of exploring the extent to which there is equal access to justice for all disadvantaged groups in an inclusive way, recent equality-seeking efforts in the judicial system have addressed primarily if not entirely the needs of only three groups, namely women, racial minorities and aboriginal persons.[2] These groups unquestionably can face significant difficulties in

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1 See generally M. D. Lepofsky, "The Canadian Judicial Approach to Equality Rights, "Freedom Ride or Rollercoaster", (1990) 1 N.J.C.L. at 315

2 See e.g. Ontario's Commission on Systemic Racism in the Ontario Justice System, Interim Report of the Commission on Systemic Racism in the Ontario Criminal Justice System: Racism Behind Bars, Toronto: The Commission, (1994); Report of the Aboriginal Justice Inquiry of Manitoba, Manitoba's Commission into the treatment of Aboriginal Persons in the Justice System, (1991); Report of the Royal Commission on the Donald Marshall Jr., Prosecution, (Halifax, N.S.: The Commission, (1989); the Bellemare Commission in Quebec (1988); the Stephen Lewis Report on Race Relations in Ontario (1992); and the Alberta Blood Inquiry, (1991)

the judicial process, and deserve immediate corrective action. However, they are not the only disadvantaged equality-seeking groups in the justice system who require prompt public and governmental examination.

At the front of the line of those chronically left out of the debate over equality in the administration of justice are persons with disabilities. The purpose of this article is to examine barriers confronting persons with disabilities in the Canadian justice system, and to make practical recommendations for reform in order to reverse the inequality which these persons so often face in the courts.

A concerted discussion of the treatment of persons with disabilities in the Canadian judicial system is particularly timely. Persons with disabilities tend to be more dependant on and vulnerable to the judicial system than are the more advantaged in Canadian society. Criminal and civil courts can take away their liberty, whether by means of pre-trial detention for psychiatric assessment, or via the civil or criminal commitment of mentally disordered persons.[3] Family court judges can rule upon the capacity of persons with disabilities to remain together with their families either as parents with disabilities wishing to retain custody of their children, or as children with disabilities wishing to remain together with their parents and siblings.[4] Courts can decide on the right of children with disabilities to attend school in their local school system, while being mainstreamed with children without disabilities, rather than being shipped away to segregated schools for disabled children, possibly far from home.[5] Most centrally, courts can adjudicate upon the entitlement of persons with disabilities to equality at the hands of government and of private organizations, by ruling on the application of human rights legislation and the *Canadian Charter of Rights and Freedoms*.

To address this hitherto unexplored subject, this article begins with a description of the status of persons with disabilities in Canadian society. It then highlights the core content of the legal guarantees of equality to persons with disabilities with a focus on the kinds of discrimination which they most frequently face. Then the discussion turns to an examination of the specific inequalities and barriers which persons with disabilities confront in the judicial system. Finally, specific recommendations are offered to aid in removing these barriers, in order to promote full equality for persons with disabilities when they are involved in Canada's justice system.

While this article's direct focus is on access to the judicial process in Canada's courts, its analysis is equally applicable in the context of access by persons with disabilities to regulatory justice before administrative tribunals. Persons with disabilities are at least as dependent on administrative agencies - social assistance tribunals, workers' compensation agencies, human rights commissions and the like - as they are dependent on courts. Accordingly, this article's reform

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3 See e.g. s. 672.16 and s. 672.17 of the Criminal Code, R.S.C. 1985, c. C-46 governing pre-trial and post-trial detention of mentally disordered persons. See also e.g. the Ontario *Mental Health Act* R.S.O. 1990 c. M-7 as amended, regarding civil commitment in Ontario.

4 See e.g. C.A.S., Halifax v. A. (C.), (1988) 18 R.F.L. (3d) 100 (N.S. Fam. Ct.) and Supt.of Child Welfare v. P.(J.), (1988) 15 R.F.L. (3d) 216 (B.C.C.A.)

5 See e.g. Eaton v. Brant County Board of Education, unreported, Ont. C.A. per Arbour, J.A., released Feb. 15 1995.

proposals for courts merit full consideration in the administrative/regulatory justice system as well.

To those unfamiliar with the disability field, the term "access" in the disability context tends to conjure up only issues of physical access to facilities i.e. questions of whether a person using a wheelchair can physically enter a building or room, where admittance is only possible by ascending stairs. However, the term "access" for persons with disabilities has come to take on a far broader connotation. It refers to the opportunity both to enter a facility and to make full and equal use of that facility, free from arbitrary barriers, whether physical, administrative, organizational, attitudinal or otherwise. This article addresses "access" in this broader sense.

**The Status of Persons with Disabilities in Canada**

It is now accepted as virtually axiomatic that persons with disabilities in Canada constitute a substantial and a substantially disadvantaged minority in our society. They now number as high as 15 to 17% of the Canadian population.[6] Since advancing age is the most common direct cause of disability, the proportion of Canada's population which has physical or mental disabilities will increase in the immediate future. This is because the proportion of elderly persons in our society is increasing.

Numbering in excess of four million, persons with disabilities in Canada as a group often experience conditions of serious socio-economic disadvantage. For most people in Canada, national unemployment rates are considered to be entirely unacceptable when they climb as high as 10 or 11%. This common perception becomes striking if it is grafted on the experience of persons with disabilities in Canada. According to 1991 federal data, employable age persons with disabilites faced unemployment rates of 52%.[7] For them, an average unemployment rate of 11% would seem a massive improvement.

People with disabilities are over represented among the poor in this country.[8] They are underrepresented among those persons who have graduated from post-secondary educational institutions.[9] Generally, they tend to be underrepresented in the mainstream of Canadian society where upward mobility is most likely to be possible.

This litany of disadvantage results predominantly from long-standing and pervasive practices of both intentional and inadvertent discrimination. Most of our mainstream institutions, organizations, buildings and facilities have been designed and operated on the unarticulated, erroneous and unfair premise that only persons without disabilities could, would or should participate in or use them. Most buildings, public transit facilities, housing, telecommunication

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

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

8 Ministry of Human Resources Development, supra note 6, at 4.

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

systems, and job descriptions are designed in a fashion which fails to take into account the possibility that persons with disabilities might also wish to avail themselves of these. This is also true for most goods manufactured for public consumption. For example, massive resources and ingenuity are invested in the development of the latest and greatest bells and whistles to be incorporated into home electronic products such as television sets and VCR's for the consumer's convenience. In contrast, manufacturers usually invest nothing to ensure that these products are designed in a fashion that enables persons with visual, motor or mobility disabilities to make full use of them unless compelled to do so by specific regulations.

In addition to pervasive physical and structural barriers, persons with disabilities confront an often impenetrable wall of discriminatory attitudes when they seek to participate in society's mainstream. Persons with disabilities are regularly subjected to pity, patronization, paternalism, and stereotypical false assumptions that they are generically less capable than persons without disabilities. Often operating subconsciously, these deep-rooted attitudes can at times be manifested in the misguided name of sincere concern for the welfare of persons with disabilities. Such attitudes can culminate in well-intentioned cruelty towards their intended beneficiaries.

This stereotyping process is best illustrated in the employment setting. Employers too often decline to hire job applicants with disabilities, based on the categorical assumption that a person without a disability is more likely to be competent or productive. Such assessments tend not to be based on actual hard information or practical experience with disabilities. Rather, they are often the product of stereotypes which associate disability with inability, which prejudge people because of personal attributes, and which view persons with disabilities as deserving charity rather than equality.

A vicious cycle has perpetuated and reinforced these barriers. Decades ago, previous generations designed our society's buildings, institutions, jobs and facilities on the unconscious or unarticulated assumption that persons with disabilities could not, or would not participate in the mainstream. Persons with disabilities were relegated to the doting care of charitable service organizations, special segregated schools and residences, and/or their families. Thereafter, new generations of Canadians grew up assuming that the proper place for persons with disabilities continued to be in segregated special homes, special sheltered workshops, and special institutions, since that is where they had so often been found. These new generations would design new buildings, new facilities, new goods and new jobs on the continued assumption that people with disabilities do not belong in the mainstream. The old barriers would beget new discriminatory attitudes. Discriminatory attitudes would then in turn beget new discriminatory barriers, and so on.

Ironically, while this cycle of exclusion was recurring, the actual potential of persons with disabilities to participate in and contribute to society has been increasing. Historically, persons with disabilities have very often been able to meet the challenges that their disabilities pose, and to develop the capacity to live independently, to pursue gainful employment, and to participate in society to the extent that society will afford them the chance to do so. This was accomplished by devising alternative methods to perform life's daily tasks which circumvent the disability. Braille was invented two centuries ago to enable blind persons to read. Sign language was devised to

facilitate communication by hearing impaired persons. Wheel chairs provided a low-tech method to provide mobility to persons who cannot walk. One's capacity to meet the challenges posed by a disability was often a product of the intensity of one's desire to do so, the availability of resources to do so, and one's access to social support, family support, and rehabilitation training and technologies.

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

Visually impaired people have recently gained far greater and swifter access to the printed word. New adapted computer technology presents the text, ordinarily seen on a computer screen, in a format which a visually impaired person can use. A Braille computer display presents a computer screen's contents on a metallic screen in electronically generated Braille. A speech synthesizer, connected to a computer, reads aloud the text on the computer screen to the blind or visually impaired computer user via an electronically-generated voice.[10] New software allows a low-vision computer user to dramatically enlarge the printed text displayed on a computer's video monitor, so that it can be visually read by users with very limited eyesight. Thus visually impaired persons can economically access most text information ordinarily available through a personal computer, either standing alone, or tied into computer networks or bulletin board services.[11]

As a result of the foregoing, people with disabilities now face two ironies. First, their potential for fully participating in society is increasing. Yet the old barriers that have impeded them for years often remain in place, although some have gradually been removed. This makes the exclusion of many persons with disabilities from society's mainstream all the more vexing.

Second, people with disabilities are being confronted with new barriers that make their participation in society's mainstream even more difficult. For example, even though the technologies described above have been devised to enable visually impaired persons to access the printed word on the computer screen, the newest trend in computer software has been in the direction of depicting "graphics" in lieu of printed words on the video monitor. Graphics are pictures at which a computer user may point with a pointing device or "mouse" to direct the computer to do something. The existing access technologies for visually impaired computer users work well with the printed word, but are either totally incapable of, or have only limited capacity to vocalize graphics or pictures for visually impaired computer users. These new software barriers may

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[10] This article is being written on such a system.

[11] For example, visually impaired lawyers can "download" the text of statutes and court decisions from computerized legal data base systems, such as Quick Law in Canada and Lexis in the U.S., and then read this material, either on a Braille display, via large print software, or by having their computer read the text aloud via a computerized voice.

undermine the gains which people with visual disabilities have made in the past in the area of computerized access to the printed word. Specialized software developers must now struggle to keep up with the new trend towards graphics-based software, in order that persons with disabilities not lose the gains that were made in the computer field in the 1980's.

**The Essence of the Guarantee of Equality to Persons with Disabilities**

The preceding section described the inequality which often pervades the lives of persons with disabilities in Canadian society. Attention now turns to the content of the legal guarantee of equality as it applies to persons with disabilities. Persons with mental and/or physical disabilities in Canada are extended a supreme constitutional right to equality by section 15(1) of the *Canadian Charter of Rights and Freedoms*.[12] Similarly, the human rights codes of every jurisdiction in Canada extends a statutory guarantee of equality and of freedom from discrimination to persons with disabilities in a wide range of economic ctivity, including employment, housing, and access to services, facilities and the like.[13] The Supreme Court of Canada has held that these human rights statutes are not mere ordinary legislation. They are quasi-constitutional in status. They proclaim fundamental public policy which takes precedence over both public legislation and private contracts[14]

These constitutional and quasi-constitutional equality guarantees to persons with disabilities have as their common core purpose the achievement of equality of opportunity for persons with disabilities to fully participate in Canadian society, to the extent of their individual abilities. People with disabilities have the right not to suffer from discrimination, whether intentional or unintentional, whether well-motivated or mal-intended, whether conscious or uncoscious, whether individualized or systemic. As a central component of this entitlement, people with disabilities have a right to have their needs accommodated in relation to the activities in which they seek to participate. These guarantees necessitate the removal of pre-existing barriers which impede people with disabilities from full participation in the mainstream of Canadian life. They also require that new barriers not be erected in the future which might impede full participation by people with disabilities in Canadian life.

While the right of people with disabilities to be accommodated under Charter section 15 and human rights legislation is not unlimited, it is substantial in scope. A defendant or respondent has a

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[12] Charter section 15 provides as follows:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental physical disability.

(2) Subsection (1) does not preclude any law, program or activity that as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[13] See example Ontario Human Rights Code, R.S.O. 1990, c. H.19 Canadian Human Rights Act, R.S.C. 1985, c. H-6

[14] See e.g. Ontario Human Rights Commission v. Simpson Sears, [1985] S.C.R. 536 and *Central Okanagan School District No. 23* v. *Renaud*, [1992] S.C.R. 970

high burden to meet in order to justify a failure to accommodate. They must establish that accommodation of the needs of a person with a disability would cause them undue hardship.[15] The hardship must be real, substantial, and inevitable. A respondent or defendant has a duty to make adequate efforts to inquire into possible accommodations, and then to take active, serious and substantial steps to implement accommodations, even on a trial-and -error basis, until equality is in fact achieved.

A failure to accommodate is not excused on the grounds that a barrier was not created with a discriminatory intent. To make out a discrimination claim, it is not necessary to show that there was any discriminatory motive or intent. Only discriminatory results or impact need exist.[16]

The cost of accommodating a person with a disability may be a factor in assessing whether a proposed accommodation will cause undue hardship. However, the simple fact that an accommodation will cost money does not of itself constitute a justification for failing to accommodate. Rather, a respondent must establish that the actual cost of accommodation is inevitable if a disability need is to be accommodated, and that the cost is necessarily so substantial that it would cause undue hardship in fact. The concept of "undue hardship" presupposes that some "hardship" is "due", and can be incurred to achieve the goal of effective accommodation. Only "undue hardship" justifies a party in failing to accommodate.

The larger the respondent and the more resources that are at its disposal, the harder it will be for that respondent to show that a particular cost will cause it undue hardship.[17] In assessing whether an accommodation's cost amounts to undue hardship, regard should be had to outside sources of funding for the accommodation. If funding is available from outside sources, a respondent cannot complain of undue hardship arising from cost. In assessing whether an accommodation's costs will impose undue hardship, regard should also be had to any off-setting benefits that will flow from the provision of that accommodation. For example, if a ramp is installed in front of a building normally accessed by stairs, this helps not only persons who use wheelchairs but also people pushing baby strollers or hauling suitcases on wheels or carts.

In the final analysis, the accommodation of persons with disabilities helps undo the harmful results of the vicious spiral of exclusion described in the preceding section. It allows society to benefit from the talents which people with disabilities can offer. It helps replace exclusion with inclusion.

**Barriers Impeding Persons with Disabilities in Canada's Courts**

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15 See Ontario Human Rights Commission v. Simpson Sears, supra note 14 and Central Okanagan School district No. 23 v. Renaud, supra note 14. Also, see M.D. Lepofsky, "A Purposive Approach to the Duty to Accommodate under Canadian Anti-Discrimination Legislation" (1992) 1 Can. L.L.J.1.

16 See generally Ontario Human Rights Commission v. Simpson Sears supra note 14.

17 See Central Alberta Dairy Pool v. Alberta Human Rights Commission, [1990] 2 S.C.R. 489 at 521 per Wilson, J.

The preceding discussion focused on the barriers confronting persons with disabilities in Canadian society in general. Regrettably, the pattern of exclusion which persons with disabilities so commonly experience in all corners of society is also encountered in Canada's courts. There are a number of serious barriers which impede the full and equal participation of persons with disabilities in the Canadian judicial process. This is particularly troubling since the courts are supposed to be the place where persons with disabilities can go to have their equality rights vindicated when they are infringed by government or private parties. If our courts themselves have significant barriers, persons with disabilities cannot expect that the judicial process will be able to effectively enforce their equality rights and human rights.[18]

The first and perhaps the most immediate barrier confronting persons with disabilities in the justice system is architectural. Many Canadian court rooms and court houses have not been designed or retro-fitted to enable persons with disabilities to have full physical access to them. The most obvious barrier can be stairs in front of a courthouse. Many structural barriers can be found inside a courthouse as well, such as steps within the hallways, steps up to the Judges bench, to the witness stand or to the jury box. Counsel tables may be too low to enable a lawyer in a wheelchair to sit right up at the desk, and make use of the desktop to spread out materials needed for the proceeding. Courthouses are not necessarily equipped with conveniently-located bathrooms which can accommodate persons in wheelchairs, or with doorways that are wide enough for a person in a wheel chair to pass through. . In addition to these barriers to the mobility impaired, court houses and court rooms may not be designed to accommodate the mobility needs of persons with visual handicaps, including persons with low vision, as well as those with no vision. For example, signs may be positioned in the middle of a floor, or sticking out from a wall, so as not to be easily detectable by a white cane.

It is commonly believed that all buildings, or at least all new public buildings, must be accessible to persons with disabilities and that the legislated accessibility standards are rigorous and effective. Unfortunately, this is a myth. Legislated physical access requirements often tend to be inadequate. They also tend to apply only to new structures, rather than pre-existing buildings. Most

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[18] The following discussion focuses on barriers which confront persons with disabilities in the court process itself. It must be noted, however, that these are not the only impediments to the full and effective enforcement of the equality rights and human rights of persons with disabilities. For these rights to be effectively enforced, people with disabilities must have access to effective legal services. Regrettably, they often do not. In her landmark report on access to legal services for persons with disabilities, Judge Rosalie Abella (as she then was) documented that the Ontario legal profession had substantially failed to meet the legal needs of persons with disabilities. This is so despite the fact that persons with disabilities are significantly more dependant on government and private bureaucracies, and hence, have greater legal needs than many others. See Ontario, A Report of a Study by Judge Rosalie S. Abella: Access to Legal Services by the Disabled (Toronto: Queen's Printer, 1983) One of the key reasons why persons with disabilities have been unable to secure effectively legal services is that these individuals are often economically disadvantaged, and therefore, unable to pay for effective legal services. In contrast, parties who defend disability equality claims are often represented by well-financed and effective legal counsel, given their relatively greater access to financial resources. As well, Canada's law schools and Bar Admission courses have done little if anything to train law students to meet the specific legal needs of persons with disabilities. See M. David Lepofsky, "Disabled Persons and Canadian Law Schools: The Right to the Equal Benefit of the Law School", (1991), 36 McGill L.J. 636. .

court houses in Canada are undoubtedly older structures which did not even have to conform to insufficient building codes when they were constructed.

Who are the victims of these architectural barriers? They include persons with disabilities who come to court as parties to civil proceedings seeking vindication of their legal rights, as criminally accused persons whom the state seeks to convict and incarcerate, as witnesses who appear either voluntarily or under court order to perform the civic duty of testifying, and as prospective jurors who seek to fulfil the democratic duty of jury service. They also include those persons with disabilities who wish to pursue a career in the administration of justice, such as judges, court staff or lawyers with mobility impairments. If a litigation lawyer in a wheelchair lives in a community whose courthouse is physically inaccessible, they can be rendered unable to practice in their chosen field of law for reasons that have no relation to their professional competence.

These structural barriers can also impede members of the public who have mobility disabilities from exercising their fundamental common law, statutory and constitutional right to attend and observe court proceedings. Canadian courts have held that Charter s. 2(b)'s guarantee of freedom of expression includes a constitutional right of members of the public to attend and observe court proceedings.[19] This right is meaningless to persons with mobility disabilities, where court houses are physically inaccessible. Thus, physical barriers to their access to the court house violate not only their rights under Charter s. 15, but under s. 2(b) as well.

To some, it might first seem sufficient to simply provide some physical assistance to persons with disabilities who cannot gain access to a courthouse or courtroom. Why not simply carry a person with a mobility disability up a flight of stairs, and then place them back in their wheelchair? To a person with a disability, this is not meaningful access. Rather, it is an affront to their independence, dignity and autonomy. Equality of access includes a right to enter premises with dignity on one's own power. Able-bodied persons would not tolerate it if they had to undergo the demeaning spectacle of being carried into and out of a courtroom or courthouse as a precondition to securing admission. Persons with disabilities have no greater desire to suffer such treatment.

A second barrier in the justice system confronts persons with hearing disabilities. Our courts do not have readily available sign language interpretation or real-time transcription[20] of court proceedings where a deaf person is a party, witness, juror, lawyer, or public spectator. Charter section 14 covers part of the terrain, in so far as hearing impaired persons who are parties to or witnesses in a proceeding are concerned. It provides: 14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter. However, Charter s. 14 does not address the needs of hearing-impaired jurors, lawyers, judges or public spectators who are present during a court proceeding. Even though s. 14 speaks to the right to interpretation for parties or witnesses to a proceeding, the simple fact that the Charter articulates this right does not mean that court staff

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19 See e.g. Southam v. The Queen No. 1 (1983), 41 O.R. (2d) 113

20 Real-time transcription involves a person typing the words which are spoken as they are spoken, on a computer keyboard. The text then appears on a video monitor which a hearing impaired individual can read. It is called "real-time" because the transcription is available immediately.

actually comply with it in a timely fashion across Canada whenever needed.

Third, much of the information which is placed before a court, during a proceeding may be in printed form e.g. documentary exhibits. For a person with a visual handicap, or a person with a learning disability such as dyslexia, this can impede full participation in the court process as juror, litigant, counsel, witness, judge or public spectator. There are a number of alternative formats, such as Braille, large type, computer speech synthesizers, and the like, which can make printed materials available to a print-handicapped individual[21] in a useable form. Courts are now generally not equipped to make printed information available in any of these alternative formats. This is part of a larger problem with government generally. While freedom of information laws have extended to the public a right of access to public information in government hands, governments have generally not set up comprehensive systems for ensuring timely access to information for visually handicapped and otherwise print-handicapped persons in alternative formats, even though the cost and time needed to produce such alternative formats has dramatically reduced in recent years.[22]

Fourth, a number of persons who come before the courts as witnesses or parties may have developmental disabilities. For them, a significant barrier to full participation in the justice system is the complex and abstruse language which judges and lawyers often use in court. Plain language in court can be as important for persons with developmental disabilities to be able to follow the case and to participate in them to the extent of their abilities, as is Braille for a visually impaired person, or sign language interpretation for a hearing impaired person.

A fifth barrier in the judicial process concerns impediments to persons with disabilities serving as jurors. Jury service is a fundamental aspect of the rights and duties of a citizen in a democratic society. It is only through jury service that most members of the public can play a decision-making role in the administration of justice. In fact, apart from the exercise of the vote during an election, jury service is probably the only way that most people can participate in the democratic process of self-government.

The Supreme Court of Canada has emphasized that it is fundamentally important that juries be representative of the greater community.[23] Jury representativeness helps ensure public confidence in the fair administration of justice. As well, the jury has an intersticial law-making role which requires that it be able to draw upon the broad experiences of all facets of the community. Since people with disabilities are a substantial group in Canadian society, it is important that there be an opportunity for their experiences to be reflected in the jury room.

Historically there have been a number of barriers impeding persons with disabilities from

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21 The term "print handicapped" refers to a person who cannot use printed material due to any disability, whether a vision handicap, a learning disability such as dislexia, or a physical disability that impairs activities such as page-turning.

22 Access to printed information is not only a problem for print handicapped persons, but for persons who are illiterate as well. Given the fact that many people are still illiterate in Canada, and that persons caught up in the justice system can include those who do not know how to read, this information barrier is a significant problem.

23 See R. v. Sherratt (1991), 63 C.C.C. (3d) 193 at 204 (Ont.C.A.)

serving as jurors. As discussed above, court facilities including jury boxes, have often not been designed to be accessible to persons using wheelchairs. Exacerbating these physical impediments have been legislative barriers. Juries legislation often excluded many persons with disabilities from jury service whether or not they were incapable of effectively discharging the duties of a juror, with or without reasonable accommodation.

For example, Ontario's previous version of its Juries Act[24] provided in s. 4(a) and (b) that a person is ineligible to serve as a juror who "is infirm, decrepit or afflicted with blindness, deafness or other physical infirmity incompatible with the discharge of the duties of a juror" or "not in the possession of his natural faculties". This reflected a stereotype-driven categorical legislative judgement that none of these individuals would ever be able to serve as jurors, whether or not their disability did in fact impede their capacity to perform the functions of a juror, and whether or not that disability could be accommodated without undue hardship, so they could fulfil a juror's essential functions.

Ontario amended this provision in an effort to modernize it. It now provides in material part as follows:

Jurors Act, section 4: A person is ineligible to serve as a juror who:

a) has a physical or mental disability that would seriously impair his or her ability to discharge duties of a juror...[25]

This provision's "seriously impaired" standard properly construed, should only preclude a person with a disability from serving as a juror if he or she could not perform a juror's essential duties due to a disability even after his or her disability-related needs are accommodated to the point of undue hardship. This is because the jurors legislation must be construed in a manner consistent with the strictures of the Charter and human rights legislation, including the requirement to meet the constitutional and statutory human rights duty to accommodate. While it would be preferable for this duty to be explicitly incorporated into the jury legislation, its absence there does not take away the obligation of the courts and courts administration officials to comply with the duty to accommodate arising under the Charter and human rights codes.

While Ontario has substantially reduced the legislative barrier to jury service by some persons with disabilities, other provinces have not. The Jury Act of the Yukon Territory[26] flatly states that "No person is qualified to serve as a juror who .. is afflicted with blindness or deafness, or who is a mentally disordered person, idiot or imbecile, or possesses any other physical or mental infirmity incompatible with the discharge of the duties of a juror." The B.C. Jury Act[27] provides that a person is disqualified from serving as a juror who is "blind, deaf or has a mental or physical

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24 S.O. 1974 c. 63.

25 See Juries Act, R.S.O. 1990, c.J-3, s.4.

26 R.S.Y. 1986, C. 97 s. 5(b).

27 R.S.B.C. 1979, c. 210 s.3(1)(n).

infirmity incompatible with the discharge of the duties of a juror". The New Brunswick Jury Act[28] categorically excludes from jury service those who are "blind, deaf or affected by any other physical or mental condition incompatible with the discharge of the duties of a juror".

While other provincial enactments do not single blind or deaf persons out in such explicit terms, other juries legislation is similarly overbroad, and employs pejorative and demeaning language to describe disabilities. Alberta's Jury Act[29] provides that a person "may be exempted" from jury service who "suffers from a physical, mental or other infirmity that is incompatible with the discharge of the duties of a juror". Manitoba's Jury Act[30] disqualifies every person from jury service who is "afflicted with a mental or physical infirmity incompatible with the discharge of the duties of a juror". Quebec's Jurors' Act[31] states that persons may be exempted from jury service if they are "afflicted with an infirmity". PEI's Jury Act[32] provides that a person may be exempted from jury service if he or she "suffers from a physical, mental or other infirmity that is incompatible with the discharge of the duties of a juror". The Jury Act of the Northwest Territories[33] disqualifies any person who "possesses any physical or mental disability that is incompatible with the discharge of the duties of a juror".[34]

This anachronistic legislation is fundamentally at odds with Charter s. 15's guarantee of equality to persons with disabilities. No justification exists for such legislation which would make it constitutionally salvageable under Charter s. 1 as a reasonable limit on Charter rights. This overbroad and stereotype-immersed exclusions of certain groups of persons with disabilities from jury service, without regard to their individual capacity to discharge a juror's duties or to the possibility of accommodating their needs, serves no pressing and substantial governmental objective.

Even where juries legislation does not categorically exclude persons with disabilities from jury service, there exists the real risk that the court or litigants will use peremptory challenges and/or challenges for cause to preclude prospective jurors with disabilities from having the opportunity to undertake jury duty because of their disabilities. The peremptory challenge is especially problematic since it is easily exercised based on counsel's arbitrary presumptions and stereotypes about personal

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28 S.N.B. 1980 c. J-31 s. 2(1)(c).

29 S.A. 1982 C. J-2.1 s. 5(1)(e).

30 R.S.M. 1987 c. J30 s. 3(o).

31 R.S.Q. 1977 c. J-2 s. 5(f).

32 S.P.E.I. 1992 c. 37 s. 6(1)(d).

33 R.S.N.W.T. 1988 c. J-2 s. 5(b).

34 Newfoundland's Jury Act 1991 S.N 1991 c. 16 includes no comparable provision. As Well, Nova Scotia's Juries Act R.S.N.S. 1989 c. 242 has no specific disability disqualification. Section 15 of that statute allows a trial judge to excuse a juror who has already been sworn on grounds of illness. Similarly, Saskatchewan's Jury Act S.S. 1980-81, C. J-4.1 does not include any broad-brush bar to persons with disabilities in terms akin to these other enactments. Section 4(g) and (h) disqualify "persons who are legally confined in an institution" and "persons who are certified incompetent". By s. 5(2(b) and (f),a potential juror may apply to the sheriff to be relieved of jury duty if they are "suffering from an illness which is likely to persist and to render him incapable of serving as a juror at the sitting of the court for which he is summoned" or is "incapable of discharging the duties of a juror".

characteristics, whether or not these have any correlation with reality. Courts are becoming increasingly vigilant to avoid racially discriminatory practices in the jury selection process.[35] However, no concerted effort has yet been devoted to ensure that persons with disabilities have full and equal opportunity to serve as jurors.

Stereotypes regarding disabilities as well as stereotypes regarding jury service should not be allowed to distract our deliberations in this area. For example, it might stereotypically be thought that a visually impaired person could not perform the functions of a juror, because they cannot see the demeanour of the witness. Such a view reflects two erroneous stereotypes. First, it suggests that the only way to assess credibility is through visual observation, as opposed to listening to subtle variations in the voice of a witness. For a visually impaired person, listening to the voice can be a very effective means of judging credibility, especially when the witness has carefully controlled their visual demeanour to avoid an appearance of dishonesty or nervousness. Second, it presupposes that visual observations are in fact critical to the assessment of witness credibility. It is increasingly recognized among some judges, informally, if not formally, that visual observation of the demeanour of witnesses is less valued than was traditionally thought.

The barriers to participation in the justice system for persons with disabilities delineated above are physical and functional in character. In addition to these, there are embedded in our legal system a number of doctrinal barriers which impede equal participation in the judicial process by persons with disabilities.

For example, the traditional process by which a witness gives testimony includes close judicial scrutiny of their demeanour on the stand, and subjection to rigorous and at times protracted cross-examination. This is difficult for anyone who serves as a witness at the best of times. For persons who are vulnerable, this process may be more than can reasonably be borne. For example, a person with a significant psychiatric disorder may be practically precluded from availing themselves of access to the courts for redress of injustices perpetrated upon them, even though they have a perfectly valid case, because they are unable to effectively give testimony through this gruelling process. Even if they can at least undertake the actual testimonial process, they may be unable to give good quality testimony, judged by the traditional standards that trial judges and juries are legally bound to apply.

The usual yardsticks of credibility, such as a witness's ability to observe the events which are the subject of their evidence, may create impediments for some persons with disabilities. A blind victim of a violent crime cannot visually identify the offender. They may have alternative means for giving effective identification testimony. However, there is a real risk that courts will not treat these as particularly credible, as contrasted with the traditionally valued process of eye-witness identification.[36]

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[35] See e.g. R. v. Pizzdalla (1991), 69 C.C.C. (3d) 115. In the U.S., see the efforts at judicial prevention of discriminatory use of the peremptory challenge in *Batson v. Kentucky* 475 U.S. 79, and *J.E.B. v. Alabama* 114 U.S. 1419.

[36] For an example of a court taking a more flexible approach to the assessment of the credibility of a witness who cannot effectively communicate their evidence due to a physical or mental disability, see R. v. Pearson,

Another legal doctrine which is so deeply embedded in our jurisprudence as to be seen as self-evident, but which fails to take into account the needs of certain persons with disabilities is found in the principles of open justice. Canadian courts have repeatedly held that courts must be open to the public, so that justice is seen to be done, and so that there is public confidence in the judicial process.[37] The traditional rhetoric in support of this requirement includes a long-held and oft-stated judicial belief that witnesses are more likely to tell the truth if they testify in public, and are more likely to lie if they give evidence in closed proceedings. Open justice is thus said to serve a truth-seeking function.

There is undoubtedly some truth in this traditional view. However, in some circumstances, open justice can also serve to undermine the court's truth-seeking efforts, rather than advancing them. For example, a prospective party or witness who has a significant psychological disorder may be unable to effectively give evidence if the court room is filled with strangers watching them from the public seating area. For them, open justice will not lead them to tell the truth. Instead, it may preclude them from ever being able to effectively communicate their evidence. The Supreme Court's oft-cited categorical view that "(a)s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings"[38] fails to take into account the reality facing those who may be more vulnerable due to certain mental disabilities.[39]

It is important that doctrines throughout our legal system, such as those in the open justice field be reshaped where needed. Judges must begin to take into account the fact that although these doctrines may be neutral in their intent and universal in their application, they can nevertheless have adverse discriminatory impact on persons with disabilities.

Finally, when our courts are called upon to rule on disability discrimination claims under the Charter, human rights legislation or other enactments, they must bring to bare a well-informed understanding of disability equality, and the nature of discrimination against persons with disabilities. Unfortunately, many judges now lack this knowledge.[40] Of course, this is not their fault. This subject was not covered in their legal education, either when they were in law school, or during continuing legal education programs. It is also not currently the subject of most judicial training programs, including those instructing on issues of equality in the administration of justice. A judge now confronts a daunting challenge in endeavouring to give full and meaningful force to the equality rights and human rights of persons with disabilities, if he or she has no pre-existing familiarity with this subject.

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B.C.C.A unreported, released Dec. 12, 1994.

37 See generally, M.D. Lepofsky, Open Justice; The Constitutional Right to Attend and Speak About Court Proceedings, Butterworths, Toronto:1991) 3.

38 See Attorney General of Nova Scotia v. MacIntyre, [1982] 1 S.C.R. 175, at p. 185 per Dickson, J.

39 For an example of a court deciding to give primacy to the principle of open justice over the need to accommodate persons with mental disorders, and thereby rejecting a disability-based s. 15 claim, see Blackman v. British Columbia (Review Board), (1993) 82 C.C.C. (3d) 5 (B.C.S.C.)

40 As a recognition of one small facet of this, the Supreme Court of Canada noted in Re Eve [1986] 2 S.C.R. 388 at 432 that judges know little about mental illness.

**Practical Recommendations for Full Access to the Courts**

What can be done to remove or at least alleviate the barriers and hardships which persons with disabilities now can experience in the justice system, whether as counsel, judge, witness, party, juror, or public observer? Here are some practical suggestions. This list is far from exhaustive.

**1. Acknowledge Problem and Devise Corrective Action Plan**

At the outset, it is critical that those who are responsible for the administration of justice in Canada, including the judiciary with Chief Justices in the lead, Attorneys General, courts administration staff, and the legal profession, publicly acknowledge that there are many serious and substantial barriers in the Canadian Court system which impede persons with disabilities from fully and equally participating in the judicial process at all levels, whether as parties, witnesses, counsel, judges, jurors or even as court staff or public spectators. It is also necessary at the outset that an overall, comprehensive strategy be devised and adopted for promptly identifying and removing these barriers. Solutions to these deep-rooted problems require leadership from the top, and a co-ordinated plan. It is not enough to wait for individual persons with disabilities to come forward and identify barriers that impede them. The duty to accommodate includes an obligation on the court system to pro-actively set about to identify the barriers which now exist, and to plan for their prompt removal.

**2. Implement Judicial Training on Disability Needs**

It is critical that judicial organizations and chief Justices across Canada take immediate steps to ensure that judges are given training in the needs of persons with disabilities involved in the judicial system. Training should include the kinds of matters covered in this article. It is reasonable to expect that existing judges, and the legal profession from which new judicial appointments are drawn, have not had any such training in the past. Absent this training, it is not realistic to expect that the barriers described in this article will be significantly reduced.

**3. Remove Physical Barriers to Courthouse and Courtroom Access**

Physical barriers in court facilities should be removed, to enable persons with disabilities to have full and equal access to all parts of court houses and court rooms. Courts administration officials, working together with the judiciary, should take immediate steps to ensure that new court houses are designed to be fully physically accessible throughout, and that old court houses are retrofitted as quickly as possible. This is especially important when new court facilities are being built, or where old facilities are being renovated. It is generally much cheaper and easier to build disability accessibility into a building in advance, as compared to retrofitting after the fact.. The standards which they should seek to meet are not simply those minimal requirements now found in

the applicable Provincial Building Code if any, as these are often inadequate or incomplete. Rather, they should seek to conform with the current state of the art of barrier-free design. These standards can be obtained from experts in this field. A first contact for such information can be disability service agencies which deal with the needs of persons who are mobility impaired as well as organizations dealing with persons who are blind or visually impaired.

Whether or not a comprehensive strategy is formulated and implemented to redress the barriers confronting persons with disabilities in the judicial system, individual judges who preside at legal proceedings in inaccessible court facilities should use their inherent judicial power over their processes to require that the court facilities be made accessible. As one approach, in the case of an accused person who has a disability which precludes full and equal access to the court room, the judge should require that the case be adjourned to a court room which is no greater distance from the accused's home, but which is physically accessible to persons with disabilities. In the alternative, the judge should consider using remedial powers to stay the proceeding in the absence of a trial in an accessible venue.

It is insufficient to simply adjourn the case to another location which would not ordinarily serve as a court room, such as a library hall, and to set it up to look like a courtroom for purposes of dealing with that specific case. Equality for persons with disabilities means full and true equality. This includes full access to society's mainstream, not relegation to "separate but equal" facilities, since "separate but equal" has long been recognized as inherently discriminatory.[41]

### 4. Designate Court Staff Official as Access and Accommodation Coordinator in Each Court

Each court should appoint a court staff official to be responsible for accommodating the needs of persons with disabilities who are involved in any capacity with that court's proceedings. This staff official should report to a judge with administrative responsibility for that jurisdiction. People with disabilities should be able to find out the name of the person to whom they should turn for assistance. In turn, the court should ensure that this official is both responsible for and accountable to ensure that accommodations to the needs of persons with disabilities are made when required. The identity and availability of the designated court staff official should be made public, to aid persons with disabilities to know with whom they should deal when they have accessibility and/or accommodation needs.

### 5. Implement Procedure for Accommodating Needs of Judges with Disabilities

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[41] See Brown v. Board of Education of Topeka (1954), 347 U.S. 483, cited with approval in the context of access by students with disabilities to mainstream educational programs in *Eaton v. Brant County Board of Education*, supra, note 5.

Each court system across Canada should implement a system to ensure that the disability-related needs in the workplace of judges with disabilities are met. Persons with disabilities can be found on various courts in Canada. Some were appointed when they already had a disability. Others acquired a disability some time after their appointment to the judiciary. These judges, like any other employee with a disability, have the right to have their work-related disability needs accommodated as part of the guarantees of equality found in the charter and in human rights legislation, so that they can fully participate on the bench.

At present, there is no comprehensive system in place across Canada to ensure that the work-related needs of all judges with disabilities will be met in an effective and timely fashion. Although they are paid out of public funds, judges with disabilities may not have access to funds and programs established by the federal government and some provincial governments to finance the job accommodations of public servants with disabilities within their own workforces. Thus, judges with disabilities who require job accommodations can fall between the administrative cracks. Such administrative gaps cannot justify a failure to accommodate the needs of these judges. Therefore, chief justices and other administrative officials should take steps to put in place a process that will enable judges with disabilities to seek and obtain appropriate accommodations where needed.

## 6. Ensure Prompt Availability of Sign Language Interpretation or other Communication Support for Hearing Impaired Persons Where Needed

Where there is a need for sign language interpretation or real-time transcription of court proceedings for hearing impaired persons, whatever be their role in a proceeding, the presiding judge should direct courts staff to take the necessary steps to promptly arrange for these. Obviously, the need for this interpretation or transcription should be brought to the court's attention at the earliest possible time, so that the staff can make these arrangements. However, it is likely that hearing impaired individuals involved with the court process would now have little or no expectation that the court would assist them in this regard. They would also often not know whom to notify in the court administration to seek interpretation services. Accordingly, the court should not only arrange to have this kind of assistance available where needed, but should make it known that such requests will be received and acted upon, if made in a timely fashion. If courts administration officials do not now have a system in place for arranging for these kinds of services in a timely fashion, the court should use its supervisory power over courts administration staff to direct that such be established. The accessibility/accommodation coordinator referred to in the preceeding recommendation could be given responsibility over this specific area of accommodation needs.

## 7. Ensure Printed Materials Made Available to Print-Handicapped Court Participants in Accessible Alternate Format

Where a court proceeding involves a print handicapped individual, whether as party,

witness, lawyer, judge, juror or other participant, the court should ensure that any printed material is made available to them in an accessible format, in a timely fashion. If the print handicapped person has access to computer equipment described above, then it may be sufficient to provide them with a copy of the relevant document on computer disk. In some cases, the most practical way of providing needed access may simply be to require that documentary material be read aloud to the visually impaired individual, whether during a recess or otherwise, in circumstances which will enable the individual sufficient time to absorb the content of the material. The courts should communicate to counsel that there is a heavy obligation to ensure that this need is addressed in advance. For example, if a counsel unexpectedly springs a mass of documentary material on a visually impaired witness, party or opposing counsel who is visually impaired, without affording them an opportunity to review that material in advance of the proceeding, this is properly the subject of appropriate criticism and discipline from the Bench. If allowed to go on unchecked, this kind of conduct will only create otherwise avoidable court delays due to adjournments to enable the visually impaired person to have the material read to them or transcribed into an alternative format such as Braille.

To address this need, it would also be of great assistance if the court were to ensure that any specific printed text that is being discussed during the court proceedings itself be read aloud where feasible. For example, if there is great debate during the proceedings over the interpretation of a particular clause of a contract or statutory provision, the parties, lawyers, and judge can make the proceeding more functionally accessible for print handicapped individuals if they simply read that passage aloud during the proceeding where needed. If the parties engage in the common practice of simply referring to the paragraph or section number as a shorthand, rather than reading its full text aloud, a print handicapped person will find it more difficult to follow and fully participate in the argument or debate. These measures would also be of assistance to persons who are functionally illiterate, as they will have the same difficulties as print handicapped persons in gaining access to printed material.

### 8. Use Plain Language

Where court proceedings involve as a participant a developmentally delayed individual, the judge and court participants should strive to use plain language, rather than unduly obscure technical legal verbiage wherever possible. Lawyers and judges have been properly criticized for using technical language where it is not necessary, to the detriment of all lay participants an observers. Some technical language is inevitable in as precise a field as law. However, if care is taken to use plain language instead of technical terms whenever possible, the chances that proceedings will be made more accessible to individuals with developmental disabilities is quite great. This will, of course, also assist all members of the lay public who are involved in court proceedings, whether as parties, witnesses, or public observers. As is the case in many other aspects of disability equality, steps which accommodate persons with disabilities will also help all members of the public.

**9. Remove Legislative and Other Barriers to Persons With Disabilities Serving As Jurors**

The courts, along with provincial legislators and courts administration officials, should take steps to ensure that persons with disabilities have full opportunity to serve as jurors. Legislation should be amended which continues to bar jury service by qualified persons with disabilities, whether or not their needs can be accommodated. It is also important that the courts:

a) take steps to ensure that the needs of prospective jurors with disabilities are accommodated where required, so that they can function as jurors if selected;

b) take steps to avoid using judicial "stand asides" or other judicial discretion to preclude a person with a disability from being selected as a juror, on account of their disability. One judge suggested during a seminar on this issue that he had considered standing aside all visually impaired jury candidates before counsel had a chance to consider them for service on the jury. Such a use of judicial power is unwarranted and inappropriate as a matter of fact, and is contrary to the Charter as a matter of law, except perhaps in a case where the interpretation of specific visual evidence such as photographs will be vital to the case's outcome. Indeed, such judicial action if carried out in Ontario would have the effect of reversing the Legislature's decision to allow visually impaired persons to be qualified for jury service, repealing their previous categorical legislative disqualification;

c) be scrupulously careful to ensure that counsel are not excluding persons with disabilities from potential jury service based on stereotypes about disabilities, rather than based on an actual inability to perform a juror's essential duties even with reasonable accommodation.

d) review and declare unconstitutional any provincial juries legislation which bars persons with disabilities from jury service in situations where they can discharge the essential duties of a juror with reasonable accommodation;

**10. Feel Free to Inquire about Disability Needs Where appropriate**

Where a person with a disability is involved in a court proceeding as lawyer, witness party or juror, the presiding judge should feel quite free and at ease to ask them what steps if any might be taken to ensure that they are able to fully participate in the proceedings. Some judges might feel nervous or uncomfortable about making such inquiries, perhaps out of a fear that a person with a disability might be offended at or uncomfortable with such an inquiry. In general, persons with disabilities should not be offended at any such inquiries. Rather, they can be expected to be appreciative of the court's concern, particularly if it is expressed in a respectful and dignified way, devoid of the traditional paternalistic treatment that persons with disabilities so often experience at the hands of the public. As a general rule, persons with disabilities are quite accustomed to being asked questions about their disabilities.

## 11. Learn About Current Terminology for Disabilities

Some judges may be uncertain as to the appropriate terminology to use when dealing with disabilities. While persons with disabilities are likely not unduly sensitive about the use of terminology, reasonable attention to the choice of words is not misplaced. Judges cannot be expected to be familiar with the latest terminology regarding disabilities, nor should they feel that this is a sensitive or touchy subject.

There has been a recent effort to select terminology in the disability field which gets away from old pejorative images and stereotypes. For example, this population had commonly been referred to in the past as "the disabled" or "the handicapped". This suffered from two flaws. First, it deprived this population of status as people, by emphasizing solely their disability, and nothing else. Secondly, it suggested that the entire person is "disabled" or "handicapped". Hence, there has been a move towards an expression such as "persons with disabilities", which both emphasises the fact that these individuals are in fact people, and that they are people first, with disabilities second.

A judge should feel entirely comfortable in asking a person with a disability what terminology is considered the most appropriate. Much of the commonly used terminology remains perfectly acceptable. People who are blind or visually impaired will, for example, likely have no difficulty with the use of terms as blind or visually impaired. However, the public has been mis-educated for years that the use of a white cane necessarily connotes total "blindness". In reality, the white cane signifies either total blindness or low vision. Persons with some vision often do not refer to themselves as "blind", because they can still see some things.[42]

Some disability terminology has changed entirely. The outdated term "mentally retarded" has given way to "developmental disability" or "developmentally delayed". Also, it is preferable if pejorative or negative terms be avoided. For example, it is not desirable to speak of "victims" of a disability or people who "suffer" or are "afflicted" with blindness, deafness, or some other disability. Such terms connote a life of misery and suffering - an erroneous stereotype about persons with disabilities which has served only to impede their integration into society's mainstream. These concerns about terminology are not based on some hyper-sensitivity, nor are they the result of undue pre-occupation with words. Rather, they derive from the fact that old-fashioned ways of talking about disabilities carry with them out--dated and stereotypical connotations which undermine rather than serve the goal of equality an full participation.

## 12. Take Disability Needs into Account When Shaping Legal Doctrines

In interpreting legislation and developing common law and constitutional doctrines, courts

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[42] Unfortunately the term "legally blind" has been used for years in the blindness rehabilitation field to describe both those who are blind and those who have low vision. The white cane was said to signify legal blindness. However, this terminology was ill-founded, as there is no one unique definition of the term "blindness" in the law. Different laws define blindness as well as other disabilities in different ways, in accordance with the purpose of the legislation in which the term is used.

should take into account the fact that the Canadian population includes not only persons without disabilities, but as well a substantial number of persons with disabilities whose needs are often disregarded by the law. Our courts have begun to infuse into Canadian jurisprudence an acknowledgement of the equal role in society which women should play, in an effort to eradicate from our law pre-existing stereotypical notions regarding the role of women. The same is required in the disability context.

**Conclusions Towards a Barrier-Free Court System**

Judges need not be unduly fearful or embarrassed if they make honest mistakes in this area. For example, it is not uncommon for a judge, seeing counsel addressing them in a seated position, to suggest that the lawyer stand when addressing the court. The judge may then feel enormous embarrassment when the lawyer indicates that they are unable to do so, as they require a wheelchair. The judge feels about two inches tall, and is concerned that the lawyer with a disability has been deeply offended or unfairly treated. In fact, such good faith mistakes need pose no embarrassment for the judge. Once the judge explains that they did not know that the lawyer was using a wheelchair, they can proceed on the reasonable expectation that no feelings were hurt, and that the matter is quickly forgotten. It must be remembered that many disabilities are not visible or otherwise readily apparent to an onlooker.

Although the barriers confronting persons with disabilities in the justice system are numerous and substantial, there are some recent indications that real advances in this area can be made. There are now more blind and visually impaired lawyers, law students and judges across Canada then ever before. They have been organized into a Canadian Association of Visually Impaired Lawyers (CAVIL), which seeks to advance equality of opportunity for visually impaired persons to fully participate in all aspects of the legal profession. The Ontario Court of Justice General Division has also accommodated the needs of judges with varying degrees of physical limitations, so that they can continue to serve on the bench.

It is axiomatic that for our court system to serve the entire population, it must be fully open and accessible to all. It is also regrettably axiomatic for persons with disabilities that our court system like much of our society is now neither fully accessible to nor useable by them in many instances. The barriers confronting persons with disabilities in the Canadian court system are neither small in size nor recent in creation. It will take a substantial effort to eradicate these barriers. New vigilance will also be needed to ensure that new barriers are not created in our court system.

Individual judges, acting alone, will not be able to totally solve this problem. For a full solution, we require leadership from the top of the judicial and legal community. However, the actions of individual judges, in endeavouring to act upon the specific recommendations offered here, can contribute in a meaningful way, and can initiate a new trend towards the goal of a barrier-free court system. Individual instances of active judicial conduct in the name of ensuring greater access for persons with disabilities would set an example for other judges to follow.

The removal of the barriers described in this article is not only a matter of good policy. It is also a fundamental requirement of the Canadian Constitution and of quasi-constitutional human rights legislation. The unfortunate trend in Canada has been for the equality rights of persons with disabilities to be low on the nation's equality agenda. This must change. Persons with disabilities cannot expect that their equality rights and human rights, as guaranteed by the Charter and by human rights legislation, will be meaningfully enforced unless the judicial system, on which they depend for the enforcement of these rights, is itself made free of discriminatory barriers to their full participation.