Inaccessibility and the Law of the Built Environment:

Understanding People with Disabilities as Members of the Public

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Abstract:

This thesis considers the ways that the law of the built environment in Canada perpetuates the segregation of people with disabilities away from public space. How and what we build is a highly regulated activity. If these regulations, like provincial building code or municipal bylaws, presume that the public is able-bodied then we will continue to build in a way that excludes or disadvantages disabled people. Using the analytical tools of critical disability theory and Iris Marion Young's concept of the "heterogeneous public", I argue that rebuilding our communities to reflect the full range of human embodiments will require strategies that target able-bodied privilege in the substantive and procedural law of the built environment. In order to explain how this privilege operates, I begin with a historical study of the role of the federal government in drafting building standards in the 1940s which led to Canada's first National Building Code (NBC). The standards in the NBC, which originally only provided for the safe use of buildings by able-bodied people, have been adopted as a whole or in part by every province. Even after the federal government published the "Building Standards for the Handicapped" in 1965, it took decades for the provinces to start enforcing "barrier-free" standards and these continue to be separate from and subordinate to the main text of provincial building code. Next, I use a contemporary case study about a disability advocacy group's fight for accessible summer patios in Montreal, Quebec, to illustrate the strengths and limitations of human rights law remedies for inaccessibility in the built environment. Though this case led to changes in the design of summer patios, it had an absurd result of allowing wheelchair users to eat and drink on an outdoor patio without any guarantee that they would have interior access, including access to a washroom. I propose that the most effective way for disabled people to use human rights complaints is to target the underlying laws that presume an able-bodied public, like restaurant licensing regulations that require public hand-washing facilities but do not require these facilities to be accessible. Finally, I propose some proactive approaches to building inclusive communities by looking at the procedural aspects of planning law that provide for members of the public to provide input or contest permitting decisions. If people with disabilities participate in planning law processes, like public consultations or appeals at the permitting stage, they can potentially prevent the mistakes that will likely be made if only able-bodied people are in the room. It is not reasonable, or cost effective for anyone, if persons with disabilities have to wait and file a human rights complaint post-construction when they could intervene directly in how the laws that regulate the built environment are applied and interpreted.

Cette thèse examine les façons dont le droit de l'environnement bâti au Canada perpétue la ségrégation des personnes handicapées dans l'espace public. Le comment et ce que nous construisons sont des activités hautement réglementées. Si ces règlements, comme le code du bâtiment provincial ou les règlements municipaux, présument que le public est valide, nous continuerons à construire d'une manière qui exclut ou désavantage les personnes handicapées. En utilisant les outils analytiques de la théorie critique du handicap et le concept de " public hétérogène " d'Iris Marion Young, je soutiens que la reconstruction de nos communautés pour refléter la gamme complète des incarnations humaines nécessitera des stratégies qui ciblent le privilège des personnes valides dans le droit substantif et procédural de l'environnement bâti. Afin d'expliquer le fonctionnement de ce privilège, je commence par une étude historique du rôle du gouvernement fédéral dans l'élaboration des normes de construction dans les années 1940, qui a conduit au premier Code national du bâtiment (CNB) du Canada. Les normes du CNB, qui à

l'origine ne prévoyaient que l'utilisation sécuritaire des bâtiments par les personnes valides, ont été adoptées en tout ou en partie par chaque province. Même après la publication par le gouvernement fédéral des " Normes de construction pour les personnes handicapées " en 1965, il a fallu des décennies pour que les provinces commencent à appliquer des normes d'accessibilité, et celles-ci continuent d'être distinctes et subordonnées au texte principal du code du bâtiment provincial. Ensuite, j'utilise une étude de cas contemporaine sur la lutte d'un groupe de défense des personnes handicapées pour l'accessibilité des terrasses d'été à Montréal, au Québec, afin d'illustrer les forces et les limites des recours du droit des droits de la personne en cas d'inaccessibilité dans l'environnement bâti. Bien que cette affaire ait conduit à des changements dans la conception des terrasses d'été, elle a eu pour résultat absurde de permettre aux personnes en fauteuil roulant de manger et de boire sur une terrasse extérieure sans aucune garantie d'accès à l'intérieur, y compris à des toilettes. Je propose que la manière la plus efficace pour les personnes handicapées d'utiliser les plaintes relatives aux droits de l'homme est de cibler les lois sous-jacentes qui supposent un public valide, comme les règlements sur les permis de restaurant qui exigent des installations publiques pour le lavage des mains mais n'exigent pas que ces installations soient accessibles. Enfin, je propose quelques approches proactives pour construire des communautés inclusives en examinant les aspects procéduraux du droit de l'urbanisme qui permettent aux membres du public de donner leur avis ou de contester les décisions relatives aux permis. Si les personnes handicapées participent aux processus du droit de l'urbanisme, comme les consultations publiques ou les appels au stade de la délivrance des permis, elles peuvent potentiellement éviter les erreurs qui seront probablement commises si seules des personnes valides sont présentes dans la pièce. Il n'est pas raisonnable, ni rentable pour quiconque, que les personnes handicapées doivent attendre et déposer une plainte pour atteinte aux droits de l'homme après la construction, alors qu'elles pourraient intervenir directement dans la manière dont les lois qui régissent l'environnement bâti sont appliquées et interprétées.

Acknowledgments

Even though doctoral work has a reputation for being lonely, this project has actually been the most collaborative experience of my life. I became disabled just before starting my doctorate at McGill's Faculty of Law. So when I started the program, I had to develop new work habits. I had to get used to having other people accompany me everywhere and help me with the research and writing process. Fortuitously, the first person to take on the role of helping me at school - Sophie Berg - was not only patient but also intellectually curious and very fun to be around. She somehow learned to understand my impatient dictation style during a few whirlwind writing to deadline moments.

I'm also immensely grateful to my sister Lauren for moving with me to Montreal so that I could pursue my doctorate. She had already invested a year of her life staying by my side when I was in the hospital for 8 months and, thereafter, taking me to physio for 4 months. I don't think either of us knew what Montreal would actually be like for us and that we were moving to the most inaccessible city in Canada.

When I decided to write my doctoral thesis about disability I knew that I needed to find mentors in the disabled community. I was so lucky to be welcomed into the academic community at Concordia University to learn from scholars who had experience with disability and disability activism. In particular, I want to thank Danielle Peers, Laurence Parent and Aimee Louw. I am grateful to Laurence and to Linda Gauthier for agreeing to be interviewed for this thesis.
I also want to thank my supervisor, Alana Klein, for being supportive of my ideas and taking time to read my work closely and give me very helpful feedback – especially during the final push! And thanks to my committee members, Colleen Sheppard and Tina Piper, for taking a strong interest in my research and helping me develop my arguments.

Finally, I did the majority of the writing for this thesis in Calgary during the pandemic and I was fortunate be in a "pod" with my parents, Lauren, Ryan and Sandeep (and some wonderful caregivers) who all supported me through this process in different ways and I am looking forward to celebrating with them!

Preface

This thesis project originated with a very simple question: why can't I go anywhere in public anymore? I had suddenly become a wheelchair user because of a car accident in August of 2014, one month before I was to commence my doctoral studies at McGill University's Faculty of Law. I spent a year in hospital and intense rehabilitation close to my family in Calgary, Alberta, and then returned to Montreal in the fall of 2015 to start my doctorate at McGill.

My first day in Montreal as a wheelchair user was devastating. I rolled along Laurier Avenue East and in fifteen blocks, which were densely packed with commercial spaces, I found only three places that I could enter: a grocery store, a flower shop and a cafe.[1] I was in tears by the time I reached Laurier Park and I realized that adjusting to my disability would be more than accepting my body, I would also have to accept that going out in public would now be a carefully planned event because I could no longer assume that I could go into public places. This meant calling ahead to ask about the design features of buildings I had not been to before. Even when I had done my due diligence, there were still many times that able-bodied people answering my questions on the phone would misinform me by forgetting that there was a step at the entrance or that the washroom was downstairs.

After my initial emotional reaction to inaccessibility in Montreal, I began to consider how law influences the way we design buildings or sidewalks. I decided to write this thesis about the types of regulations that govern the built environment and realized that there is a dearth of legal scholarship on these rules and how they came about. Disability and human rights scholars describe design features, such as stairs, which prevent people with disabilities from equal

[1] The grocery store was the only level entrance with an automatic door. Both the flower shop and the café had steep ramps that made it technically possible for me to enter but there was no way I could do so independently because of the difficulty of opening a heavy door while on an incline.

participation in the community as “barriers”. Yet the intricacies of legally required minimum design standards, which are found in provincial building codes and municipal bylaws, are not usually discussed as matters of social policy. I have come to the view that the reason these rules are not subject to much scrutiny, whether in the media or in academia, is because they serve the able-bodied public. As long as we can safely use a building, most of us do not tend to think about the rules that require certain door widths or construction materials. Nor do most of us consciously register the design features that make it possible to mobilize in public space or at home. When I first became a wheelchair user I tried to remember whether my favourite stores or restaurants in Montreal had stairs at their entrances. Returning to these places in a wheelchair was frustrating because almost all of them were inaccessible to me. But I had no memory of using the one or two steps at their entrances when I was able-bodied.

I did not have a relationship with any wheelchair users before my car accident, so I was completely ignorant about what it is like to mobilize on wheels that you cannot lift over curbs or up stairs. But I do have a distinct memory from the summer leading up to my car accident – I was cycling in the bike lane on Rue Rachel in Montreal and noticed a road construction project that covered the sidewalk with large tubes. I thought to myself: “how does someone in a wheelchair use this sidewalk?” Only a few months later, this passing thought would become a constant preoccupation but I would now pose the question differently: “why is a construction project allowed to block wheelchair users from this sidewalk?”

I hope that the stories and arguments I present in this thesis will help to persuade my readers to think critically about the built environment and reject a casual approach to the issue of inaccessibility. By this I mean that my goal is to encourage an awareness among able-bodied people about their own privilege when they frequent spaces that are not safe or useable for

members of the public who are disabled. I also want to empower members of the disability community with legal strategies for demanding that all levels of government treat us as members of the public who should be able to expect that we can safely use the built environment. As a new member of the disability community, I have experienced the privilege of living in a world that was designed for my benefit and then the loss of that privilege. Perhaps the immediacy of this loss made me particularly indignant about accessibility, as anyone might feel when they lose something that they felt entitled to have. Now that I have studied the history of why we have created a built environment that excludes and endangers people with disabilities, I am even more convinced that there is something deeply wrong with accepting the status quo.

There are many excuses about why we continue to tolerate inaccessibility in Canada. Many people (who are otherwise concerned about equality or social justice) will tell me that, "unfortunately", Montreal just has a lot of old or "historic" buildings and it would sting to hear this excuse. This explanation attempts to absolve blame or emphasize that people with disabilities are not intentionally being excluded. But it also glosses over the fact that older buildings are not accessible because they were built at a time when it was socially acceptable to keep disabled people in institutionalized settings and it was rare to see us in public places.

Disability is not a new phenomenon. There were people with disabilities alive when the buildings we now consider old were first constructed. The aesthetics of historic buildings that are treated as a public good and preserved as a matter of law are also reminders of a past when we kept people with disabilities out of public view. When I hear excuses about inaccessibility due to a building's age, it comes across as: "even though it is no longer legal to discriminate against you because of your disability, we keep some physical reminders of past discrimination and don't you think they look nice."

Another excuse, which is much less demeaning, is that the cost of renovating to make public places accessible to everyone is very expensive, particularly for small businesses. The cost of redesigning some spaces, like a small restaurant with a washroom down a set of narrow stairs, can be so prohibitive that business owners say that they will have to shut down if legally required to make the space accessible to a wheelchair user. I do not have an answer for how we balance accessibility with its economic cost. But I have experienced the frustration of eating at a restaurant and then discovering mid-way through my meal that there is nowhere for me to use the washroom. The embarrassment or inconvenience of that experience is nothing compared to being denied access to a polling location on election day because there is no ramp or being told when you arrive in Canada as a refugee that there are no shelter spaces that will accept you because they cannot physically accommodate someone who is blind.[2]

The commonality between the trivial and more consequential effects of inaccessibility is that they are all determined by the rules that govern the built environment. My thesis is about those rules and how they came about. One of the central themes in my argument is that the law of the built environment assumes an able-bodied public. The more I have learned about this area of law, the more I have come to understand that it is very difficult to differentiate between design choices that will have significant impacts on people with disabilities in a way that most would find intolerable, like taking away someone's ability to vote, and the design choices that able-bodied people might think of as merely inconvenient for persons with disabilities (but would probably not wish to experience). In reality, it is impossible to predict the way that public spaces will be used, particularly given the life span of buildings and how fluid our interactions are in those spaces. Buildings are not silos for human conversations or activities. For example, old

[2] Both of these experiences have happened to people I have met during my research on disability and the built environment in Canada.

churches become polling stations where only able-bodied people can vote and inaccessible restaurants are the places where only able-bodied people create social bonds that lead to job offers or promotions.

I return to my personal experience with disability and the experiences of others with disabilities throughout my thesis. I want to make sure that the everyday realities of trying to mobilize in public space as a person with a disability in Canada remain front of mind for the reader.

Introduction

Prior to the 1980s, Canadian law and public policy treated disability, and even the people who experience it, as a public health problem. This approach was rooted in eugenics, the belief that social ills could be blamed on people with undesirable characteristics based on their genetics. Eugenicist policies, which were popular in Canada in the early 20th century, led to the forced institutionalization and sterilization of many persons with disabilities, particularly those deemed to have cognitive impairments.[3] Of course, not all people are born with their disabilities. Canadian veterans returning from both World Wars changed the perception of lawmakers and Canadian society more generally because any disabilities acquired by these veterans were a reminder of their sacrifice. The government policies to rehabilitate and financially support veterans with disabilities were politically popular but did not fundamentally change the way the government treated civilians with disabilities, whether congenital or acquired.

For decades following World War II, people who were born with or who had acquired disabilities that required a high level of care or support were subject to live in institutional settings, without decision-making power over their bodies and away from public life. Canadian provinces largely discontinued forced sterilization in the 1970s but some institutions, where people with disabilities had been placed without their consent, did not shut down until the 2000s.[4] As a result of individual and class action lawsuits, the federal and provincial governments have had to pay damages to some of the individuals that were sterilized or

[3] Colette Leung, "The *Living Archives* Project: Canadian Disability and Eugenics" (2012) 1:1 Can J Disability Stud 143.
[4] Jihan Abbas & Jijian Voronka, "Remembering Institutional Erasures: The Meaning of Histories of Disability Incarceration in Ontario" in L Ben-Moshe, C Chapman & A Carey, eds, *Disability Incarcerated: Imprisonment and Disability in the United States and Canada* (New York: Palgrave Macmillan, 2014) 121; Veronica Strong-Boag "'Children of Adversity': Disabilities and Child Welfare in Canada from the Nineteenth to the Twenty-First Century" (2007) 32:4 J Fam Hist 413; Kate Rossiter & Annalise Clarkson, "Opening Ontario's 'Saddest Chapter': A Social History of Huronia Regional" (2013) 2:3 Can J Disability Stud 1.

institutionalized against their will.[5] Though Canadian society now disavows eugenics, the legacy of eugenics is not limited to the explicitly violent practices of forced sterilization and institutionalization. There are many other consequences of Canada's history of treating disability as a social ill, and people with disabilities as deserving of segregation, that are harder to discontinue or to remedy. One such consequence is that the present-day built environment in Canada continues to exclude people with disabilities.

Segregation pervades the built environment in Canada and is often invisible to those with young, healthy and/or typical bodies. The most common circumstances in which the built environment becomes unuseable or difficult for able-bodied people are when they experience temporary injuries (such as a broken leg) or through the aging process. Elderly people in Canada, whether by choice or not, spend the end of their lives in institutions designed to be safer than their homes and that facilitate their access to caregiver supports.

It is remarkable that we continue to build physical environments that primarily serve able-bodied people given how common it is for almost everyone to experience aging and other forms of bodily impairment at some point in their lifetime. There have been recent shifts in attitudes towards the cultural practice of institutionalizing older people. The COVID-19 pandemic demonstrated the dangers of congregate living settings for those at risk of severe

[5] *Welsh v Ontario*, 2018 ONSC 3217 ($15 million settlement against province for abuses suffered in residential school for the deaf); *Clegg v HMQ Ontario*, 2016 ONSC 2662 ($36 million settlement against province for abuses suffered in 12 institutions for individuals labelled with developmental disabilities); *Seed v Ontario*, 2017 ONSC 3534 ($8 million settlement against province for abuses suffered in residential school for the blind); *Dolmage v HMQ*, 2013 ONSC 6686 ($35 million settlement against province for abuses suffered in an institution for individuals labelled with developmental disabilities); *McKillop and Bechard v HMQ*, 2014 ONSC 1282 ($32 million settlement for abuses suffered in two institutions for individuals labelled with developmental disabilities); *Muir v Alberta*, 1996 CanLII 7287 (AB QB) ($740,000 damages awarded against province for wrongful sterilization and wrongful confinement of woman labelled with an intellectual disability); *MacLean v Nova Scotia (Attorney General)*, 2019 CanLII 115231 (NS HRC) ($200,000 in damages awarded to individuals with disabilities that were institutionalized by the province against their will; province ordered to find them living arrangements in the community); *HJ v British Columbia*, [1998] BCJ No 2926 (SC) (judgment for $100,000); *Boyd v British Columbia* (judgment for $20,000).

outcomes from a contagious disease. There is also broader interest in "aging in place", particularly amongst the baby boomers, which has brought particular attention to the fact that most single-family homes are unsafe for aging bodies because of the prevalence of stairs.[6]

The concepts of accessible and inaccessible are central to public discourse on disability in Canada. They signal whether or not a particular environment or form of communication is safe and/or useable by a person who is disabled or who has an atypical body. Since these words are used so frequently they can start to lose impact, particularly on those who have no experience of disability. At the same time, within the disability community these words trigger an emotional response. If a wheelchair user describes a place as "accessible" then I know I will be able to go there safely and with dignity. I know that I will not waste my time going there and being forced to turn around and go home. I will not have to consider whether the reason for going in a space is worth risking injury to myself or others by being carried up or downstairs. If a person with visual impairments describes their university course materials as accessible then that means they will not have to spend extra time and energy getting the material translated into another format or read to them by another person.

When disabled people say that something is inaccessible it means that they have had to waste their time and, in the case of the built environment, they may be in danger or in distress because of, for example, limited access to a washroom or emergency egress. People with disabilities cope with these problems in creative ways and often they, and those who assist them, get credit for being inspiring or resilient. However, these stressors are not inherent to the

[6] See Andre Picard, *Neglected No More: The Urgent Need to Improve the Lives of Canada's Elders in the Wake of a Pandemic* (Toronto: Random House, 2021); RBC, Press Release, "A place to call home - Canada's retiring boomers hope to stay put, despite potential health issues" (30 May 2019), online: *RBC* <http://www.rbc.com/newsroom/news/2013/20131024-myths-realities.html>.

experience of disability. They are the accumulation of societal choices about how we build and for whom.

Inaccessibility in the built environment is more than just physical impediments that prevent a person with a disability from using a particular building safely. It is a product of the laws and policies that have segregated people with disabilities from the general population. This segregation was maintained in an obvious way in the past by forced institutionalization but it has persisted because of laws that have allowed or required the construction of physical environments that are designed as if atypical or impaired bodies do not exist. Historically, the laws regulating the construction of buildings, like building codes, have assumed that everyone using those buildings will be able-bodied. This is because they were originally drafted in the 1930s and 40s when people with disabilities were not expected in public spaces. These regulations were meant to ensure the safety of the public in building design and construction but only the able-bodied public.

The expectation that one can use the built environment with ease is a form of privilege that many of us have experienced at some point in our lives. But those who are born with disabilities or bodily difference, and those who disabled by injuries or aging, have had to bear the costs of this form of able-bodied privilege. Yet the issue of cost is often framed exclusively as the cost, either to private businessowners or to taxpayers (both assumed to be able-bodied), of renovating the built environment to be accessible to all. In order to address this concern, advocates for people with disabilities, some of whom are disabled themselves, have argued that the renovation costs to the public and private sector will pay for themselves once people with disabilities are tax-paying consumers.[7] This is known as "the business case for accessibility".

[7] The Conference Board of Canada, *The Business Case to Build Physically Accessible Environments,* (Ottawa: The Conference Board of Canada, 2018) [Conference Board].

However, such a cost-benefit analysis can trivialize or ignore the history of eugenics-based segregation in Canada.

In this thesis I will not be making an argument based on the value to the Canadian economy if people with disabilities have more places where they can work or shop. Instead, I will be examining inaccessibility in the built environment as a legal and historical phenomenon. This approach reframes the issue of cost, because it it exposes the decisions in the past to build our communities for use by able-bodied people that have led to the current situation where expensive retrofitting is necessary at all.[8] And, most importantly, any discussion of costs is misleading if we only consider the expense of changing the built environment now that so much construction has taken place without treating people with disabilities as potential end users. An accurate assessment would also weigh the cumulative costs, financial and otherwise, that people with disabilities have paid, and continue to pay, because the built environment privileges able-bodiedness.

An understanding of why the built environment does not meet the needs of people with disabilities in Canada could influence how Canadian law and policy makers solve the problem of inaccessibility. Today, most academic or policy discussion about disability addresses the importance and desirability of the shift from the medical to the social model of disability. In contrast to the medical model, which individualizes disability as a condition inherent to the body, the social model of disability emphasizes that people are actually disabled by aspects of their

[8] Marie Sépulchre, "Ensuring equal citizenship for disabled people: A matter of rights or a matter of costs?" (2020) 14:2 Alter 114 at 122 and 125: Sépulchre argues that "the enjoyment of citizenship always requires resources" and so the cost of rebuilding to include people with disabilities is a cost of equal citizenship rather than inherent to disability politics.

environment, which are referred to as "barriers".[9] The social model asks us to view disability as a societal problem and this is a radical shift in disability policy, because it places an onus on society to remove barriers that prevent people with disabilities from being treated equally and with dignity. However, the social model's focus on barriers can ignore or be indifferent to the reason that those barriers were erected in the first place and who has benefited from them.

The relationship between able-bodied and disabled people will be central to my argument throughout this thesis. The history of the regulation of the built environment in Canada reveals an absence of people with disabilities, both as decision makers about what we build and intended end users of public space. Critical disability theory provides an understanding of disability in terms of privilege and power.[10] People with disabilities have always had to persuade, lobby or take legal action to obtain the retrofits that will allow them to move around as freely as able-bodied people. The social model of disability was transformational when it began to influence public policy to view disability as societal construct rather than an individual problem. However, critical disability theorists argue that it is not enough to identify disabling barriers but that we

[9] The concept of "barrier" is very broad in disability scholarship. For example, the Law Commission of Ontario defines "barrier" in the following way: "Persons with disabilities may encounter a wide range of barriers to the achievement of substantive equality. Barriers may arise as much or more from the environment of persons with disabilities as from the effects of impairments. They may include physical barriers, resulting from the failure to design the built environment in a way that takes persons with disabilities into account, informational and communications barriers, or barriers that are embedded in laws or in written or unwritten policies and practices. Barriers may also be found in attitudes that dismiss, devalue or render invisible persons with disabilities and may be manifested directly in poor treatment in providing services or interpreting and applying laws and policies, or more subtly, for example in decisions about which services to provide or how those will be delivered. There may also be less obvious barriers resulting from the effects of life-long disadvantage for persons with disabilities, for example in the effects of lower educational or literacy rates on the ability to access services, employment or other opportunities": Law Commission of Ontario, *A Framework for the Law as it Affects Persons with Disabilities*, (Toronto: Law Commission of Ontario, 2012) at 100.

[10] Dianne Pothier & Richard Devlin, "Introduction: Toward a Critical Theory of Dis-Citizenship" in Dianne Pothier & Richard Devlin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (Vancouver, BC: UBC Press, 2006) 1 at 12-13 [Pothier & Devlin].

ought to acknowledge the relational aspects of these barriers: disabled people encounter barriers because of able-bodied privilege.[11]

My argument here will be grounded in critical disability theory. Instead of just taking present-day inaccessibility in the built environment as a neutral fact that can be fixed or ameliorated by law, I approach the issue historically and I identify how law has contributed to or created this inaccessibility. The history of building regulations in Canada reveals that the law privileges able-bodiedness in what and how we build. Ever since the federal, provincial and municipal governments became involved in drafting and enforcing minimum building standards in the 1940s, these standards have primarily ensured the safety and useability of buildings for an able-bodied public even though they purport to ensure that buildings will be safe and useable for everyone. This understanding of able-bodied privilege is central to my argument. In this thesis I explore a variety of ways that the law of the built environment assumes an able-bodied public. Not only will I examine the substantive provisions of this area of law, like provincial building code, but also its procedural aspects, such as the formal requirements for community consultation and the right to appeal local planning and permitting decisions. I will identify the ways that these procedural and substantive laws fail to consider people with disabilities as members of the public. In the case of provincial building code, people with disabilities have never been the "normal" building user. The design standards that facilitate how people with disabilities use the built environment are separate from and subordinate to the requirements in the main body of building codes across Canada. It is not as obvious that procedural aspects of planning law are oriented towards an able-bodied public to provide input or contest planning or permitting decisions. But, in practice, people with disabilities are not expected participants and,

[11] *Ibid.*

in some cases, these procedures are used by able-bodied people to contest accessibility. Throughout, I explain and critique the primacy of human rights law remedies to redress inaccessibility in the built environment. My purpose is not to advocate for abandoning human rights law. Rather, I argue that it may be more effective when human rights complaints (or *Charter* litigation) target the laws that regulate the built environment in favour of an able-bodied public.

The next two sections provide a brief overview of the field of disability theory, law and policy in Canada today. I introduce conceptual approaches to disability, mainly the medical and social models, and how these have influenced policy and law in Canada. I explain how critical disability theory offers the concept of ableism as a way to understand how law privileges able-bodiedness and ignores or devalues those who experience disability. The idea of "the public" is central to the law of the built environment because of its role in protecting public health and safety, along with its public participatory features. Laws that explicitly or implicitly assume that the public is able-bodied treat inaccessibility as the norm that people with disabilities have to fight against. As a result, even if there is societal and legal consensus that people with disabilities are human rights holders and that exclusion from the built environment is discriminination, this will have little consequence in our everyday lives if the laws of the built environment continue to privilege only the able-bodied public.

Disability Policy in Canada

In 1981, the United Nations' Year of Disabled Persons, the Canadian federal government formed a special committee on disability and published the findings of that committee in a report titled *Obstacles*.[12] The *Obstacles* report set the tone for future government policy for persons

[12] Special Committee on the Disabled and the Handicapped, *Obstacles: Report of the Special Committee on the Disabled and the Handicapped* (Ottawa: Minister of Supply and Services Canada, 1981).

with disabilities. It contained many recommendations to improve the federal government's programs and services but its most important legacy was framing the marginalization of those with disabilities in Canada as a human rights problem rather than public health problem or a private matter.

Following the publication of *Obstacles*, disability advocacy groups successfully capitalized on the rights language used in the report to put significant pressure on the federal government to include disability as a prohibited grounds of discrimination in the newly drafted *Canadian Charter of Rights and Freedoms*.[13] Advocates had already lobbied the federal and provincial governments to include disability as a prohibited ground of discrimination in human rights codes. As a result of these efforts, the field of "disability law" in Canada during the 1990s and 2000s was largely centred on landmark cases clarifying the anti-discrimination protections in the *Charter* and human rights codes. The most accessible and prolific process for combating discrimination on the basis of disability has been the human rights complaint. Complaints to provincial or federal human rights commissions and tribunals can be made without hiring a lawyer because of the support of commission staff. Today, the majority of complaints at human rights tribunals and commissions across Canada address claims of discrimination on the basis of disability.[14]

One consequence, and common criticism, of channelling inaccessibility into the human rights complaint process is that it individualizes a problem that has systemic causes. The step at an entrance of a restaurant is evidence of the owner's discrimination against wheelchair users

[13] *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[14] Canadian Human Rights Commission, *The Rights of Persons with Disabilities to Equality and Non-Discrimination: Monitoring the Implementation of the UN Convention on the Rights of Persons with Disabilities in Canada* (Ottawa: Government of Canada, 2015) at 1.

even though the step is also sanctioned by the various permits and licenses issued by local governments. Even though they are the primary means for people with disabilities to challenge inaccessibility today, human rights codes originally prohibited complaints based on the built environment *per se*. As I will discuss later in Chapter One, when disability was first added to provincial human rights codes, lawmakers were careful to explicitly state that a physical barrier on its own would not constitute discrimination but that a successful complaint must show evidence of both a physical barrier and attitudinal discrimination. Eventually Canadian courts overruled this distinction and began to treat physical inaccessibility as sufficient evidence of discrimination on its own. However, the case-by-case nature of human rights complaints about physical barriers is not only inefficient and burdensome on people with disabilities but it tends to assign responsibility too narrowly when the respondents to a complaint are private actors that rely on state actions, like building inspections, in meeting the legal requirements for opening their business to the public.

To be clear, however, my point in this thesis is not to discourage the use of the human rights law in Canada by people with disabilities. Rather, I propose that the problem of inaccessibility is currently misunderstood or misconceived in terms of its legal significance. In her book *Speaking Out on Human Rights*, lawyer and human rights scholar Pearl Eliadis introduces the concept of discrimination in Canadian human rights law: "treating someone differently or unfairly based on a characteristic that is protected by law."[15] She then lists examples of actions that are "clearly discriminatory", including a school or sports team refusing to admit Sikh students because of their religious dress or a restaurant owner refusing to build a ramp for wheelchair users.[16] There have been successful human rights complaints or *Charter*

[15] Pearl Eliadis, *Speaking Out on Human Rights* (Montréal: McGill-Queens University Press, 2014) at 34 [Eliadis].
[16] *Ibid.*

lawsuits involving nearly identical fact patterns to these examples.[17] However, the nature of the legal problem in the case of the restaurant owner is different from the situation involving religious discrimination against Sikh students. Both situations involve exclusion, but the myriad of legal regulations that impact the design features of buildings put the restaurant owner's action in a completely different context than the school's policy decision about its dress code.

In the restaurant/ramp example, a representative of the state, a building inspector, has issued a building permit sanctioning the stairs at the entrance way. Further, since the business in this example is a restaurant, there are several other licenses and permits that are issued by the state that endorse the physical premises of the restaurant. After the permitting and licensing stage, a restaurant owner reasonably believes they have met all legal requirements. However, business owners cannot use compliance with relevant building as a defence to a human rights complaint.[18] It may be frustrating and confusing for a business person if a wheelchair user names them as the respondent in a human rights complaint rather than complaining about the government's failure to ensure that a building is accessible to everyone at the permit/license stage. It may also be frustrating and confusing for the wheelchair user that they cannot rely on state inspections to guarantee that a particular business establishment will be accessible to every body.

Disability advocates and legal scholars have been critical of the way the human rights complaints individualize barriers in the built environment rather than treating inaccessibility as a systemic problem.[19] As I will discuss in Chapter One, some legal scholars point out that it is

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[17] See, for example, *Peel Board of Education v Ontario Human Rights Commission (Div Ct)*, 1991 CanLII 7356 (ON SC); *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 (CanLII), [2006] 1 SCR 256.
[18] *Quesnel v London Educational Health Centre* (1995), 28 CHRR D/474 (Ont Bd Inq) at para 5 [*Quesnel*].
[19] Dianne Pothier, "Tackling Disability Discrimination at Work: Toward a Systemic Approach" (2010) 4:1 McGill JL & Health 17; Ian B McKenna, "Legal Rights for Persons with Disabilities in Canada: Can the Impasse Be

particularly burdensome on people with disabilities to have to bring a human rights complaint everytime they encounter inaccessible spaces in public.[20] Many organizations that represent people with disabilities have argued that the provincial and federal governments ought to take on the primary burden of requiring a certain standard of accessibility in public buildings. Ontario, in 2005, and Manitoba, in 2008, were the first provinces to enact legislation that sets goals and deadlines for the public and private sectors to reach certain accessibility targets.[21] Modelling Ontario and Manitoba's legislation, Nova Scotia passed its *Accessibility Act* in 2017.[22] In the fall of 2019 British Columbia began drafting new accessibility legislation with a goal of becoming the most accessible province in Canada by 2024.

Following these provincial successes, disability advocates continued to pressure the federal government for Canada-wide legislation in the 2010s. These advocates argued that because only some provinces had legislation specifically addressing the problems faced by persons with disabilities, there still needed to be a national strategy. After winning the federal election in October 2015 the Liberal government prepared to fulfill its election promise of new federal disability legislation by creating a new cabinet position, a Minister of Accessibility. The new Minister, the Honourable Carla Qualtrough, began the process of drafting new legislation by holding a series of public consultations in the summer of 2016 to obtain input from persons with disabilities across Canada. The report summarizing these consultations, *Accessible Canada:*

Resolved?" (1997) 29:1 Ottawa L Rev 153; Mary Ann McColl et al, "People with Disabilities and the Charter: Disability rights at the Supreme Court of Canada under the Charter of Rights and Freedoms" (2016) 5:1 Can J Disability Stud 183.

[20] Judith Mosoff, "Is the Human Rights Paradigm 'Able' to Include Disability: Who's In? Who Wins? What? Why?" (2000) 26 Queen's Law Journal 225 [Mosoff]; M David Lepofsky, "The Long, Arduous Road to a Barrier-Free Ontario for People with Disabilities: The History of the Ontarians with Disabilities Act — The First Chapter" (2004) 15 National J Constitutional L 125 [Lepofsky, 2004].

[21] *Accessibility for Ontarians with Disabilities Act, 2005*, SO 2005, c 11; *The Accessibility for Manitobans Act, 2008,* CCSM 2008, c A1.7.

[22] *Accessibility Act*, SNS 2017, c 2.

Creating New National Accessibility Legislation, identified six priorities: employment, built environment, transportation, program/service delivery, information/communications, and government procurement of goods and services.[23] However, the report emphasized that many of the concerns of the disability community were a provincial rather than federal responsibility.

Organizations representing persons with disabilities had been urging the federal government to create national legislation with specific standards, deadlines for removing barriers and enforcement mechanisms, akin to the provincial legislation already in force and the *Americans with Disabilities Act* (ADA).[24] The ADA had been the model for Ontario and Manitoba's approach and provided a template for leadership at the national level on accessibility. Regulations enacted in 1991, the year after the ADA was signed into law, the ADA Standards for Accessible Design, provide clear guidance to public and private entities about their obligations under the law.[25] The US federal government requires the implementation of these standards in its own buildings. Individuals can bring a complaint regarding non-compliance with the ADA Standards for Accessible Design, which is first addressed by mediation and then, if necessary, the US Department of Justice obtain compliance by way of suit in federal court.[26] The results of mediated and court ordered resolutions are published online (from 2006 onwards) to form a body of precedent for future disputes.[27]

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[23] Employment and Social Development Canada, *Accessible Canada: Creating New National Accessibility Legislation* (Ottawa: Employment and Social Development Canada, 2017) at 16 [Employment and Social Development Canada].
[24] *Americans with Disabilities Act*, 42 U.S.C. § 12101 (1990) [*ADA*].
[25] United States Department of Justice. *1991 ADA Standards for Accessible Design*, online: Civil Rights Division, Disability Rights Section < https://www.ada.gov/1991ADAstandards_index.htm>. The most recent version of these standards was published in 2010 and applies to buildings constructed after 2012.
[26] "Department of Justice ADA Responsibilities: ADA Enforcement", online: Civil Rights Division, Disability Rights Section https://www.ada.gov/enforce_footer.htm.
[27] "ADA Enforcement", online: Civil Rights Division, Disability Rights Section <https://www.ada.gov/enforce_current.htm>.

By contrast, the legislation tabled by the federal government in 2018, Bill C-81, did not have substantive accessibility requirements or enforcement mechanisms like the ADA.[28] Rather than dealing directly with the priorities identified in the public consultations, the legislation only provided some monitoring of federal entities by way of reuiring accessibility plans/progress reports, which would need to be drafted in consultation with persons with disabilities. Even for matters under federal jurisdiction, there were no specific targets or minimum requirements regarding accessibility in the built environment.

Nearly 100 disability organizations cosigned a letter recommending improvements to Bill C-81, which primarily related to the importance of enforceable minimum accessibility standards, including:

- specify timelines for developing accessibility standards and turning them into law;
- change the word "may" to "shall" in many key provisions, thereby creating a duty for the federal government to act on the powers created by the legislation;
- add requirements for the accessibility plans (and progress reports) both as to substance and implementation; and
- remove the provision giving the federal government the power to exempt itself, and any organizations governed by the legislation, from the accessibility plans and progress reports (amongst other requirements).[29]

[28] Bill C-81, *Accessible Canada Act*, 1st Sess, 42nd Parl, 2018 (1st reading).
[29] Council of Canadians with Disabilities, *et al*, *Open Letter Regarding the Need to Strengthen Bill C-81 – Accessible Canada Act* (30 October 2018), online: *ARCH Disability Law Centre* https://archdisabilitylaw.ca/accessibility-laws/accessible-canada-act/open-letter/ [Council of Canadians with Disabilities].

The federal government responded to these criticisms by adding the goal of "a Canada without barriers" by January, 2040, and limiting exemptions to a period of three years. With these changes, the *Accessible Canada Act* received royal assent in 2019. [30]

Since the *Accessible Canada Act* is quite new at the time of this writing and there has been no litigation regarding compliance issues, it is difficult to predict what impacts it will have and whether it will meet its goal of removing barriers (under federal jurisdiction) by 2040, especially since it does not concretize that goal with specifics. When Minister Qualtrough introduced the draft bill to Parliament, she reminded those present of the reasons that the legislation was needed:

> The history of how we have treated Canadians with disabilities is not a proud one. It is a history of institutionalization, of sterilization, of social isolation. We addressed our fears of what we did not understand and of difference by creating systems that, by design, took children away from their families, that took power away from our citizens, that perpetuated a medical model of disability that saw persons with disabilities as objects of charity and passive recipients of welfare. We treated our citizens as if they were broken, when in fact it was our systems and policies that were broken.[31]

Qualtrough's stark description of the state policies of eugenics and societal attitudes contrasts with the relatively limited ambition of the *Accessible Canada Act.* She did acknowledge that government policy marginalized and mistreated people with disabilities in the past. However, as I will argue in Chapter One, the language of the *Accessible Canada Act* and its substance treat inaccessibility as a matter to be resolved through government agencies drafting reports rather than as a matter of collective responsibility to invest in righting an historical wrong.

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[30] *Accessible Canada Act*, SC 2019, c 10 [*Accessible Canada Act*]; ARCH Disability Law Centre, Press Release, "ARCH Disability Law Centre welcomes the passage of the Accessible Canada Act" (30 May 2019), online: *ARCH Disability Law Centre* <archdisabilitylaw.ca/press-release-arch-disability-law-centre-welcomes-the-passage-of-the-accessible-canada-act/>**;** Canadian National Institute for the Blind, Press Release, "CNIB welcomes new federal accessibility legislation" (25 June 2018), online: *Globe Newswire* <www.globenewswire.com/news-release/2018/06/25/1528787/0/en/CNIB-welcomes-new-federal-accessibility-legislation.html>; Laurie Monsebraaten "Disability rights advocates welcome national legislation", *The Star* (June 21, 2018) online: <www.thestar.com/news/canada/2018/06/21/disability-rights-advocates-welcome-national-legislation.html>.

[31] Bill C-81, *An act to ensure a barrier-free Canada*, 1st Sess, 42nd Parl, 2018, 1525 (2nd reading).

Apart from any criticisms of the *Accessible Canada Act*, Qualtrough's speech to Parliament when introducing the legislation does represent a radical conceptual shift. This was the first time that a federal Minister introducing disability-related legislation connected the history of eugenics to the problem of inaccessibility. Invoking the way people with disabilities have been treated in the past can be powerful rhetoric, but those who do so (including myself) also run the risk of appealing to a sense of pity amongst able-bodied people. In the next section I will discuss scholarly approaches to the concept of disability and how they have influenced Canadian law. I introduce critical disability theory, which is a scholarly approach to disability that emphasizes the concept of able-bodied privilege rather than asking for able-bodied pity. I also explain the importance of the idea of "the public" in my argument and why it helps explain law's contributions to or responsibility for the exclusion of disabled people from the built environment.

Theoretical Approaches to Disability

The use of rights-based language in the federal government's 1981 *Obstacles* report and the subsequent *Charter* protections for people with disabilities, as discussed above, have firmly situated Canadian disability policy in the field of human rights law. The legal scholarship on disability usually conflates the rights-based approach to disability in Canadian law with the social model of disability.[32] The phrase "discriminatory barrier", which is used to describe many forms of discrimination, is particular suited to disability because of the social model's focus on external factors, or "barriers", that create disability. As I will explain in this section, the social model of disability has come to dominate disability scholarship and government approaches to

[32] For an example of this, see Anne Levesque & Ravi Malhotra, "The Dawning of The Social Model? Applying a Disability Lens to Recent Developments in the Law of Negligence" (2019) 13:1 McGill JL & Health 1 [Levesque & Malhotra].

disability in Canada. I argue that critical disability theory can offer a better understanding of how law impacts persons with disabilities and the reasons why.

There is general agreement in disability scholarship about the significance of the shift from the medical to the social model of disability, particularly in Canadian law and public policy in the 1980s. This conceptual shift reframed the "problem" of disability as societal rather than individual. In Chapter One I describe the federal government's first time treating disability as a matter of public policy, which took place during and following the World Wars. Prior to this time, people born with disabilities or who acquired disabilities through injury or disease would have to look to their families, private charities, and religious organizations for assistance. However, the federal government could no longer treat disability as a private matter when it was soldiers that fought in World Wars I and II who were returning with disabilities. The policy approaches used by the federal government were primarily aimed at rehabilitating or "curing" the veterans and getting them back into the workforce. This approach, associated with the medical model of disability, focused on fixing the disabled person to reenter society as close as possible to the able-bodied person who existed before injury in the war. Significant medical and technological advances, financed by the federal government for the benefit of disabled veterans, created the conditions for people with disabilities to live longer and more comfortably with, for example, the invention of the power wheelchair by a Canadian scientist employed by the federal government at the National Research Council.[33] For those who were deemed "incurable" the federal government provided monthly financial support and, when necessary, arranged for veterans to be permanently institutionalized. By the 1960s the federal government extended its rehabilitation policies to include the civilian disabled population.

[33] Brian Woods & Nick Watson, "The social and technological history of wheelchairs" (2004) 11:9 Int'l J Ther & Rehabilitation 407 at 409.

Today, disability scholarship identifies the medical model of disability as an outdated approach that was regressive and harmful to persons with disabilities.[34] This is because this model placed no onus on government to create the conditions for persons with marginalized bodies to co-exist as their disabled selves in society with able-bodied people.[35] At the time, the idea of rehabilitating people with disabilities so that they could become more like able-bodied people was actually considered a modern improvement of the older approach of treating people with disabilities as objects of pity or charity.[36] Government policy that is instead based on the social model of disability addresses the external conditions that disable people rather than trying to fix the person with the disability. The social model of disability treats disability not as a problem inherent to a person but as a set of obstacles that disable a person whose body is atypical. Since the 1980s this approach has been almost universally adopted in Canadian academic scholarship, legislation and government policy.[37]

Scholars identify the evolution in Canadian law and public policy from a medical to social understanding of disability as an unequivocally positive development. However, some aspects of the social model and medical model are not completely reducible to good and bad. For

[34] Levesque & Malhotra, *supra* note 33 at 3; Jerome E Bickenbach, *Physical Disability and Social Policy* (Toronto: University of Toronto Press, 1993) [Bickenbach, 1993]; Marcia H Rioux & Michael Bach, eds, *Disability Is Not Measles: New Research Paradigms in Disability* (North York, ON: Roeher Institute, 1994); Henry Enns, "Foreword" in Mary Ann McColl & Jerome E Bickenbach, eds, *Introduction to Disability* (Philedelphia: WB Saunders Co, 1998) at xi.
[35] Pothier & Devlin, *supra* note 10 at 12.
[36] Ian Campbell, "Progress of Rehabilitation in Canada" (1957) 48:2 Can J Pub Health 58 at 58 [Campbell].
[37] Ravi Malhotra & Benjamin Isitt*, Disabling Barriers: Social Movements, Disability History, and the Law* (Vancouver: UBC Press, 2017); Bickenbach, 1993, *supra* note 30; Michael J Prince, *Absent Citizens: Disability Politics and Policy in Canada* (Toronto: University of Toronto Press, 2009) [Prince]; Ravi Malhotra & Robin Hansen, "The United Nations Convention on the Rights of Persons with Disabilities and Its Implications for the Equality Rights of Canadians with Disabilities: The Case of Education" (2011) 29:1 Windsor YB Acess Just 73; Levesque & Malhotra, *supra* note 28; Office for Disability Issues, Human Resources Development Canada, *Defining Disability: A Complex Issue* (Gatineau, QC: Human Resources Development Canada, 2003); Council of Canadians with Disabilities, In Unison: A Canadian Approach to Disability Issues (1998), online: *Council of Canadians with Disabilities* < http://www.ccdonline.ca/en/socialpolicy/poverty-citizenship/income-security-reform/in-unison>.

one, thinking about disability as a bodily condition pursuant to the medical model is necessary to identifying the population of persons with disabilities. As a practical matter, medical diagnoses and an understanding of functional limitations are not only necessary to ascertain who is disabled but whether they are disabled as a matter of law.[38] Statistics Canada collects information about persons with disabilities, which allows governments to understand the size of the disability community, including the range of impairments and their incidence.[39] This knowledge can then inform evidence-based public policy approaches.

As for the social model, in its attempt to focus on disability as a social phenomenon this approach can risk glossing over the bodily experience of disability, particularly chronic pain.[40] This can lead to the mistaken conclusion that, for example, if certain physical barriers are removed, then people with disabilities can enter the workforce on par with those with those who do not experience disability. Not everything about the experience of disability can be externalized to the environment, because the bodily differences between able-bodied and

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[38] See, for example, the definition of disability under the *Accessible Canada Act*, *supra* note 30 at s 2: "disability means any impairment, including a physical, mental, intellectual, cognitive, learning, communication or sensory impairment — or a functional limitation — whether permanent, temporary or episodic in nature, or evident or not, that, in interaction with a barrier, hinders a person's full and equal participation in society"; Section 10 of the *Ontario Human Rights Code* defines "disability" as:
(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
(b) a condition of mental impairment ora developmental disability,
(c) a learning disability,or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
(d) a mental disorder, or
(e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997.
[39] Statistics Canada, *Canadian Survey on Disability Reports,* online: *Statistics Canada* <https://www150.statcan.gc.ca/n1/en/catalogue/89-654-X>.
[40] Jerome Bickenbach, Sara Rubinelli & Gerold Stucki, "Being a person with disabilities or experiencing disability: Two perspectives on the social response to disability" (2017) 49:7 J Rehab Medicine 543; T Shakespeare & N Watson, "The social model of disability: an outdated ideology?" in SN Barnartt & BM Altman, eds, *Exploring Theories and Expanding Methodologies: Where we are and where we need to go (Research in Social Science and Disability, Vol 2)* (Bingley UK: Emerald Group Publishing Limited, 2001) 9-28.

disabled people can have significant consequences even if we somehow reach the goal of a "barrier-free" society.

There is an extensive body of academic scholarship on the differing models of disability, whether it is actually a universal condition, and the concepts of impairment versus disablement.[41] The advantage of the social model of disability is that it is a straightforward concept that treats the disadvantage associated with being disabled as a societal construct rather than individual misfortune. This approach has popularized the use of the word "barrier" to describe anything that prevents people with disabilities from experiencing the world in the same way as able-bodied people. The very purpose of the *Accessible Canada Act* is to identify, remove and prevent such barriers, which it defines as:

> anything — including anything physical, architectural, technological or attitudinal, anything that is based on information or communications or anything that is the result of a policy or a practice — that hinders the full and equal participation in society of persons with an impairment.[42]

Critical disability theory does not oppose the idea of eradicating barriers, but it moves beyond the dyad of the medical versus social model of disability.[43] Critical disability scholarship uses the concept of ableism to describe beliefs, practices, laws, etc, that create a hierarchy of body types and identify some bodies as more human than others. According to this understanding, the focus is not the disabled person or the disabling environment; rather, the central idea is that ableism is an approach that treats people with disabilities as inherently less worthy or less valuable than able-bodied people. Ableism can underlie overt eugenicist policies

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[41] Jonas-Sébastien Beaudry, "The Vanishing Body of Disability Law: Power and the Making of the Impaired Subject" (2018) 31 Can J Fam L 7; Margrit Shildrick, "Critical Disability Studies: Rethinking the Conventions for the Age of Postmodernity" in Nick Watson & Simo Vehmas, eds, *Routledge Handbook of Disability, 2nd Ed* (London: Routledge, 2019) 32-44.
[42] *Accessible Canada Act, supra* note 30 at ss 2, 5.
[43] Helen Meekosha & Russell P Shuttleworth, "What's so 'critical' about critical disability studies?" (2009) 15:1 Austl J HR 50.

like forced sterilization or it can operate by a subtle means of exclusion like an underground subway with no elevator access.[44] Much of critical disability scholarship identifies capitalism as particularly oppressive towards people with disabilities because of the way it privileges economically productive bodies and devalues those who are dependent on others and/or who cannot participate in the market.[45]

Critical disability theorist, Robert McRuer, identifies the "system of compulsory able-bodiedness" that underlies both the medical and social models of disability since both are premised on a belief that ultimately disabled people would (or should) rather be able-bodied.[46] This is obvious for the medical model when disability is reduced to a condition that must be eradicated or ameliorated. As for the social model, the privilege assigned to able-bodiedness is more subtle. It is apparent though when arguments based on the social model encourage the removal of barriers so that people with disabilities can perform or participate in ways that will make them more like able-bodied people. The social model also treats the experience of disability as an exclusively negative one. By reducing the disadvantage that disabled people experience to the idea that it is society that disables people, the social model leaves no room for anything but a negative association for what it means to be disabled.

Using the term ableism, critical disability theory invokes a comparison to other forms of prejudice such as racism, sexism and homophobia.[47] While this seems like a simple claim, it is

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[44] Fiona Kumari Campbell, *Contours of Ableism: The Production of Disability and Abledness*, (Hampshire, Great Britain: Palgrave Macmillan, 2009) at 5.
[45] Aimi Hamraie, "Enlivened City: Inclusive Design, Biopolitics, and the Philosophy of Liveability" (2018) 44:1 Built Env't at 39.
[46] Robert McRuer, *Crip Theory: Cultural Signs of Queerness and Disability* (New York: New York University Press, 2006) at 9 [McRuer].
[47] See Alyssa Clutterbuck, "Rethinking *Baker*: A Critical Race Feminist Theory of Disability" (2015) 20 Appeal 51 at 58. Clutterbuck explains why it is too simplistic to directly compare the experience of ableism and the experience of racism, particularly because it may fail to acknowledge the complexity the experience of those with more than one type of marginalized identity: "women of colour's experiences of disability fundamentally affect their

quite radical. Combatting racism by eliminating all but one race, or homophobia by eliminating all but one sexual orientation, is a perversion of those terms. Yet, the history of utopian thought contains many examples of the desirability of a world without sickness or disability.[48] Today, disability as a negative attribute is a central concept in public debate on issues such as the use of CRISPR technology to eliminate congenital disability[49] or enhanced access to assisted suicide for people with disabilities.[50] Critical disability theory confronts aversion to disability and atypical bodies by positing that an ideal world would accept and support the full range of human embodiment.

The practical implications of a critical disability approach for Canadian law, as I will be exploring in this thesis, are that it identifies the ways in which law privileges or presumes able-bodiedness. Most significantly, a critical disability approach might actually do a better job than the social model of disability of treating a person with a disability as worthy of the same dignity as an able-bodied person. Instead of considering a person with a disability as deserving of equality in spite of certain deficits, a critical disability approach questions the underlying assumption that a "normal" body is better than a disabled or "atypical" body. Even though the Supreme Court of Canada explicitly adopts the social model of disability, there are many decisions that actually take what I view as critical disability approach in that they reject reinforcing a hierarchy between able-bodiedness and disability.

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experiences of racism and sexism. It is different from disabled white women's experiences, able-bodied women of colour's experiences, and disabled men of colour's experiences simultaneously."

[48] McRuer, *supra* note 47 at 11.

[49] Felicity Boardman, "Human genome editing and the identity politics of genetic disability" (2019) 11 J Community Genetics 125; Alice Wong, "Resisting Abelism: Disabled People and Human Gene Editing" (2017) online: *Fabric of Digital Life* <https://fabricofdigitallife.com/index.php/Detail/objects/3288>.

[50] Catherine Frazee, "Assisted dying legislation puts equality for people with disabilities at risk", Globe and Mail (17 November 2020) online: Globe and Mail <https://www.theglobeandmail.com/opinion/article-assisted-dying-legislation-puts-equality-for-people-with-disabilities/>.

In a series of disability discrimination cases involving section 15 of the *Charter* claims, the Supreme Court defines the social model of disability as the idea that it is not disability itself but rather society and, often, the state that limits or creates barriers for people with disabilities.[51] However, the Court is careful to emphasize that the issue is not that these barriers must be removed to allow people with disabilities to be on equal footing with able-bodied people. Rather, just as critical disability theory proposes, the problem is when the state privileges able-bodiedness through law.

Though none of the major Supreme Court decisions involving the *Charter* and disability have been about the built environment, their written reasons explain the exclusion of people with disabilities both literally and metaphorically as a matter of how the world is constructed. In *Eaton*, Justice Sopinka writes that we have constructed "a society based solely on 'mainstream' attributes" that results in the exclusion of persons with disabilities.[52] In the same case, Justice Sopinka writes that we will end discrimination against persons with disabilities when we "fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation."[53] In *Granovsky*, Justice Binnie emphasizes that the *Charter* is "not a magic wand that can eliminate physical or mental impairments, nor is it expected to create the illusion of doing so."[54] Rather, he writes that the *Charter* is there to address how the state treats people with disabilities "in a world relentlessly oriented to the able-bodied."[55] Similarily, in *Eldridge*, Justice La Forest writes:

> historical disadvantage [of people with disabilities] has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled

[51] *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at paras 28-30 [*Granovsky*]; *Eaton v Brant County Board of Education*, 1997 CanLII 366 (SCC), [1997] 1 SCR 241 [Eaton].
[52] *Eaton, supra* note 52 at para 272.
[53] *Ibid.*
[54] *Granovsky, supra* note 52 at para 33.
[55] *Ibid.*

> persons have not generally been afforded the 'equal concern, respect and consideration' that s. 15(1) of the Charter demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms.[56]

Apart from the actual determinations in each of these discrimination cases before the Supreme Court, which I will not go into here, the theoretical approach that the Court applies to the marginalization of disabled people demonstrates support for a critical disability approach in Canadian law.

The way that the Court describes the relationship between able-bodied and disabled people emphasizes the privileged status of "normal" bodies. The social model of disability does not have much to say about this type of privilege. Rather, the social model proposes that if certain environmental conditions, or barriers, are changed or removed, then people with disabilities will no longer experience disadvantage vis-à-vis able-bodied people. By focusing on these environmental factors, the social model glosses over the history of segregation, or what Justice Sopinka calls "banishment", that people with disabilities have experienced in Canada. It is not that the condition of being disabled is so new or modern that suddenly Canadian society must now adapt to the needs of an entirely new population. As these Supreme Court decisions describe, people with disabilities have been purposely left out while able-bodied people have created institutions, laws and communities that are designed for able-bodiedness.

In *VIA Rail,* the only Supreme Court case addressing a form of physical accessibility, the Council of Canadians with Disabilities successfully argued that VIA Rail must modify its newly purchased rail cars to make them wheelchair accessible.[57] The decision was not made pursuant to a human rights complaint but the majority decision did apply the *Canadian Human Rights Act* to

[56] *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 SCR 624 at 668.
[57] *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 [*Via Rail*].

its analysis. The primary issue in the case was whether the accessibility modifications to the rail cars would constitute undue hardship to Via Rail. Via Rail argued that modifying the newly purchased rail cars to make them accessible to wheelchair users would increase fares for its (able-bodied) customers. To be clear, by the time the case reached the Supreme Court, Via Rail was appealing the Canadian Transportation Agency's determination that one coach car and one sleeper unit for every day or night trip would have to be accessible such that (only!) one wheelchair user can ride on each trip.[58]

In line with the disability discrimination cases discussed above, the Supreme Court addressed the issue of accessibility on Via Rail cars by exposing the way Via Rail's arguments on the appeal amounted to not only privileging able-bodied customers but treating disabled people as if they are not members of the public.[59] The Court essentially admonished Via Rail for choosing to buy rail cars that were not accessible and then arguing that it was entitled to exclude wheelchair users from its services because the purchase price was "a better bargain for its able-bodied customers."[60] The Court also compared the cost of making the rail cars accessible, which is required by human rights law, to the cost of safety measures, which are required by transportation regulations.[61] Ultimately, Via Rail was required to retrofit one car per train for use by wheelchair users.[62]

Each of the approaches to disability – medical, social and critical – provide different questions and different solutions to the relationship between persons with disabilities and the

[58] This means that people who are wheelchair users may not travel together. Further, as I have experienced personally, wheelchair users must book well in advance to ensure that the one wheelchair user spot is not already booked on their desired train trip.
[59] *VIA Rail, supra* note 58 at para 164, 220 and 221.
[60] *Ibid* at para 164.
[61] *Ibid* at paras 220 and 221.
[62] The silver lining of this decision was that, because of space constraints on its trains, Via Rail has opted to place the wheelchair spot in its first-class cars while still only charging wheelchair users for an economy ticket.

built environment. If we are to think of this in the framework provided by the medical model of disability, the focus is on medical and technical interventions for the disabled person to mobilize in the built environment. This is the bare minimum a person with disabilities needs from the healthcare system and other social services that research and finance these interventions. However, though these devices or medical supports are necessary, they do not address the built environment itself. This is one of the reasons that those in the field of disability advocacy have pressed for the move from the medical model to the social model when it comes to policy making.

Pursuant to the social model, it is the barriers in the built environment that disable a person rather than a particular condition or atypical body. This approach implies that once those barriers are removed, a person will no longer be disabled. As I explained above, this tends to ignore the embodied experience of disability and, problematically, takes the ableist approach that the goal is eliminate disability altogether. The social model also does not do enough to interrogate how and why the barriers were created in the first place. The danger with this is that it treats the barriers as a starting point as if people with disabilities were nowhere to be found when we built our communities. The turn to critical disability theory, which I suggest, would help to destigmatize disability and recognize that if there are barriers in the built environment then they exist as a product of ableist laws, policies and practices.

The critical disability approach does not seek to end disability but rather to accept the diversity of embodiments, even during a person's lifespan. As I will apply it to the issue of the built environment in this thesis, the critical disability approach demands an investigation into what laws or policies created a built environment that is only useable by "normal" or "healthy" bodies. It diverges from the social model in that it seeks to end ableist laws regardless of whether

the result will be that disabled people become more like able-bodied people in terms of their participation in the market. My point will not be to prove that disabled people are "worth it". Rather, my intended audience are those who disagree with inaccessibility and want to understand the role that law has played in excluding people with disabilities from the built environment. I hope to present some practical legal strategies that people with disabilities and their allies can use to change our communities.

As I explained above, the disability discrimination cases at the Supreme Court frame the *Charter*, and discrimination law more generally, as tools to end the marginalization of people with disabilities. In the case of the built environment, the *Charter* and human rights codes empower persons with disabilities to legally challenge inaccessibility in a particular location, such as a school or workplace. I will argue here that such a legal strategy will not address the ableist laws that produce these environments in the first place if complaints only deal with the physical results of ableist laws but not the laws that define disabled people out of existence. Here I identify those laws as the regulations that govern the construction of the built environment, which are primarily provincial building codes but also include municipal bylaws that govern infrastructure, like sidewalks.

The way that I apply the critical disability approach in this thesis is similar to the work of Dean Spade, an American academic specializing in law and trans people. Spade exposes the harm caused by enforcing a certain standard of "natural" or "normal" through law.[63] Spade identifies the ways that administrative law can define trans people out of existence as in, for example, the rules that govern birth certificates or other identification documents. The assigned gender on these types of documents then determines access to "bathrooms, homeless shelters,

[63] Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Brooklyn, NY: South End Press, 2011) at 29, 31.

drug treatment programs, mental health services, and spaces of confinement like psychiatric hospitals, juvenile and adult prisons, and immigration prisons."[64] Trans people may not fall on either side of a gender binary or may not appear to conform to a gender specified on identification documents. Thus, just as for persons with disabilities, law creates physical spaces that deny the existence of trans individuals.

Spade concludes that legal strategies focussed on equality or discrimination may actually be less impactful on the lives of trans people than the realm of administrative law.[65] This is because "administrative systems in general are sites of production and implementation of racism, xenophobia, sexism, transphobia, homophobia, and ableism under the guise of neutrality."[66] Spade does not deny the importance of laws that guarantee the equality of trans people and protect trans people from discrimination on the basis of gender. Rather, Spade is arguing that advocates for trans rights can broaden their scope of inquiry to include the adminstrative laws that have a direct impact on the everyday lives of trans people.

Like Spade, I argue that antidiscrimination law is necessary but insufficient to address why and how society has chosen to marginalize people with disabilities. Canadian legal scholarship on disability narrowly addresses how the *Charter* and human rights codes can be used by persons with disabilities to confront the barriers in their lives that prevent them from participating fully in society. I will argue in this thesis that this is an insufficient approach to conceptualizing the way that law privileges able-bodiedness but it is also insufficient because it fails to locate the underlying legal causes and how law operates to marginalize people with disabilities as somehow not part of the public. In the case of the built environment the laws that

[64] *Ibid* at 77.
[65] *Ibid* at 28.
[66] *Ibid* at 73.

have the most direct impact on people with disabilities include provincial building codes, related municipal bylaws, and the permitting processes of planning.

Canadian legal scholarship has tended to ignore the importance of the intricacies and impact of building regulations on marginalized populations. In the field of public health, some scholars argue that improving public health outcomes requires attention to the technicalities of building code.[67] I argue that the same is true for those who wish to improve accessibility for persons with disabilities. The laws that govern the built environment – which include provincial building codes and planning legislation, along with municipal bylaws – have historically supported the segregation of persons with disabilities from public space. In order to improve accessibility, we need to understand these laws, even the ones that appear highly technical and that have been left to experts in the construction and design industries. There are scholars in the fields of geography and architecture that have pioneered this way of understanding the built environment.[68] Rob Kitchin, a geographer who studies the spatial exclusion of people with disabilities, emphasizes that the design of the built environment is not accidental or neutral. Rather, Kitchin argues that physical barriers are "produced through individual social interactions combined with State policy, building regulations, and architectural and planning practice."[69] Similarly, Jo Beall, a British political scientist, argues that the built environment is never neutral:

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[67] Nancy Edwards, et al, "Advocating for improvements to building codes for the population's health" (2019) 110 Can J Pub Health 516.

[68] See Barbara B Wilson, *Social Movement Towards Spatial Justice: Crafting a Theory of Civic Urban Form* (University of Texas at Austin, 2010) [Wilson, 2010]; Rob Kitchin, "'Out of Place', 'Knowing One's Place': Space, power and the exclusion of disabled people" (1998) 13:3 Disability & Soc 343 [Kitchin, 1998]; Rob Imrie, "The interrelationships between building regulations and architects' practices" (2006) 34 Env't & Plan B: Plan & Design 925; Rob Imrie, "Space, place and policy regimes: the changing contours of disability and citizenship" in Karen Soldatic, Hannah Morgan & Alan Roulstone, eds, *Disability, spaces and places of policy exclusion* (New York: Routledge, 2014) 13-30; Rob Imrie, "The body, disability and Le Corbusier's conception of the radiant environment" in Butler, Ruth & Parr, Hester, eds, *Mind and Body Spaces: Geographies of illness, impairment and disability* (London: Routledge, 2005) 25-44; Ralph James Green, "An Introductory Theoretical and Methodological Framework for a Universal Mobility Index (UMI) to Quantify, Compare, and Longitudinally Track Equity of Access Across the Built Environment" (2011) 21:4 J Disability Pol'y Stud 219 at 223.

[69] Kitchin, 1998, *supra* note 69 at 346.

"[t]he physical structure of the city is the product of conscious decision-making and social relations…Cities are literally concrete manifestations of ideas on how society was, is and should be."[70] Since the built environment is only designed for able-bodied people, people with disabilities experience "spatial exclusion" which leads to "social invisibility and in turn policy neglect."[71]

My contribution here will be to investigate the role that law plays in spatial exclusion of disabled bodies by assuming an able-bodied public. My focus on the idea of "the public" is a different take than most Canadian disability scholarship and it may seem to be vague in comparison to the well-theorized legal concepts of human rights or citizenship. I intend to show that what we mean by "the public" has great significance in the law of built environment and, as a result, it is detrimental to people with disabilities if this area of law presumes or privileges an able-bodied public.

Michael J. Prince, a Canadian political scientist, uses the concept of "absent citizens" to describe the marginalization that people with disabilities experience.[72] He writes about the "gap" or "contradiction" between the ideals of citizenship and the lived experiences of people with disabilities.[73] Prince argues that the discourse of citizenship can "legitimate claims using a familiar set of concepts around equality and opportunity, and to connect with the wider political community on aspirations of belonging and participation."[74] The concept of citizenship is quite broad as, according to Prince, it:

> is much more than a political concept and legal status, though these too are crucial dimensions. Citizenship entails cultural, economic, and social dimensions. In one or

[70] Jo Beall, "Valuing Difference and Working with Diversity" in Jo Beall, ed, *A City for All: Valuing Difference and Working with Diversity* (London: Zed Books, 1997), 2-37 at 3.
[71] *Ibid* at 28.
[72] Prince, *supra* note 38.
[73] *Ibid* at 224-5.
[74] *Ibid* at 225.

> more of these dimensions, many Canadians with disabilities are effectively absent, lacking full enjoyment of liberty of the person, or freedom of expression and communication.[75]

Even though Prince focuses on the idea of citizenship, his use of the word "absent" signals the exclusion or segregation that people with disabilities experience because of inaccessibility. It may be a slight misnomer because, as an adjective, "absent" implies that people with disabilities are at fault or have failed to show up. Also, the use of the concept of citizenship is under inclusive when applied to the built environment. There are aspects of inaccessibility that influence whether citizens may exercise their rights, such as the right to vote. But human rights in Canada are not dependant on citizenship status.

Certainly the concept of "citizenship" is applicable to the issues of exclusion that disabled people experience vis-à-vis the built environment. But I am not convinced that people with disabilities are absent citizens; they are simply absent. They are missing because the law only guarantees a safe and useable built environment for able-bodied people. This guarantee to able-bodied people is, of course, a type of privilege. Able-bodied people can take for granted that the permit and licensing functions of the state will protect them. Meanwhile, people with disabilities are treated as a separate and subordinate type of public, if they are even considered at all. The idea of "the public" is central to the law of the built environment both historically and today because it determines who will use it and who will contribute to decisions about it. If we interrogate the concept of "the public", as opposed to citizenship or human rights, we will have a better understanding of how the law of the built environment defines people with disabilities out of existence and hopefully, a legal strategy for redefining the public to include all bodies.

[75] *Ibid* at 2-3.

Prince published his book, *Absent Citizens*, in 2009 and since that time he has developed his concept of citizenship by incorporating a critical disability approach. He now speaks of embodied citizenship and the ways in which: "[a]uthoritative notions of the norm – the able-bodied citizen – constitute also the other – the abnormal citizen."[76] These relational aspects of able-bodiedness and disability align with my arguments here and in many ways my projct expands on Prince's approach while at same time narrowing in on one area of law in particular to better understand the enforcement of able-bodied norms in the built environment.

I also link my concept of the public to the work of Iris Marion Young and her critique of invocations of the public that ignore or erase our differences, including embodied difference, because they entrench the privilege of those who situate their experiences as universal. She responds to a history of liberal and democratic theory that extolled the importance of a unified, disembodied public-mindedness. Young idealizes a "heterogenous public" and she means this quite literally, arguing that democracy requires "the existence of spaces and forums to which everyone has access' to participate – to speak, listen, and bear witness."[77] There are also broader implications of a heterogenous public for the power dynamics between those who hold privilege and marginalized social groups. When the privileged treat their own experiences as universal, normal or neutral, then those who differ from the privileged group "express their own experience and perspectives, their claims are heard as those of biased, selfish special interests that deviate from the impartial general interest."[78] For people with disabilities, this can mean that when they advocate for themselves or make claims on public resources in public fora, their appeals are

[76] Michael J Prince, *Struggling for Social Citizenship: Disabled Canadians, Income Security, and Prime Ministerial Eras* (Kingston: McGill-Queen's University Press, 2016) at 36.
[77] Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 2012) at 240 [Young, 2012].
[78] *Ibid* at 116.

treated as "disability issues" requiring "disability policy" or "disability legislation". Even more insidious, people with disabilities may be such a special interest, or non-public group, that their issues are not politicized at all.

In his article in the New York Times, "The Non-Politics of Disability", Jay Ruckleshaus describes the "ironclad moral consensus" on disability rights in the United States.[79] He argues that this consensus on disability allows nondisabled people to absolve themselves of taking actual responsibility for enacting real change. The superficial nature of consensus soon becomes apparent:

> when disability advocates encounter increasing resistance as the effort and costs involved in proposals come closer to being realized. (Consider the neighborhood store that decides it's just too costly to install a ramp, or the community lecture that excludes deaf attendees by refusing to hire a sign-language interpreter.)[80]

Though Ruckleshaus is speaking to an American audience, his argument applies in Canada as well. Disability-specific legislation in Canada – including the *Accessible Canada Act*, the *Accessibility for Ontarians with Disabilities* and the *Accessibility for Manitobans Act* – is essentially non-partisan and passes with unanimous support. Ruckleshaus concludes it is necessary to politicise disability in order to make concrete progress there must be "a willingness to confront the issues head-on, even when — especially when — citizens disagree on competing solutions."[81]

Deliberative democracy theorist, Stacy Clifford, makes similar claims to Ruckleshaus by arguing that excluding people with disabilities "leaves ableist assumptions unchallenged and

[79] Jay Ruckleshaus, "The Non-Politics of Disability" *The New York Times* (18 January 2017) online: The New York Times <https://www.nytimes.com/2017/01/18/opinion/denouncing-trump-wont-help-disability-rights.html>.
[80] *Ibid.*
[81] *Ibid.*

disabled lives depoliticized."[82] What she means by this is that able-bodied people tend to make negative assumptions about the experience of disability or they simply have no information about the experience. Clifford emphasizes the importance of creating spaces where people with disabilities can be present to tell their own stories, including by way of non-verbal communication. She also draws on Young's ideal of the heterogenous public and empirical literature finding that heterogenous groups are more deliberative than homogenous ones.[83] This is a common sense conclusion because it is reasonable to conclude that a heterogenous group has a larger amount of information to consider than a homogenous one. But it is not just the amount of information that is important but the effect that hearing from someone different can have on each of those present in the deliberation. As Young argues, one consequence of privilege is that those who have it can "to convert [their] perspective on some issues into authoritative knowledge without being challenged by those who have reason to see things differently."[84] Young uses an example of wheelchair users making "claims upon city resources" for accessibility and she points out that the primary way they will make those claims is by telling their own stories.[85] She argues that these stories are often the only means "for people in one social segment to gain some understanding of experiences, needs, projects, problems, and pleasures of people in the society differently situated from themselves."[86]

This thesis identifies the ways that the law of the built environment assumes a homogenously able-bodied public because of the history of segregating people with disabilities

[82] Stacy Clifford, "Making disability public in deliberative democracy" (2012) 11:2 Contemp Political Theory 211 at 220.
[83] *Ibid* at 218.
[84] Iris Marion Young, "Difference as a Resource for Democratic Communication" in James Bohman and William Rehg, eds, *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, MA: MIT Press, 1997), 383-406 at 399.
[85] Iris Marion Young, *Inclusion and Democracy (*Oxford, Oxford University Press, 2002) at 74.
[86] *Ibid.*

from public space but also critiques the continued dominance of able-bodied people's perspectives in deliberations about what and how we build. In the next section I provide a detailed overview of my argument and the methodologies I use. Throughout, I emphasize the agency of disabled people (including myself!) who have self-advocated within the legal system, who show up to public spaces that are not designed for them in order to tell their own stories.

Overview of Thesis Structure and Methodologies

In Chapter One I present a history of Canada's *National Building Code*, which is the model for provincial building codes across Canada. I describe how the federal government's housing policy in the 1930s and 40s led to the creation of the first *National Building Code* in Canada. Next, I recount the federal government's attempt to provide accessible building standards in 1965 and I argue that the way these standards were introduced ensured their subordinate status for decades. This undermined the adoption of these standards into law by each province and, as a result, today the minimum legal requirements of accessibility vary significantly across Canada and are subject to many exceptions.

I also compare the Canadian experience to the regulation of accessibility in the United States. Instead of taking the American approach of legislating federally to mandate accessible buildings, the debates on the creation of provincial human rights codes and the *Charter* channelled the energies of Canadian disability rights activists into lobbying for the addition of disability as a prohibited ground of discrimination. Human rights complaints have been an important legal tool for people with disabilities. Yet it may be that the monopoly of the complaint process on disability justice claims is overwhelming human rights commissions across Canada, where complaints on the basis of disability make up the majority of their caseload.

In order to illustrate the effectiveness and limitations of the human rights complaint process in the context of inaccessibility, Chapter Two offers a case study of a human rights complaint brought by persons with disabilities in Montréal, Québec. I describe the efforts of disability activists, the *Regroupement activistes pour l'inclusion Québec* (RAPLIQ), to improve access for wheelchair users on temporary summer patios in the Plateau neighbourhood of Montréal, Québec. RAPLIQ's human rights complaint and the mediation process supervised by the Québec Human Rights Commission ultimately led to bylaw changes requiring ramps on these patios. I argue that this apparent success actually illustrates the limitations of human rights complaints for systemic changes to the built environment. At the procedural level, the use of a non-disclosure agreement (commonly used in human rights mediations) limits the value of this case as precedent and conceals the terms of the settlement. Substantively, this human rights complaint may have improved accessibility to summer patios in Montréal but it had no effect on access to the interior of the restaurants and bars with these patios and, most importantly, it did not provide access to washrooms. I conclude Chapter Two by discussing a successful human rights complaint in Nova Scotia about accessible washrooms in restaurants. This case redeems the human rights complaint process and shows how best to use the process to bring about systemic change. The complainants targeted provincial restaurant licensing processes and argued that the province should not be issuing licenses to restaurants that do not have accessible washrooms since a precondition of a license is that the public must have access to hand washing facilities, which ought to include wheelchair users. By challenging provincial policy rather than individual restaurants and by focussing on public health (the importance of access to handwashing), the litigants avoided the trap of arguments about the prohibitive cost of accessibility renovations. By emphasizing the idea of a public that includes wheelchair users, the

complainants were not only successful in their complaint but the province then revised its building code to make accessibility a requirement for building permits issued to any restaurant facility.

Finally, in Chapter Three I contemplate legal strategies at the municipal level that could offer persons with disabilities, and their allies, opportunities to intervene in the construction of the built environment. I start with a historical example of this type of approach, which is the story of how curb cuts were introduced in Canada in 1970s to allow wheelchair users to use sidewalks and cross intersections. This was not acheived as part of any organized or national effort or by way of a human rights complaint. Rather, it was through the lobbying efforts of people with disabilities who appeared at their city councils to explain how curb cuts would improve the built environment. Next, I describe the centrality of direct public participation in land use planning decisions at the provincial/municipal level and the potential of this type of participation for people with disabilities.

First, I address the potential of participation in formalized public consultations about proposed construction projects, which are a common practice across Canada that are usually required by law. I look at the public consulations conducted by Montréal's Office of Public Consultation, the only of its kind in Canada, to assess the advantages and disadvantages for persons with disabilities participating in these consultations. I also compare consultation in the planning context with another type of government consultation that has become popular throughout Canada: consultations with the disability community to obtain input on disability policy. I argue that these targeted discussions should not be the only fully accessible public hearings and that people with disabilities ought to be expected as deliberative participants in the planning context.

Second, I explain another form of public participation on planning decisions: the availability of a "third party permit appeal" to challenge issued permits and their potential as a strategy for blocking inaccessible development proposals at the pre-construction stage. In the past, this type of appeal has been used by disgruntled neighbours or by litigants that identify as public interest groups to stop projects for environmental reasons. I explain why human rights complaints are unavailable as a remedy at the planning and permitting stage, because they require a complainant to encounter a physical barrier in person before bringing such a complaint. I argue that exercising the third party permit appeal could be a powerful tool for people with disabilities. These types of appeals have been used in the past, including by neighbours of proposed group homes for persons with disabilities, to command the attention of developers and municipalities, even when the appeal is ultimately unsuccessful. Public consultations and third party permit appeals are both opportunities for participating in how the built environment is designed at the planning stage. People with disabilities and their advocates have not used these types of interventions because of the primacy of the human rights complaint process for combatting barriers in the built environment. Broadening the scope of advocacy to include planning law tools has the potential to be more efficient than retrofitting ableist environments by way of human rights complaints.

The choices I made about the content and the methodologies I use in this thesis are a product of my position as a disabled researcher and the critical disability approach. The questions I ask and the way I go about answering them are wholly based on my experience with disability. As a disabled person who uses a wheelchair I personally experience the inaccessibility that is the impetus for this thesis. This means that much of my discussion of the built environment focuses on the experiences of wheelchair users. The case study I chose for Chapter

Two is about disability activists that I know personally and I lived in the neighbourhood where the dispute over the accessibility of summer patios took place. I do not know that this is true for other people with disabilities, but for me, my experience as a disabled person has made my world smaller, literally. This both because of the way the built environment excludes wheelchair users but also because of fatigue associated with my spinal cord injury. This has meant that I have built my thesis out of source material that was immediate to me – such as the accessibility of the buildings in my neighbourhood. I think that in the end, by taking an in-depth look at laws that are highly local and/or technical, I have been able to provide a sense of the everyday impact of law on people with disabilities and bodily differences beyond just wheelchair users like myself.

Some consider critical disability theory to be a methodology itself in that it requires accountability to and working toward social justice for people with disabilities.[87] According to this view, those engaged in critical disability scholarship should not do it "for its own sake but with the goal of producing knowledge in support of justice for people with stigmatized bodies and minds."[88] I consider that this is especially true for legal scholarship, given the close nexus between academic and practical legal training and the relative privilege of those (including myself) who have legal education and experience. For these reasons I engage in the traditional legal methods of analysing case law and legislation with a view of providing practical tools for using law to achieve an end goal of improving accessibility in the built environment. This is most obvious in Chapter Three, where I explore the use of third party permit appeals by people with disabilities, but it is also found in Chapter Two, where I assess human rights complaints

[87] Julie Avril Minich, "Enabling Whom? Critical Disability Studies Now" (2016) 5.1 Emergent Crit Analytics for Alternative Human [Minich]; Sami Schalk, "Critical Disability Studies as Methodology" (2017) 6.1 Emergent Crit Analytics for Alternative Human.
[88] Minich, *supra* note 88 at 3.

about the built environment and argue for the effectiveness of targeting laws that fail to treat people with disabilities as members of the public.

I also provide a critical reading of the new federal legislation, the *Accessible Canada Act*, which is based on the other methodology I employ in this thesis: legal history. In Chapter One, I put this legislation in its historical context, by explaining the federal government's leadership since the 1930s in model building code and then introducing accessible design standards in the 1960s. The subordinate status of accessible design standards in the federal government's model code has had a significant impact on the legal status of these standards in provincial law. This means that the *Accessible Canada Act* merely entrenches the role that the federal government has always had in drafting accessibility standards, rather taking any new role in improving accessibility, such as requiring or incentivizing the provinces to require that all buildings, including federal ones, are safe for the disability community. Legal history not only tells us about how law has impacted the everyday lives of people in the past but it also explains how "the legal values encoded in past practices and decisions continue to have relevance in the present."[89] Legal history does not merely critique by exposing privilege and hierarchies that remain embedded in law; it also provides an opportunity to amplify the untold stories of those who have contested these hierarchies.[90] Many of the sources I have used to tell these types of stories, like the history of curb cuts, are from local newspapers from across Canada or city council minutes that have been digitized but have not yet been published in one place to form a narrative about the work of disabled activists to change the built environment. I also was able to personally interview the leadership of RAPLIQ for the case study on accessible patios in Montreal in order

[89] Lori Chambers, "Exposing the Myth of the Peaceable Kingdom: Trends and Themes in Recent Canadian Legal History," Acadiensis XLI, no. 1 (Winter/Spring 2012): 247 at 247.
[90] *Ibid* at 256.

to preserve the details of their efforts, which would otherwise not appear in any traditional legal source material, as it was a mediated settlement subject to a non-disclosure agreement.

Bess Williamson has recently published a history of accessible design standards in the United States and she links their evolution to the rights of people with disabilities, or the right to "live in the world".[91] Williamson quotes legal scholar and disability activist Jacobus tenBroek and his 1966 article "The Right to Live in the World: The Disabled in the Law of Torts", which is not only credited as a founding document of disability rights in North America but I consider it the first example of doing "disability legal history".[92] TenBroek undertakes a historical review of tort law and analyses how courts have treated plaintiffs with disabilities, and blind people in particular, who suffer injury when using the built environment. He critiques the "reasonable man" standard in tort law because of its presumption of able-bodiedness and because those who apply it are also almost exclusively able-bodied:

> Standing on good feet and legs, erect through the strength of taut muscles, peering through eyes approaching or receding from 20/20 visual acuity, the judge or juror, or their personified image, provide the blind, the deaf, the lame, and the otherwise physically disabled with a standard of reasonableness and prudence in the light of all of their circumstances, including some often quite erroneous imaginings about the nature of the particular disability.[93]

Like tenBroek, I take a historical approach to my analysis of a particular area of law – the law of the built environment – and show how it presumes that members of the public are able-bodied.

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[91] Bess Williamson, *Accessible America: A History of Disability and Design* (New York: NYU Press, 2019) at 3.
[92] Mary Ellen Gabias, "Organize: Working Together to Live the Lives We Want" (CFB 'Organize' Convention delivered at the Sandman Inn, Victoria, BC, 5 May 2018) online: *The Canadian Federation of the Blind* <https://www.cfb.ca/organize-working-together-to-live-the-lives-we-want>; see Lisa Beckmann, "Undoing Ableism: Disability as a Category of Historical and Legal Analaysis" (2017) 3 On_Culture: The Open Journal for the Study of Culture, online: *on_culture <https://www.on-culture.org/journal/issue-3/beckmann-undoing-ableism/>*; Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* (Cambridge UK: Cambridge University Press, 2010) [Welke].
[93] Jacobus tenBroek, "The Right to Live in the World: The Disabled in the Law of Torts" (1966) 54:2 Cal L Rev 841 at 918.

American legal scholar Barbara Young Welke provides another approach of disability legal history in her 2010 book, *Law and the Borders of Belonging in the Long Nineteenth Century United States*.[94] Welke uses the overarching concept of "borders of belonging" to analyze inclusion and exclusion not just in traditional sources of law but also by looking at

> the structures and institutions of law and the lawmakers; the dynamics of social, political, cultural, and economic change over time that shape law and that law also shapes; the exercise of power and the agency of the disempowered; and law's unintended, as well as its intended, consequences.[95]

I share Welke's broader approach to law and her use of a central concept, which in my case is the concept of "the public" and the ways that people with disabilities have not been considered a part of the public, either explicitly or implicitly.

Though it can be difficult for historians to find archives that describe the work of or give a voice to those who Welke describes as "the disempowered", when we are looking at more recent historical periods there is more source material. Particularly since the mid-twentieth century, people with disabilities have made concerted efforts to record themselves and their nondisabled allies in academia and advocacy organizations have also become vigilant in recording disabled peoples' stories.[96] Not only do I use these sources throughout my thesis but I also contribute to this project by adding to the historical record with my own experiences and those of the disability activists that I interviewed. The narrative approach, as set out in R. Blake Brown's taxonomy of legal history methodologies, has several strengths:

> it provides insights into cultural forces affecting law; it offers a sense of the law in action…; it clarifies the relationship between legal and non-legal systems of norms…;

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[94] Welke, *supra* note 93.
[95] *Ibid* at 18.
[96] The Eugenics Archive, Social Sciences and Humanities Research Council of Canada, online: *Eugenics Archive* <https://eugenicsarchive.ca/>; John Lord, *Impact: Changing the Way We View Disability* (Ottawa: Creative Bound International, 2010) [Lord].

> it presents a source of emphatic understanding and of political illumination and inspiration; and, finally, it is a source of complexity and nuance.[97]

What makes my use of this methodology unconventional is not just that I include my own experiences but that I use several narratives throughout the thesis in order to feature people with disabilities who have exercised political or legal tools to influence the built environment. In Chapter One, I rely primarily on the work of David Lepofsky to describe the impact that people with disabilities have had on anti-discrimination law and provincial disability legislation. The case study at the centre of Chapter Two describes the work of a disability activist group in Montreal, which is based on interviews with the leadership of the group, video footage recorded by the group and local newspaper coverage of the efforts. As legal historian Constance Backhouse writes: historical case studies permit "the pinpointing of the concrete impact of legal rules upon real people at specific times. The thick description of a microscopic event allows a fuller dissection of how the law interacts with the wider social, political, economic, and cultural surroundings."[98] In Chapter Three, I include two narratives that describe the work of people with disabilities to self-organize not only to elevate their voices on disability policy in Canada but also to lobby at the municipal level for the installation of curb cuts. I consider that these narratives, which span from the 1960s up until present day, function not just as legal history narratives but also serve to create accountability between the scholarly project of this thesis and the disability community.

I hope that this thesis project will only be a beginning of creating a world that is designed for the full spectrum of human abilities. The history of for whom we regulate the built

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[97] R Blake Brown, "A Taxonomy of Methodological Approaches in Recent Canadian Legal History" (2004) 34:1 Acadiensis 145 at 152.
[98] Constance Backhouse, *Colour-Coded: A Legal History Of Racism In Canada 1900–1950* (University of Toronto Press: Toronto, 1999) at 15-6.

environment is only one aspect of why people with disabilities have been excluded from the public sphere. Laws that seem neutral because of their technical nature, like those that regulate building design, may create privilege for those who fit into a particular definition of normal. Uncovering these hidden ways that ableism pervades law and policy will be a necessary part of the ongoing work of undoing the marginalization of people with disabilities in Canada.

Chapter One - The History of Regulating the Built Environment in Canada for an Able-Bodied Public

In this chapter I explain the history of the regulations that govern the construction and renovation of buildings in Canada. Prior to the 1940s, this type of regulation took the form of municipal bylaws only. As a result, the rules differed even in neighbouring towns because there were no efforts at the federal or provincial level to standardize these bylaws. The federal government decided that this approach was unsatisfactory and so, in 1941, it published a model code for the municipalities and the provinces, the *National Building Code of Canada*.[99] Over the past 75 years the federal government has also drafted model codes in the areas of plumbing, fire, farms and energy, amongst many others.[100] Because of the federal-provincial distribution of legislative powers, these model codes must be adopted by the provinces and municipalities to become law.

The absence of almost any legal scholarship on construction codes in Canada, or internationally, might imply that this subject is irrelevant to a legal audience and entirely within the scope of construction industry experts, such as architects or engineers. However, for individuals with disabilities, the effects of construction codes are an everyday challenge. One step at the entrance to a building can completely exclude all wheelchair users or the absence of Braille signage can deprive a blind person of their independence. More alarming is that if there are no visual cues for a fire or carbon dioxide alarm, someone who is deaf might not know that

[99] National Research Council of Canada, *National Building Code of Canada*, (Ottawa: National Research Council of Canada, 1941) [NBC 1941].
[100] National Research Council Canada, "Historical Editions of Codes Canada publications" (28 March 2019) online: *National Research Council* <www.nrc-cnrc.gc.ca/eng/publications/codes_centre/historical_codes_titles.html>.

they need to evacuate a building. The reason that people with disabilities cannot safely or independently navigate the built environment is because provincial building codes either do not require such design features or they provide vast exemptions from the application of accessible standards for certain types of buildings, usually based on the building's age. Disability scholarship tends to focus on the physical design problems, *i.e*. the step, which results from how the social model of disability frames every disadvantage that persons with disabilities experience as a "barrier". I propose that to properly address inaccessibility from the legal perspective we must go deeper than just conceptualizing the step as a "barrier" and look at the rules, like provincial building codes, that govern the design features in the built environment and privilege the able-bodied public. In this chapter, I will explain the importance of understanding the history of building regulations and their impact on people with disabilities.

It is uncontroversial to assert that the built environment has been designed for able-bodied users.[101] The fact that law still endorses the inaccessibility of the built environment in Canada sends a strong message about the inherent dignity of people with disabilities particularly because of Canada's relative wealth and purported commitment to human rights. Looking at construction codes as a reflection of societal values is a relatively new idea emerging out of architectural and urban planning scholarship on the concept of "spatial justice".[102] American scholar Barbara Brown Wilson looks at historical examples such as the civil and disability rights movements as evidence of the way rules about the built environment evolve in response to demands from marginalized populations.[103] Wilson argues that, just like civil rights activists and

[101] D N Henning, "Consideration of the physically disabled" (1971) CBD-135:3 Canadian Building Digest 1 at 1.
[102] Steven A Moore & Barbara B Wilson, *Questioning Architectural Judgment: The Problem of Codes in the United States* (New York: Routledge, 2014).
[103] Wilson, 2010, *supra* note 69.

the disability community in the United States, the environmental movement might also lobby for changes to building codes with a view to ameliorate the effects of climate change.

Wilson's arguments are predicated on the unique history of the disability community's activism in the United States, which culminated in passage of the *Americans with Disabilities Act* of 1990 (*ADA*).[104] The *ADA* provides specific minimum standards for constructing or renovating accessible buildings and it created enforcement mechanisms to ensure compliance. Canada has no such federal legislation. Instead of changes to construction codes, exclusion from the built environment is treated on a case-by-case basis as a matter for courts, commissions or tribunals applying human rights law. This approach addresses the specific problems of one complainant and their problems with a particular building rather than the underlying regulations that permit the construction of barriers in the first place or allow these barriers to continue unchecked.

In her work on spatial justice, Wilson argues that if construction codes do not evolve with societal values they can perpetuate historical injustice.[105] In Canada, if provincial law continues to endorse inaccessibility in the built environment it perpetuates the historical wrong of segregating people with disabiltities from public life. Legal scholarship on the subject of disability in Canada often focuses on the United Nations *Covenant on the Rights of Persons with Disabilities* and on the guarantees provided in the *Charter of Rights and Freedoms* or the provincial and federal human rights codes.[106] Despite the substantial impact of built environment on the lives of persons with disabilities,[107] the regulations that govern construction have not

[104] *ADA, supra* note 24.
[105] Wilson, 2010, *supra* note 69.
[106] See, for example, Prince, *supra* note 36; Laverne Jacobs, "An Introduction to Exploring Law, Disability, and the Challenge of Equality in Canada and the United States: Papers from the Berkeley Symposium" (2015) 32:1 Windsor Y B Access Just at 1.
[107] David B Gray, Mary Gould & Jerome E Bickenbach, "Environmental Barriers and Disability" (2003) 20:1 J Architectural Plan & Research 29.

received sufficient scholarly attention. As I will explain in more detail in Chapter Three, human rights complaints are required to address a specific barrier in the built environment and challenge provincial building code itself or a potential barrier based on building plans. An understanding of the history of building regulations in Canada undermines a legal approach that solely focuses on the existence of a physical barrier. Not only is such an approach inefficient because it requires complainants to wait for the construction of a barrier, but it misunderstands the truly legal nature of the problem of inaccessibility as a consequence of prioritizing the ways able-bodied people mobilize in the built environment.

The history of regulation of the built environment in Canada supports the conclusion that human rights complaints and *Charter* litigation are not sufficient to remedy the ways that the built environment excludes persons with disabilities. At their origin, building regulations were only for the benefit of able-bodied people. Because of this, any subsequent amendments to building codes meant to improve access in the built environment for people with disabilities were an afterthought. The subordinate status of what became known as "barrier-free" or "accessible" building standards stands in contrast to other types of additions to building codes such as earthquake or fire safety related provisions. While all buildings must be safe for able-bodied people, the provisions regarding accessible standards are only required sometimes for new buildings or when some types renovations are conducted. This exceptional status for barrier-free standards reflects the history of treating accessibility as optional and failing to consider the safety of people with disabilities as part of the overall objective of public safety.

In this chapter I will provide a history of building regulations in Canada and explain how they have privileged able-bodiedness. First, I describe how the federal government's housing policy in the 1930s and 40s led to the creation of Canada's first *National Building Code*. Next, I

recount the federal government's first attempt to provide accessible building standards in 1965 and emphasize the subordinate status of these standards. I also compare the Canadian experience to the evolution of regulation on accessibility in the United States. Instead of taking the American approach of legislating federally to mandate accessible buildings, the debates on the creation of provincial human rights codes and the *Charter* channelled the energies of disability rights activists into lobbying for the addition of disability as a prohibited ground of discrimination. I focus on the province of Ontario because of the availability of records of the work that has been done there. I conclude with a review of recent provincial legislation, such as the *Accessibility for Ontarians with Disabilities Act*, which has been an attempt to systemically remove barriers in the public and private sector, rather than leaving this to human rights complaints and *Charter* litigation alone.

My research on the history of Canadian building codes and disability will make several original contributions to the academic literature. First, there is little legal scholarship on the regulation of the built environment in Canada, and none on the history of the *National Building Code*. Second, I identify how, in the past, construction regulation in Canada has been relegated to the realm of technocracy, rather than being considered part of a legal structure that determines who may or may not be in public space. Finally, my research will help explain why the built environment is a different experience for people with disabilities in Canada as compared to the United States. Even though there is new federal legislation, the *Accessible Canada Act*, there remain no national requirements or enforcement mechanisms for accessibility in the built environment.

The Origins of Federal Housing Policy

The federal government enacted the *Dominion Housing Act* of 1935 to respond to housing shortages and poor conditions following the Great Depression.[108] This was the federal government's first time legislating in the area of housing and even though this type of regulation is a matter under provincial jurisdiction, the federal government considered it appropriate to address the problems in this area at a national level because of the housing crisis, Further, as I describe below, the banking industry was heavily involved in drafting the legislation and banking is under federal jurisdiction.

During the parliamentary debate of the proposed legislation, the Minister of Finance stated that its purpose was, in particular, to increase housing for poor people and create working class jobs in the construction industry.[109] This promise was a response to demands from construction unions, architects, social workers and parts of the building industry for subsidized low-income housing.[110] In 1933, the Canadian Construction Association, the Canadian Manufacturers Association, and representatives from the engineering and architectural professions created the National Construction Council to lobby for new legislation.[111] This group prepared surveys and reports on housing throughout Canada and argued that a new housing program would ameliorate some of the problems of unemployment during the Great Depression, improve access to low income housing and address poor housing conditions.[112]

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[108] John C Bacher, "Canadian Housing 'Policy' in Perspective" (1986) 15:1 Urb Hist Rev 1 at 5 [Bacher, 1986].
[109] *House of Commons Debates*, 17-6, No 4 (23 June 1935) at 3910 (Right Hon Sir George Perley).
[110] John C Bacher, *Keeping to the Marketplace: The Evolution of Canadian Housing Policy* (Montreal: McGill-Queen's University Press, 1993) at 66 [Bacher, 1993].
[111] J David Hulchanski, "The 1935 Dominion Housing Act: Setting the Stage for a Permanent Federal Presence in Canada's Housing Sector" (1986) 15:1 Urb Hist Rev 19 at 22 [Hulchanski].
[112] *Ibid*.

Historians argue that the *Dominion Housing Act* actually ended up being quite conservative legislation aimed at improving market conditions.[113] The federal government ultimately adopted the approach advocated by Deputy Minister of Finance, William Clifford Clark, to use housing legislation as an "economic stimulant" rather than addressing the social problems of the need for low-income housing.[114] Not only did banks aid in drafting the law, but the government also directly sought their approval before even tabling the legislation in the House of Commons.[115] Rather than providing specific measures to increase low rent housing, the law supported home ownership by allowing lower down payments and giving the federal government the ability to make joint mortgage loans with approved financial institutions.[116] The *Dominion Housing Act* did require the federal government to study how to provide low-rent housing, but Prime Minister Bennett never filled the appointments to the committee meant to study the issue.[117]

Several groups, including municipalities, labour unions, architects, engineers, and members of the construction industry were dissatisfied with the *Dominion Housing Act* and immediately pushed for new legislation to replace it.[118] Three years later, in 1938, the *National Housing Act* replaced and expanded the provisions of the previous law, but continued to ignore low-income housing. In fact, the same individuals, Deputy Minister of Finance Clark and Thomas D'Arcy Leonard of the Dominion Mortgage and Investment Association, drafted both pieces of legislation. Part Two of the *National Housing Act* provided for increased rental housing

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[113] John C Bacher, "W. C. Clark and the Politics of Canadian Housing Policy, 1935-1952" (1988) 17:1 Urb Hist Rev 4 at 5 [Bacher, 1988]; John Belec "Origins of State Housing Policy in Canada: The Case of the Central Mortgage Bank" (1984) 28:4 Can *Geographer* 377 at 380.
[114] Hulchanski, *supra* note 112 at 24.
[115] Bacher, 1988, *supra* note 114 at 5.
[116] Bacher, 1986, *supra* note 109 at 7; Jean Dupuis, "Federal Housing Policy: An Historical Perspective" (Ottawa: Parliamentary Research Branch, 2003) at 1.
[117] Bacher, 1986, *supra* note 109 at 7.
[118] Bacher, 1988, *supra* note 114 at 8.

for low and moderate-income families, but this initiative was suspended during World War II before any public housing could be produced.[119]

John Bacher has written the most thorough historical accounts of housing policy in Canada and he critiques the federal government's housing policies for failing to achieve their stated purpose of improving access to low-income housing. He argues that the government's actual and unstated aim was to create better conditions for the free market to operate and allow private businesses, insurance and loan companies to meet public need for housing.[120] Bacher goes so far as to assert that the actual effect of housing policy from 1935 to 1964 was to direct government funding towards those who could afford home ownership rather than the poor who needed public low-rent housing.[121] Ultimately only the top 20% of households in Canada could afford the housing produced under this legislation.[122] The federal government's housing policy did not actually lead to the provision of low income housing until 1964 amendments to the *National Housing Act*.

The federal government's foray into housing policy, which coincided with World War II, could have presented an opportunity for Canadian policy to address the connection between the built environment and persons with disabilities. Many veterans, who had acquired disabilities in combat, returned home and had the federal government's attention and respect, which had never been afforded to people with disabilities before. However, instead of addressing issues in the built environment, like access to housing for people with disabilities, the federal government formed the Sub-Committee on the Retraining of Special Casualties between 1940 and 1944 to

[119] *Ibid*.
[120] Bacher, 1988, *supra* note 109 at 5.
[121] *Ibid* at 4 and 11.
[122] Bacher, 1993, *supra* note 111 at 66.

get disabled veterans back into the workforce.[123] As I explain in the next section, the goal of employment for people with disabilities surpassed all other federal policy objectives in this area from the 1940s to the 1960s.

In the next section I describe how the federal government's involvement in housing policy led to Canada's first *National Building Code*. As noted previously, even though the federal government couched the legislative purpose of the *National Housing Act* in promises of low-income housing, its actual goal was to improve access to mortgages with the close involvement of the banking industry. The project of a model building code is likewise best understood as fitting into the larger aim of aiding market forces by serving the needs of the construction industry.

The National Building Code Project

The justification for standardized building code across Canada was the growing concern about the negative economic consequences of highly varied regulations for the construction industry in the 1930s. The provinces had delegated the power to draft building bylaws to the municipalities in the 1890s and for this reason there were many regional differences between even neighbouring cities and provinces.[124] The bylaws regulating the construction industry often grew out of local conditions. In Toronto, for example, city architects looked to a model code from New York City.[125] Some communities in Canada did not regulate the construction industry at all.[126]

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[123] Mary Tremblay, "Going Back to Main Street: The Development and Impact of Casualty Rehabilitation for Veterans with Disabilities, 1945–1948" in Peter Neary and J L Granatstein, eds, *Veterans Charter and Post-World War II Canada* (Montreal: McGill-Queen's University Press, 1998) at 161.
[124] Jeroen Van Den Heijden, "One task, a few approaches, many impacts: Private-sector involvement in Canadian building code enforcement" (2010) 53:3 Can Pub Admin 351 at 354.
[125] "New Building Code, A Guide for Toronto" *The Globe* (29 April 1912) 8.
[126] NBC 1941*, supra* note 100 at 3.

During parliamentary debate of the *Dominion Housing Act*, some argued that the variations in municipal construction codes were a burden on the construction industry and hindered innovation.[127] This argument was impactful because of the federal government's interest in improving conditions for the housing market. A national building code would not only improve the safety and quality of buildings but would also "address existing deterrents to technical progress and barriers to construction productivity."[128]

The period of debate surrounding the *Dominion Housing Act* was not the first time a national building code had been considered. In 1922, a national code was debated within the federal government to assist municipalities in drafting regulations and to improve building conditions across the country.[129] However, this idea was not sufficiently motivating until the federal government had a stake in the housing market in the late 1930s. The federal government's involvement in housing policy, particularly its role in funding mortgages, provided the financial incentive to concern itself with the safety and financial success of housing construction.[130] Further, improving housing conditions was intended to save money on expenses related to fire damage, police services and hospitalizations.[131] Beyond housing policy alone, the federal government's interest in the construction industry was based on the fact that it was Canada's largest industry at the time.[132]

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[127] A D Wilson "Canadian Housing Legislation" (1959) 2:4 Can Pub Admin 214 at 216 [Wilson, 1959]; J W Archer, *A Brief History of the National Buildings Code of Canada* (Ottawa: National Research Council, 2003) at 1 [Archer, 2003].
[128] J W Archer, *Building codes - why are they developed?* (National Research Council of Canada, 2003) at 3.
[129] A F Gill, *A National Building Code* (Ottawa: National Research Council, 1937) 1 [Gill].
[130] Wilfred Eggleston, *National Research in Canada: The NRC 1916-1966* (Toronto: Clarke, Irwin & Company, 1978) at 337 [Eggleston].
[131] Bacher, 1993, *supra* note 111 at 67.
[132] L W Gold & J K Richardson, *The code development and writing process* (Ottawa: National Research Council, 1984) 100 [Gold & Richardson].

The federal government tasked the National Research Council (the "NRC") with drafting a national building code in December of 1937. The NRC had been established in 1917 as the Honorary Advisory Council for Scientific and Industrial Research, following the example of Great Britain, as an attempt to keep up with Germany's scientific advancements during World War I.[133] This building code project was, in part, a product of the NRC's own research but was also based on the American experience, just as municipalities, like Toronto, had looked to American cities for model building code in the early 1910s.[134] The NRC identified the main functions of a building code as:

> (1) The provision of a safety factor in structural design. (2) The provision of adequate safeguards against fire, both in plan and construction. (3) The provision of the minimum requirements respecting sanitary conditions and health safeguards in the light of the knowledge available.[135]

This focus on the importance of building codes for the safety and health of building users, *i.e.* the public, shifted the tone of the model code project away from the exclusively economic considerations of the federal government and the construction industry. The NRC also argued that the federal government's investment in the research and drafting of a model code would serve municipalities by improving on their local building code or providing one where none existed at all – thereby working towards uniformity throughout the country, which was the goal of the federal government and the construction industry.[136]

Having been delayed by the beginning of World War II, the NRC took four years to complete Canada's first *National Building Code* for publication in 1941. The document was organized into five parts: administration (including inspection and enforcement), definitions,

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[133] *House of Commons Debates*, 12-7, No 4 (30 July 1917) at 3905 (Sir George Foster).
[134] Wilson, 1959, *supra* note 128 at 216.
[135] Gill, *supra* note 130 at 3.
[136] *Ibid*.

structural construction requirements, fire protection, and health/sanitation.[137] One way of organizing a model code is by occupancy types (school, hospital, *etc*.), which was common in the United States, but the National Research Council opted to organize the document by subject (exits, doors, lighting, etc.) so as to keep it shorter by avoiding repetition.[138]

Given this experience with model code drafting, Canada became involved internationally in standardization, creating the United Nations Standards Coordinating Committee in 1944 with the United States and Great Britain as a response to World War II.[139] This organization was a precursor to the creation of the International Organization for Standardization in 1946, which, as I mentioned in the introduction, is now the leading body internationally for research and drafting model codes.[140]

One significant consequence of the federal government's decision to assign the building code project to the NRC was that the project became entirely technocratic, as opposed to a matter for legislators. Further, the focus from the first meeting in 1938 onwards was the research needs of the building industry.[141] This attention to industry rather than the general population, and in particular the poor, parallels the federal government's overall approach to housing policy. Both the *Dominion Housing Act* and the *National Housing Act* were designed to improve market conditions for mortgage companies rather than increase the availability of low-income rental housing, the need for which had been the impetus for the legislation in the first place. A model building code would support this overall economic project. The preparation of the *National*

[137] NBC 1941*, supra* note 100 at 9.
[138] Ibid.
[139] Willy Kuert, "The Founding of ISO: 'Things are Going the Right Way'" in ISO Secretariat, *Friendship Among Equals: Recollections from ISO's first fifty years* (Geneva: ISO, 1997) 13 at 16.
[140] *Ibid* at 15.
[141] Eggleston, *supra* note 131 at 329.

Building Code was a joint project between the NRC and the Department of Finance.[142]Just as mortgage companies would aid in drafting the *Dominion Housing Act* and the *National Housing Act*, members of the construction industry would make up the majority of those drafting the *National Building Code*.[143]

The NRC created its Division of Building Research in 1947 to address the housing shortages following World War II. Construction had been halted during the war to focus on national defence and the return of veterans.[144] The Division of Building Research was explicitly created as a research and information service to support the construction industry.[145] The staff included chemists, physicists, a climatologist, a geographer, soil scientists, engineering physicists, chemical engineers, ceramic experts, civil, mechanical and electrical engineers, and a former fire chief.[146] The NRC also appointed an Advisory Committee composed of university researchers, architects, engineers, builders and construction executives.[147] The Division of Building Research was created "to bridge the gap between the men in the laboratory and the men engaged in the building industry."[148]

In 1948 the NRC formed an Associate Committee on the National Building Code to update the Code and get broad input.[149] The Committee was composed of volunteers from the construction industry, enforcement bodies and "other [*National Building Code*] users", which is not defined.[150] In turn the Committee created standing committees of experts to advise on

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[142] National Research Council of Canada, Division of Building Research, *The First 25 Years: 1947 to 1972* (Ottawa: National Research Council, 1973) 2.
[143] Archer, 2003*, supra* note 128 at 2.
[144] Eggleston, *supra* note 131 at 329-30.
[145] Gold & Richardson, *supra* note 133 at 100.
[146] Eggleston, *supra* note 131 at 334.
[147] *Ibid* at 335.
[148] *Ibid* at 338.
[149] National Research Council, "How the national codes are developed", (26 March 2019), online: *National Research Council*, <www.nrc-cnrc.gc.ca/eng/solutions/advisory/codes_centre/codes_developed.html>.
[150] Gold & Richardson, *supra* note 133 at 98.

technical matters.[151] There was a close relationship between the Associate Committee's work on revising the Code and the Division of Building Research, which was created to serve the interests of the construction industry. The Director of the Division of Building Research was originally also the Chairman of the Associate Committee.[152] In fact, there were concerns raised at the time about the Division exerting undue influence on the Associate Committee.[153]

Of course, given that the *National Building Code* provides minimum standards for safe construction, it could never be drafted or reviewed completely by non-experts. However, the long-term social and political effects of this model code were not considered at the time that the project was initiated. The model code was drafted in such a way that it could be adopted *in toto* by legislators.[154] This meant that there was significant deference to experts and not elected officials on what would become the substance of building code legislation. However, this expertise was largely composed of construction industry insiders. In fact, the membership of the committees involved in drafting and revising the *National Building Code* was almost exclusively composed of representatives from the construction industry.[155] The legacy of the government's original approach to the building code project is that even today the benefits of construction codes are exclusively put in term of their value to the economy and, in particular, the construction industry.[156]

It took several decades after the first publication of the *National Building Code* for provinces to adopt the *NBC* into law. During the 1950s and 60s provinces continued to leave building regulation as a municipal responsibility just as it had been before the *National Building*

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[151] *Ibid*.
[152] Robert F Leggett, *The National Building Code of Canada, A General Review* (Ottawa: National Research Council, 1966) at 4 [Leggett].
[153] Gold & Richardson, *supra* note 133 at 101.
[154] NBC 1941*, supra* note 100 at 10.
[155] *Ibid* at 5-8.
[156] J W Archer, *Canada introduces "objective based" codes* (Ottawa: National Research Council, 2005) at 1.

Code was drafted. By 1966 eighty percent of Canadian cities had adopted some or all of the *National Building Code* into local bylaws.[157] In the 1970s most provinces began to draft their own buildings codes (based on the *National Building Code)* and enacted legislation detailing enforcement of these regulations by officials and inspectors. In Chapter Three I will return to a more detailed discussion of building code enforcement. For now, I will emphasize the timeline of when the federal government began drafting model code and when that code became provincial law. This process took decades and had a significant impact on how minimum barrier-free standards became legal requirements. Today, all of the provinces have adopted all or most of the *National Building Code* into law and the most recent edition was published in 2015.[158] On average, it takes between one to five years for new editions of the *NBC* to be adopted by the provinces and municipalities.[159]

Before I explain the introduction of barrier-free standards into Canada's *NBC,* I want to briefly contrast the Canadian experience with the origins of building regulation in the United States. In Canada the federal government initiated the research and drafting of a national building code. In the United States, the national building code project was led by the insurance industry. In 1905, the National Board of Fire Underwriters, an insurance industry association, published the first model code in the United States, over forty years before any such project in Canada.[160] In 1921, the federal Department of Commerce created a Building Code Committee to respond to the inefficiencies of the wide variety of building regulations across the United States.[161] Instead of a national model code, the Committee decided to deal with important topics

[157] *House of Commons Debates*, 27-1, No 10 (17 November 1966) at 10,0021 (Thomas Speakman Barnett).
[158] Gold & Richardson, *supra* note 133 at 98.
[159] *Ibid.*
[160] David Listokin & David B Hattis, "Building Codes and Housing" (2005) 8:1 Cityscape 21 at 25 [Listokin & Hattis].
[161] Gill, *supra* note 130 at 8.

one by one and create recommendations for plumbing and fire resistance, for example.[162] Thereafter, three private organizations drafted building codes in three different regions of the United States: the International Conference of Building Officials in 1927, the Southern Building Code Congress International in 1945 and Building Officials and Code Administrators International in 1950.[163] In 1982 the US federal government issued a policy (which became law in 1995) requiring federal agencies to adopt and use standards developed by private standards development organizations, rather than drafting its own model building code.[164] The three regional building code organizations merged in 1994 in order to better serve the federal government's need for uniform standards.[165] However there continues to be much diversity across the United States regarding applicable codes between and within each state.[166]

While there is not scholarship directly comparing the building code projects in Canada and the United States, the fact that the project in Canada was entirely initiated and conducted by the federal government suggests that there was more potential for it to secure input from outside the construction industry. Yet, as I explained above, even into the 1970s the NRC identified the work of the Division of Building Research, including the *National Building Code*, as a service to the construction industry. Even though the American building code project began with the private insurance industry (and continues to be dominated by private standards organizations), lawmakers in the United States started as early as 1968 to address issues of physical accessibility with federal legislation that required certain minimum standards of accessibility, first in federal buildings and then in all public buildings. The Canadian approach, detailed in the next section,

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[162] *Ibid* at 8-9.
[163] Listokin & Hattis, *supra* note 161 at 27.
[164] Tyler RT Wolf, "Existing in a Legal Limbo: The Precarious Legal Position of Standards-Development Organizations" (2008) 65 Wash & Lee L Rev 807 at 812.
[165] Roberto Leon & Jim Rossberg, "Evolution and Future of Building Codes in the USA" (2002) 22:2 Structural Engineering Int 265 at 265.
[166] *Ibid* at 265-266.

was that the NRC drafted a guide for accessible design in 1965 that only became enforceable law decades later in the late 1970s and early 1980s.

The Introduction of Barrier-free Design Standards into the National Building Code

In the 1940s, when the NRC was developing the first editions of the *National Building Code*, people with disabilities were generally segregated from public life in institutional settings.[167] Neither the *Dominion Housing Act* nor the *National Housing Act* contained any provisions regarding the housing needs for people with disabilities. Both of the World Wars had presented the opportunity for the federal government to consider this issue, because of the many veterans returning from war with disabilities. However, the federal government's policy on veterans was largely focused on rehabilitating veterans to resume their lives in an environment designed for able-bodied people.

In 1918, after World War I, the federal government created the Department of Soldiers Civil Re-establishment and the Invalided Soldiers Commission to provide retraining and pensions for disabled soldiers. The Commission issued a report on the federal government's efforts to rehabilitate veterans and find suitable jobs for them based on their type of disability.[168] The report describes the rehabilitation process as a new form of training for these former soldiers. For example, those with injuries causing blindness were sent to a program in England or to the School for the Blind in Halifax for up to a year of training.[169]

In 1947 the Department of Veterans Affairs produced the first general report in Canada on disability, *The Rehabilitation Needs of the Crippled and Disabled*.[170] Rather than addressing

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[167] Jean-Rémi Champagne, "Canadian action on handicapping environments" (1988) 2:3 Health Promotion Int'l 305 at 306 [Champagne].
[168] *Report of the work of the Invalided Soldiers' Commission* (Ottawa: Government of Canada, 1918).
[169] *Ibid* at 29-30.
[170] William Boyce et al, *Seat at the Table: Persons with Disabilities and Policy Making* (Montreal: McGill-Queen's University Press, 2001) at 17 [Boyce].

any changes required in the physical environment or government policy, the report focused on the concept of "self-emancipation" or how to get people with disabilities, and particularly veterans, back into the workforce.[171]

During the 1950s and 60s the federal government began to pass legislation and create programs designed to extend the benefits of veterans with disabilities to the broader disabled community. The federal government created the National Advisory Committee on the Rehabilitation of the Disabled in 1951 following a national conference on rehabilitation held that year.[172] The Committee recommended federal laws and policies intended to reduce or eliminate disabilities altogether and to help people with disabilities enter the workforce. These included: The Medical Rehabilitation Grant, the *Disabled Persons Allowance Act*, the *Blind Persons Act*, the Vocational Rehabilitation of Disabled Persons program and the *Co-Ordination of Rehabilitation Services Act.*[173] All were aimed at the goal of training people with disabilities for employment without attention to the issue that, without changes to the physical environment, there would be few places where people with disabilities could find work.

One approach to rehabilitating and providing employment for people with disabilities was the use of sheltered workshops.[174] These workplaces adopted a model of "work as therapy" for disabled people that had been in use in institutional settings in Canada since at least the 1870s.[175] For war veterans the workshops were meant to be a temporary setting that would provide them with the skills to reintegrate into the labour market. Beginning in the 1960s, many institutions for people with disabilities began to close down and so sheltered workshops became

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[171] *Ibid* at 18.
[172] Campbell, *supra* note 37 at 58.
[173] Boyce, *supra* note 171 at 18.
[174] Dustin Galer, "'A Place to Work Like Any Other?' Sheltered Workshops in Canada, 1970-1985" (2014) 3:2 Can J Disability Stud 1 [Galer].
[175] *Ibid*; Geoffrey Reaume, *Remembrance of Patients Past: Life at the Toronto Hospital for the Insane, 1870-1940* (Toronto: University of Toronto Press, 2009).

a means to provide community support to those who had spent the majority of their lives in an institution.[176] Even if these workshops provided the physical conditions for people with disabilities to work, they were not meant to actually provide participants with the financial means to support themselves. By the 1980s media and government investigations that were prompted by disability activists revealed that these workshops were paying people with disabilities much less than minimum wage.[177]

Those disabled people who sought to support themselves by integrating into mainstream educational and workplace settings in the decades following World War II had to adapt to the physical environment rather than the other way around. In the 1950s, Marilyn Noell, one of the first wheelchair users in Canada to attend university, was routinely carried up and down stairs by student volunteers in order to reach her classrooms.[178] Reflecting on her undergraduate experience decades later, Noell described the mentality at the time:

> I had to adapt to whatever there was…Changing things for me was not in anybody's head, including my own…there was no thought of capital expenditure or anything.[179]

Noell's university only installed elevators after she graduated and they did so for the purpose of moving pianos.

Eventually, organizations involved in advocacy for persons with disabilities sought to convince lawmakers that the physical environment ought to be accessible for persons with disabilities. The Canadian Rehabilitation Council for the Disabled, established in 1962, led efforts to encourage the federal government to draft accessibility standards and add them to the

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[176] Galer, *supra* note 175 at 13.
[177] Sheltered workshops that pay less than minimum wage still operate in Canada for people with intellectual disabilities.
[178] Mary Tremblay, "Locomotion" in Mary Ann McColl & Jerome E Bickenbach, eds, *Introduction to Disability* (Philedelphia: WB Saunders Co, 1998) at 112.
[179] *Ibid.*

National Building Code.[180] However, the NRC did not yet have the technical knowledge of what changes would be required. The model building code project originated as an economic project and the Division of Building Research at the NRC had only considered the safety of able-bodied people when researching and drafting standards. As a result, in 1963 the National Research Council created the Standing Committee on Building Standards for the Handicapped to begin research and consultation on design standards.[181] At this point the goal was to determine what exactly these standards should be rather than going so far as to make them mandatory. As I explain below, these design standards began as advisory only.

The Standing Committee on Building Standards for the Handicapped looked to four sources for guidance: the American Standards Association's 1961 "Specifications for Making Buildings and Facilities Accessible to and Usable by the Handicapped" (which I will discuss further below), Selwyn Goldsmith's 1963 *Designing for the Disabled*, an American textbook published in 1959, *Rehabilitation Center Planning,* and a 1961 Swedish study on urban environments and disability.[182] The Standing Committee produced a 25-page document that first appeared in the 1965 edition of Canada's *National Building Code* as "Supplement 7: Building Standards for the Handicapped". While the primary focus of these standards was making buildings accessible to wheelchair users, there were a few provisions at the end of the document describing the importance of eliminating obstructions that could injure those with visual impairments and explaining the audio and visual signals that could assist those with sensory related disabilities in emergency evacuations.[183]

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[180] Robert McDonald, "The handicapped help Canada grow", *Toronto Daily Star* (12 July 1965) at 20.
[181] *House of Commons Debates*, 30-3, No 2 (12 December 1977) at 1785 (Ralph Wesley Stewart).
[182] National Research Council, *Building Standards for the Handicapped, 1965: Supplement No. 7 to the National Building Code of Canada* (Ottawa: National Research Council, 1965) at 3 [*Building Standards for the Handicapped]*.
[183] *Ibid* at 18.

The "Building Standards for the Handicapped" represented a significant departure from the types of design standards that had historically been included in the *National Building Code*. As I explained above, the model building code project at the National Research Council had been part of its overall objective to assist the construction industry and improve the quality of buildings. By contrast, the purpose of the "Building Standards for the Handicapped" was "to make public buildings accessible to and usable by the physically handicapped without assistance."[184] The barrier-free standards were the first additions to the *National Building Code* that addressed the needs of a potential user, in this case people with disabilties, as opposed to economic considerations.

Another significant difference of the efforts to add barrier-free design to the *National Building Code* was the leadership within the National Research Council working on this project. Rather than being a construction industry insider or other technical expert, the Chairman of the Standing Committee on Building Standards for the Handicapped, Ian Campbell, had a long career advocating for the rehabilitation of disabled people. From 1939 to 1941 he organized and administered the Rehabilitation Department of the Workmen's Compensation Board and in 1951 he represented Ontario on the National Advisory Committee on Rehabilitation of the Disabled.[185] In 1952 the federal Department of Labour appointed Campbell as the National Coordinator for Civilian Rehabilitation in Canada. In his role as the national coordinator during the 1950s, Campbell campaigned throughout Canada to encourage employers to hire people with disabilities.[186]

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[184] *Ibid* at 5.
[185] Obituary of Ian Campbell, *Ottawa Citizen* (23 May 2002), online: *Ottawa Citizen*, <www.legacy.com/obituaries/ottawacitizen/obituary.aspx?n=ian-campbell&pid=138256431>.
[186] "Nation-wide Support Urged for Disabled" *Winnipeg Free Press* (28 August 1952) at 10; "Prefer Jobs to Pension for Disabled" *The Windsor Star* (6 May 1954) at 19.

The Standing Committee on Building Standards for the Handicapped originally had 14 members, including Ian Campbell as Chairman. Since these members are listed in the "Building Standards for the Handicapped" by the last name and first initial(s) only, *e.g.* C.N. Bennett, and there are no publicly available documents providing their full names and biographies, I have only been able to find background information on 9 of the 14 members:

- Dr. M. C. Peter Cameron, a physiatrist who was the Director of the Department of Physical Medicine and Rehabilitation at Victoria Hospital in London, Ontario;
- K. B. Davison, an architect who was the Department Head at the British Columbia Institute of Technology in Burnaby, British Columbia;
- Michael G. Dixon, an architect at the federal Department of Public Works in Ottawa, Ontario who had survived childhood polio and was an advocate for accessible housing;
- Rita Dottridge, the secretary-treasurer of the Canadian Arthritis and Rheumatism Society (CARS) who also was the longterm personal assistant to the executive director of CARS because of his blindness;
- Frances Howard, a nursing services consultant with the Canadian Nurses' Association, Ottawa;
- Douglas W. Jonsson, the Provincial Architect for Nova Scotia's Department of Public Works;
- Anthony T. Mann, a charter member of the Canadian Paraplegic Association and the Executive Director of its Central Western Division in Winnipeg, Manitoba who was a wheelchair user and disability activist;

- James Melville, the Canadian Military Engineers Colonel Commandant in Ottawa, Ontario who also founded the first workshop in Canada employing disabled soldiers to produce commerative lapel pin poppies; and
- Ethel Clarke Smith, the Executive Consultant of the Canadian Association of Occupational Therapists in Toronto, Ontario who also had expertise on psychiatric institutions.[187]

I could only find two members, Mann and Dixon, who publicly identified as having personal experience with disability. At the annual convention of the Canadian Construction Association in 1965, Robert Leggett, the director of the NRC's Building Research Division promoted the new "Building Standards for the Handicapped" to the construction industry and media in attendance:

> We would hope, for instance, that a few houses in each subdivision wll be specially designed for the handicapped…It wouldn't cost any more if builders knew in advance that features like wider doors were required…We can't understand why we never thought of [building standards for the handicapped] before. There are at least 500,000 handicapped people in Canada. The committee that drew up the supplement numbered two or three members in wheelchairs.[188]

The representation of wheelchair users on the committee helps explain why the "Building Standards for the Handicapped" primarily focused on standards related to the use of buildings by wheelchair users.

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[187] Gordon Goldsborough, "Memorable Manitobans: Anthony Theodore "Tony" Mann (c1921-1996)" (29 December 2018) online: *Manitoba Historical Society* http://www.mhs.mb.ca/docs/people/mann_at.shtml; M C Peter Cameron, "Letters to the Journal" (1965) 93 Can Med A J 278; British Columbia Institute of Technology, *Student information brochure 1964-1965* (Burnaby: British Columbia Institute of Technology, 1964) at 15; Kenneth B Smith, "Man in the News: Housing Role Stressed to Architects by First President from Public Service" *The Globe and Mail* (20 February 1970) B5; Elvira Bangert & Ronald M Laxer, "The Dunlop-Dottridge Lectureship: A Heritage of Excellence" (2018) 28:4 J Can Rheumatology 22 at 22; "Architectural Barriers to the Handicapped" (1964) 60 Can Nurse 282-3; Beaverbrook Art Gallery, online: *Historic Places* <https://www.historicplaces.ca/en/rep-reg/place-lieu.aspx?id=16982&pid=0>; Jacquie Miller, "Poppy primer: Everything you should know about Remembrance Day poppies" *Ottawa Citizen* (4 November 2014) online*: Ottawa Citizen* < https://ottawacitizen.com/news/local-news/all-about-remembrance-day-poppies-how-they-began-how-to-wear-them-and-the-ottawa-connection>; J S Tyhurst, *More for the Mind* (Toronto: Canadian Mental Health Association, 1963).

[188] "Code Considers Handicapped" *The Windsor Star* (27 January 1965) 2.

The other significant feature of the Standing Committee membership was the number of rehabilitation professionals. The post-war rehabilitation approach to the integration of people with disabilities into society focussed on how it would benefit able-bodied Canadians and as a result, the "Building Standards for the Handicapped" similarly emphasized the impact of its design standards on the able-bodied population. Ian Campbell argued that integrating persons with disabilities in society would benefit employers, emphasizing that rehabilitation, including medical treatment and skills training, could permit people with disabilities to "be fitted into the modern industrial setting and [give] performance that may equal, or even exceed, that of the able-bodied."[189] He argued that if private industry cooperated in these rehabilitation efforts they would increase their profitability by "converting liabilities into assets".[190]

The emphasis on the interests of able-bodied people is also found in how the "Building Standards for the Handicapped" frames the problem of inaccessibility: that it hinders disabled people from participating in community life and contributing to the economy.[191] The "Building Standards for the Handicapped" and other literature produced by the National Research Council assumed that the able-bodied would object to the new barrier-free standards on the basis that they would be inconvenient, costly or make buildings more difficult to use – the very opposite of improved market conditions, which was the purpose of drafting model code in the first place.[192] The introduction to the "Building Standards for the Handicapped" contained the assurance that "implementation of the Standards will in no way detract from the normal use of buildings or facilities by those who are not handicapped" and emphasized that these standards would make

[189] "Report from Civilian Rehabilitation Branch" (1956) 56 Labour Gazette 172 at 172.
[190] *Ibid.*
[191] *Ibid.*
[192] *Building Standards for the Handicapped*, *supra* note 178 at 1; R S Ferguson, *The Development of a Knowledge-Based Building Code* (Ottawa: National Research Council, 1974) at 31.

buildings easier and safer to use, for the able-bodied and disabled alike.[193] This defensive tone was a distinctive feature of the Canadian approach to accessible design standards. The source material that was used by the Standing Committee to draft the "Building Standards for the Handicapped" took a very different approach. For example, in his manual *Designing for the Disabled*, Selwyn Goldsmith, the British architect and wheelchair user, wrote that his work "does not attempt to justify its advocacy of special facilities for disabled people in buildings on economic grounds...it relies simply on the democratic principle of equal human worth."[194] As I will explain in the next section in further detail, the American Standards Association similarly framed its design standards in terms of their benefit to people with disabilities rather than how they could benefit the able-bodied.

Though the attention to the interests of able-bodied people was perhaps more of a sales pitch and not meant to devalue people with disabilities, there were many aspects of the first "Building Standards for the Handicapped" that have had a lasting negative impact on the lives of persons with disabilities. These new accessible standards were held at a distance from the main body of the main body of the *National Building Code* and explicitly meant to be a weaker type of standard than those dealing with the safety and useability of buildings by able-bodied people. The subordinate status of the "Building Standards for the Handicapped" was emphasized in the document's introduction:

> As a supplement…this document has no automatic mandatory position when the Code is adopted for use by federal, provincial, or municipal governments.[195]

[193] *Building Standards for the Handicapped*, *supra* note 183 at 1.
[194] Selwyn Goldsmith, *Designing for the Disabled: The New Paradigm* (New York: Routledge, 1997) at 389 [Goldsmith].
[195] *Building Standards for the Handicapped*, *supra* note 183 at 1.

The supplements to the Code were meant to be mere technical details that were subject to frequent revisions.[196] Further, the introduction to the "Building Standards for the Handicapped" describes them as a mere "guide for those interested in the design and construction" of accessible buildings.[197] This language is in stark contrast to how the main text of the *National Building Code* was to be considered. As discussed above, since its first publication in 1941 the National Building Code has been drafted in the form of a bylaw "ready for adoption by any municipality [or province] merely by the insertion of the appropriate name."[198]

Randolph Harding, a New Democratic Member of Parliament, raised the issue of the weakness of the "Building Standards for the Handicapped" in the House of Commons five years after the document was added to the *National Building Code*. He criticized the federal government for failing to implement the "Building Standards for the Handicapped" even in its own buildings.[199] However, given that the Standards had been issued as a guide for interested parties it should not have been surprising that they were not broadly implemented. The Standards were not legislation and the federal government had never made a commitment to implement them in public buildings.

In 1973, Sue-Ann Kirkland, a new graduate of the University of Alberta's Occupational Therapy program, published her thesis, *Architectural Barriers to the Physically Disabled*, with the help of the Canadian Rehabilitation Council for the Disabled.[200] Kirkland (who was mentored by one of the drafters of the "Building Standards for the Handicapped" Anthony T. Mann) argued that "the architectural needs of all degrees of physically disabled people have been clearly

[196] Leggett, *supra* note 153 at 5.
[197] *Building Standards for the Handicapped*, *supra* note 183 at 1.
[198] Leggett, *supra* note 153 at 4.
[199] *House of Commons Debates*, 28-2, No 7 (1 June 1970) at 7587 (Randolph Harding).
[200] Sue-Anne Kirkland, *Architectural Barriers to the Physically Disabled* (Toronto: Canadian Rehabilitation Council for the Disabled, 1973).

defined and standardized…These standards are useless if not applied; the most effective means of ensuring universal application being strict legislative enforcement."[201] Though Kirkland arguably overstated the extent to which standards at the time could have addressed every disabled person's ways of mobilizing, she astutely understood the long term effects of delaying legal status for the "Building Standards for the Handicapped" throughout Canada. She described the "private campaigns aimed at persuading architects, planners and builders to consider the needs of the disabled in their future projects" but warned that the efforts were "insufficient" and would be ultimately be "negligible" without the force of law.[202] The reason for her urgency was predictions at the time in Canada and the United States about the unprecedented growth of cities for the 1970s, 80s and 90s. Kirkland warned

> Unless all governmental bodies immediately provide comprehensive and strictly enforced legislation 'or the successful elimination of architectural barriers, the physically handicapped will suffer the repercussions of this hesitation and lack of foresight for decades.[203]

There was another weakness to the "Building Standards for the Handicapped". As mentioned above, the range of disabilities considered were quite limited in scope. Other than making provisions for audio and visual emergency signals, the first "Building Standards for the Handicapped" dealt only with issues related to individuals with mobility disabilities, in particular, wheelchair users. Standards related to visual impairments were added in the 1985 edition of the *National Building Code* when the accessibility requirements of the supplement were integrated into the primary text.

The accessibility requirements of the "Building Standards for the Handicapped" only began to appear in the primary body of the *National Building Code* in 1975. The first integrated

[201] *Ibid* at 22.
[202] *Ibid.* at 28.
[203] *Ibid* at 28-9.

standards provided that all public buildings (not including apartment buildings, industrial buildings or offices) must have one accessible entrance, wheelchair access to the entire main floor, and an accessible washroom where public washrooms were provided.[204] Without actually creating any legal obligation, by 1977, the federal government was starting to implement some of these standards in its buildings, except for those that were leased out to private entities.[205] Accessibility provisions regarding parking spaces and emergency signals, which were mentioned in the 1965 "Building Standards for the Handicapped", continued to be relegated to a supplement until 1985.

The delay in the addition of barrier-free design standards to the *National Building Code* and their subordinate status as a supplement had significant consequences for the implementation of these standards into law. Some municipalities did adopt provisions related to accessibility within a few years after the publication of "Building Standards for the Handicapped". For example, in 1973, Vancouver adopted a bylaw, "Provisions for the Handicapped," which, after persistent work of advocacy groups, became the forerunner for the provincial standards.[206]

The provinces and territories only started legally requiring certain accessible design standards decades after the publication of the "Building Standards for the Handicapped" in 1965:

[204] A T Hansen, *Accessibility requirements in the National Building Code of Canada 1985* (Ottawa: National Research Council, 1985) at 2.
[205] *House of Commons Debates*, 30-3, No 2 (12 December 1977) at 1785 (Ralph Wesley Stewart).
[206] Government of British Columbia, Office of Housing and Construction Standards, *Building Access Handbook 2014: Illustrated Commentary on Access Requirements in the 2012 British Columbia Building Code* (Victoria: Government of British Columbia, 2014) at iii [*Building Access Handbook*].

Alberta[207] in 1974; Ontario[208] in 1975; Québec[209] 1976, British Columbia[210] in 1979; Newfoundland[211], Yukon, Northwest Territories, Manitoba and New Brunswick in 1981,[212] Prince Edward Island[213] and Saskatchewan[214] in 1988, and Nova Scotia in 1989.[215] In general, building code requirements do not apply retroactively and so any changes to the only take effect in new buildings or in the parts of older buildings that undergo renovations. This means that across Canada most buildings constructed prior to the late 1970s are legally exempt from being accessible to persons with disabilities.

The main reason that building code is not usually retroactive is that it would be far too costly to require every building owner to react to every code revision. The argument is that retroactive application would discourage building owners from conducting renovations at all if the decision to renovate part of a building triggered a legal requirement to bring the entirety of the building into compliance with the latest building code requirements.[216] According to these considerations, the accessible design requirements that the provinces and territories added to their building codes in the 1970s and 80s are the same as any other code revision and therefore

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[207] Government of Alberta, Building Standards Branch, *Alberta Building Code 1974* (Edmonton: Government of Alberta, 1974); Government of Alberta, Alberta Municipal Affairs, Public Safety Division, *The Evolution of Alberta's Public Safety System* (Edmonton: Government of Alberta, 2005) at 19: "The Barrier-Free Design Advisory Committee is established to advise the department on building code issues related to access for persons with disabilities and to assist in the development of the Barrier-Free Design Guide."
[208] Government of Ontario, Ministry of Municipal Affairs, *Building Code Consultation Paper: Accessible Built Environment* (Toronto: Government of Ontario, 2012) at 1.
[209] Mélanie Bénard, "Promouvoir l'accessibilité à l'aide de la loi: un appel à une réforme législative au Québec" (2017) 6:2 Can J Disability Stud 78 at 85.
[210] Government of British Columbia, Office of Housing and Construction Standards, *History of British Columbia Building Regulations* (Victoria: Government of British Columbia, 2015).
[211] *Buildings Accessibility Act,* 1981 c 90 s 1 [*Buildings Accessibility Act*].
[212] Champagne, *supra* note 168 at 311.
[213] Barrier-Free Design Regulations, PEI Reg EC139/95.
[214] Saskatchewan Human Rights Commission, "Accessibility Rights of Persons with Disabilities Building Standards" (2010) online: *Saskatchewan Human Rights Commission* <https://saskatchewanhumanrights.ca/education-resources/information-sheets/building-standards-the-code/>.
[215] *Building Access Act*, RSNS 1989, c 45.
[216] Canadian Commission on Building and Fire Codes, Final Report - Alterations to Existing Buildings (Ottawa: National Research Council, 2020) at 10 [CCBFC].

cannot apply retroactively. However, the primary reason that we revise building code is to reflect technological advancements in building materials and methods.[217] We learn from past mistakes that may have had tragic consequences, like a building collapse or asbestos-related disease. So sometimes older buildings must be upgraded to ensure that they will be safe since "the promotion of public safety" is the primary purpose of the *National Building Code*.[218] However, in practice this means only the safety of able-bodied people. In 1985, when the NRC added barrier-free design standards to the main body of the *National Building Code*, accessibility for persons with disabilities were described as different from "the traditional concerns of health and safety."[219] This was made even more explicit with the introduction of objectives to the 2005 edition of the *National Building Code* – safety, health, accessibility for persons with disabilities, fire and structural protection of buildings – and the environment was added to the list in 2015.[220] The NRC describes the decision for legislators to apply standards retroactively involves weighing the cost of applying a standard, the effects on the level of safety, and "the relative importance of that requirement to the overall Code objectives".[221]

The accessibility of a building is inherently about whether it is safe for a person with disabilities. Yet these design standards are defined in the *National Building Code* as separate from public safety. This means that they are subject to restrictions about retroactive application without qualifying for the exceptions that apply to make older buildings safe for the able-bodied public. It is even more jarring that because accessible design standards do not apply to older

[217] CCBFC, *supra* note 217.
[218] National Research Council of Canada, *National Building Code of Canada*, (Ottawa: National Research Council of Canada, 2015) at 1-15 [NBC 2015]
[219] A T Hansen, Canadian Building Digest, *The regulation of building construction* (Ottawa: National Research Council, 1985) at 2.
[220] *Ibid*.
[221] NBC 2015, *supra* note 219 at 1-15.

buildings. Many buildings are not legally required to include the design features found in the "Building Standards for the Handicapped" when it was first published in 1965. Treating accessibility requirements as if they are the same as any other code revision but yet not inherently about safety, means that people with disabilities must endure exclusion from some public spaces. This even happens in jurisdictions that have the most expansive application of these standards. On a practical level, the fact that older buildings do not have to meet new building code requirements does not change whether able-bodied people can use them. Yet for people with disabilities, the age of a building is entirely determinative of its safety and useability.

The differential impact of the non-retroactive applicability of building codes on people with disabilities is compounded by how few accessible design standards actually became legal requirements in the 1970s and 80s. As I have explained, the "Building Standards for the Handicapped" was an informational supplement to 1965 edition of the *National Building Code* and was not meant to be adopted into law by any jurisdiction. By 1975, when provinces were beginning to adopt or consider barrier-free requirements, the *National Building Code* recommended that public buildings have one accessible entrance, one accessible washroom facility, and an accessible path of travel to public spaces on the entrance floor.[222] All of the requirements pertained to the needs of wheelchair users. The definition of public building in the 1975 edition of the *National Building Code* not only excluded residential buildings (which continue to be exempt from barrier-free standards today) but it also excluded buildings occupied by businesses/personal services, and industrial buildings.[223] The following three editions of the

[222] National Research Council of Canada, *National Building Code of Canada*, (Ottawa: National Research Council of Canada, 1975) at 107.
[223] *Ibid* at 9.

National Building Code gradually expanded the areas of a building that were subject to barrier-free requirements and changed the types of features that would be required:

- 1980 edition – adds a requirement for accessible pathway to one parking level if there is elevator access; changes the requirement for an accessible washroom to only those public buildings where there are more than two toilets;[224]
- 1985 edition – changes the definition of public building so that business/personal service buildings are now included; adds emergency egress; adds requirements for one shower stall; requires barrier-free path of travel on every floor served by an elevator; addition of handrails for blind and disabled people; includes rules about horizontal projections that could impede blind people;[225]
- 1995 edition – adds requirements for assistive listening devices in large classrooms, theatres, and auditoria; requires accessible counter sections, telephones, drinking fountains and parking spaces.[226]

While the broadening of the requirements for barrier-free spaces in public buildings was beneficial to persons with disabilities, the actual impact was lessened by the combination of this gradual approach with the fact that none of these requirements were retroactive. There is no apparent reason why adding accessible standards to the main text of *National Building Code* had to be done gradually. If any new provisions would only apply prospectively, then the reason for moving gradually could not be about the additional costs to building owners.

[224] National Research Council of Canada, *National Building Code of Canada*, (Ottawa: National Research Council of Canada, 1980) at 133.
[225] National Research Council of Canada, *National Building Code of Canada*, (Ottawa: National Research Council of Canada, 1985) at 145-149.
[226] National Research Council of Canada, *National Building Code of Canada*, (Ottawa: National Research Council of Canada, 1995) at 104-110.

Other than the assistive listening devices, none of these substantive changes over the years had anything to do with improved technologies. For instance, even though the 1985 edition of the *National Building Code* prohibits certain horizontal projections, there was no new research in the early 1980s that led to the discovery that these projections can impact the safety and independent mobility of a person who is blind. Obviously the ways that blind people navigate the built environment was no different in 1985 than it was in 1941 when the first *National Building Code* was published. The standards themselves were, for the most part, already in the original "Building Standards for the Handicapped" that was published in 1965. There is nothing inherent to the specifications themselves that connects them to the year in which they were added to the *National Building Code*. The changes to the accessibility provisions in the successive editions of the *National Building Code* appear as piecemeal concessions to the disability community, instead of rational improvements to building code.

The reported cases involving disputes over the accessible standards in building codes illustrate how their gradual introduction did more than just delay when people with disabilities could safely use the built environment. This gradual approach also limited people with disabilities to only certain parts of buildings. As I explained above, the 1975 edition of the *National Building Code* recommended an accessible path of travel to public spaces on the entrance floor. Subsequent editions expanded this path of travel to include floors served by elevators but still contained the proviso that this path was only required in public spaces. In a 1987 case from Newfoundland, the owner of a newly built Zellers department store interpreted the requirements for accessible public spaces in provincial building code to apply only in areas of the building open to customers.[227] The provincial building inspector disagreed with this

[227] *Atlantic Shopping Centres Ltd v Newfoundland (Minister of Labour),* 1988 CanLII 4416 (NL CA) [*Atlantic Shopping* (1988)].

interpretation of the building code and determined that a building permit could not be issued until the office area on the second floor met barrier-free requirements. The court of first instance agreed with the province's interpretation and held that potential employees are members of the public for the purposes of the building code:

> [t]he working public comprises many persons with many skills. The disabled are just as much a part of the working public as any one else. A common sense approach to the workplace must prevail. We are dealing with an office and clerical workplace. If disabled persons are qualified to work at Zellers as managers, clerks, accountants, or cashiers, and if in the course of their employment they must use offices, rest rooms and training rooms within the building, then in my view, they are using these facilities as members of the "working public."[228]

The Newfoundland Court of Appeal allowed the building owner's appeal on the basis that the trial judge erred in his interpretation of the "public" to include employees. In limiting public space to the areas open to customers only, the Court of Appeal relied on other provisions in the provincial building regulations that evidenced the legislature's intention that not all areas of a building would "be available to or accessible by" disabled people.[229] These provisions included the limitations on the application of barrier-free standards to only certain floors of a building and the blanket exemption for private residences.[230] Newfoundland amended its building regulations in 1990 to specifically require barrier-free standards in the areas where "employees employed in the building" have access.[231] Of course this did not have retroactive effect and so the Zellers and any other buildings constructed prior to 1990 did not need to provide accessible workspaces for employees.

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[228] *Atlantic Shopping Centres v. Newfoundland (Minister of Labour) et al.*, 1987 CanLII 5152 (NL SC) at para 39.
[229] *Atlantic Shopping* (1988), *supra* note 228 at para 11.
[230] *Buildings Accessibility Act, supra* note 212 at s 3(b); *Buildings Accessibility Regulations*, 1982 (Rep by 176/92), s 5(d).
[231] *Buildings Accessibility Act*, 1990 c55 s4.

Even if building codes are revised to apply barrier-free standards to workplaces, there other ways that the status of barrier-free standards continues to limit people with disabilities in their use of public space. In 1985, barrier-free standards were incorporated into the main text of the *National Building Code* after twenty years as only a supplement (the 7th) to the main text. Yet, accessible standards are still referred to as separate or "specialty" code.[232] Just as in the *National Building Code*, the provincial and territorial building codes have a separate section for accessible standards, which limits their general application. No jurisdiction adopts the *National Building Code* verbatim and accessible standards are different, in substance and in applicability, depending on where one lives in Canada. For example, in Québec, buildings are exempt from barrier-free requirements in the following scenarios: where the difference in height between the entrance and the main floor is greater than 6 metres, where the sidewalk in front of the entrance is too narrow for a ramp, where the first floor is five or six steps above the exterior road, offices with two floors or less, and commercial establishments with a total area of less than 300m^2.[233] As a result, as I explain in Chapter Two, the design of many buildings in Quebec there is often no obligation to implement barrier-free design features, even in new buildings or in the renovated spaces of old buildings.

There are a few parts of the main text of the National Building Code apart from the section on "Accessibility" that require design features that explicitly described as for people with disabilities, including sections pertaining to fire safety, obstructions in hallways, door hardware, handrails, and colour contrasting or patterning to indicate steps and ramps. Yet, the requirement for visual signals to accompany an emergency alarm limit their applicability to "buildings or portions thereof intended for use primarily by persons with a hearing impairment" or in spaces

[232] Listokin & Hattis, *supra* note 161 at 23.
[233] Government of Quebec, *Normes des conceptions sans obstacles* (Quebec: Government of Quebec, 2010) at 7.

where music, sounds or ambient noise are above 87 decibels, which falls into a category of sounds considered "harmful" because they can cause permanent hearing loss.[234]

Not only are there specific exceptions to barrier-free requirements written into each jurisdiction's building code, but there are also exceptions provided on a case by case basis Building owners can apply for a relaxation or variance of barrier-free requirements on the basis that they are unnecessary or not feasible. In Saskatchewan this type of application is also available if accessible design would "prevent optimum utilization of the land".[235] In 2012 the owners of a private sauna club in Alberta applied for judicial review when their relaxation application was denied.[236] Provincial building officials rejected their application on the basis that even if the facility was not open to people with disabilities (for health reasons), it might become so or the premises might be used for another purpose in the future. The Court held that it was unreasonable for building officials to consider these future possibilities (I will return to this case in greater detail in Chapter Three). People with disabilities are the only type of building users that are singled out in this way and subject to exclusion because of a building owner's economic interests or intentions about who will use their building.

In the next section I will briefly contrast the Canadian approach to barrier-free standards with the approach taken in the United States. One of the biggest differences between these approaches has been the leadership of the United States federal government since the 1960s with legislation that sets minimum requirements and contains enforcement mechanisms.

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[234] NBC 2015, *supra* note 219; "Harmful Noise Levels" Healthwise (2019) online: *Healthlink BC* <https://www.healthlinkbc.ca/health-topics/tf4173>.
[235] Building Standards and Licensing Branch, *Building Standards Guide: Barrier-Free Design* (Regina: Government of Saskatchewan, 2019) at 11. There are no reported cases in a Saskatchewan on a barrier-free exemption so we cannot scrutinize the circumstances in which these exemptions are granted.
[236] *Voropanov v Alberta (Municipal Affairs)*, 2012 ABQB 551 [*Voropanov*].

Barrier-Free Design in the United States

In the United States, government-led initiatives to improve physical accessibility began in the 1960s, which was at the same time as the National Research Council in Canada was researching and drafting "Building Standards for the Handicapped". However, within the same decade that barrier-free standards were first developed in the United States, the American federal government enacted legislation enforcing these standards in all federally owned or leased buildings. As I will explain below, the Canadian federal government has had a policy in place since 1990 that requires federally owned or leased buildings to meet certain minimum barrier-free standards. Yet there remains no federal legislation that implements or enforces this policy. Even the *Accessible Canada Act* contains no such requirement.

The first model code in the United States detailing barrier-free standards, "Specifications for Making Buildings and Facilities Accessible to and Usable by the Handicapped", was issued in 1961 by the American Standards Association (ASA).[237] Though a private organization, the ASA had been tasked with this project in 1959 by The President's Committee on Employment of the Physically Handicapped.[238] The ASA committee drafting the standards was composed of several disability-related organizations but also had representatives from the American Institute of Architects, the American Municipal Association, the Federal Housing Administration, and a number of other governmental, labour, and construction industry groups. This broad initiative contrasts with the Canadian development of accessible standards, which, as I explained above,

[237] Ruth Lauder, *The Goal Is: Mobility! Environmental and Transportation Barriers Encountered by the Disabled* (Washington DC: US Department of Health, Education & Welfare, 1969) at 22 [Lauder].
[238] American Standards Association, *Specifications for Making Buildings and Facilities Accessible to and Usable by the Handicapped* (New York: American Standards Association, 1961) [American Standards Association].

was almost exclusively a project of disability advocacy organizations, led by the Canadian Rehabilitation Council.

Comparing the introduction of the ASA's "Specifications for Making Buildings and Facilities Accessible to and Usable by the Handicapped" with Canada's "Building Standards for the Handicapped" signals some important differences in the Canadian and American approaches to barrier-free standards. While the Canadian "Building Standards for the Handicapped" emphasized that it was merely a guide for those interested in barrier-free design, the ASA's document recommended its use in "the construction of all buildings and facilties and for adoptions and enforcement by administrative authorities [emphasis added]".[239] Further, the two documents describe the benefits of barrier-free standards in very different terms. As I mentioned above, the "Building Standards for the Handicapped" stated that barrier-free design would not negatively impact able-bodied people and that it would actually benefit them by allowing people with disabilities to contribute to the nation's economy. Rather than emphasizing how able-bodied people would benefit from accessibility, the ASA standards emphasized that barrier-free standards would allow people with disabilities to "pursue their interests and aspirations, develop their talents, and exercise their skills".[240] Substantively, the ASA standards included a much broader range of design features than the Canadian "Building Standards for the Handicapped", including a broader user population in terms of disability types.

In 1966 Congress created the National Commission on Architectural Barriers to the Rehabilitation of the Handicapped. Every member of the Commission was experienced with working on barrier-free design. Before issuing their report in 1968 the Commission held public hearings all over the country and of the 40 witnesses representing a variety of interested

[239] *Ibid* at 3.
[240] American Standards Associations, *supra* note 239 at 3.

organizations, approximately 20 of them were from advocacy organizations for disabled people and only four were from the construction industry.[241] The key recommendations of the report were not only that all public buildings must be accessible but also that all construction codes ought to be revised so that privately owned buildings, such as stores and offices would be accessible too.[242] One of the most important constituencies identified in the report was the returning veterans from the Vietnam War, who, due to the nature of the war and medical advances, had acquired debilitating injuries but would be able to lead independent lives in the community.[243] In preparing the report, the Commission reviewed the national model construction codes and found that the model codes made no reference to accessibility.[244] The Commission also looked at state legislation to find that only four had revised their construction codes to incorporate provisions on accessibility.[245]

The United States first described barriers in the built environment using the language of rights in the *Architectural Barriers Act* of 1968 (the ABA). When signing the ABA, President Lyndon Johnson characterized the exclusion of disabled people from public buildings as "cruel".[246] The ABA provided that all federally owned or leased buildings must be accessible to persons with disabilities, which extended to schools, hospitals and housing receiving government funding. The closest equivalent to the ABA in Canada was in 1978, when Public Works Canada allocated some funds to make all of its buildings accessible over a five year period.

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[241] Lauder, *supra* note 238.
[242] National Commission on Architectural Barriers to the Rehabilitation of the Handicapped, *Design for All Americans: A Report of the National Commission on Architectural Barriers to the Rehabilitation of the Handicapped* (Washington, DC: Department of Health, Education and Welfare, 1967) at 2.
[243] *Ibid*.
[244] *Ibid* at 9.
[245] *Ibid* at 10.
[246] Lyndon B Johnson, *Lyndon B. Johnson: 1968-1969 (in two books): containing the public messages, speeches, and statements of the president [Book 2]* (Ann Arbor: University of Michigan Press, 2005) at 881.

The *Rehabilitation Act* of 1973 prohibited discrimination against persons with disabilities for any programs receiving federal government funds.[247] This legislation also created the Architectural and Transportation Barriers Compliance Board to ensure the accessibility of federally funded facilities and to draft more barrier-free design standards. By 1980, the American Standards Institute's "Specifications for Making Buildings and Facilities Accessible to and Usable by the Handicapped" had been adopted wholly or in part by half of the states.[248]

Even though the American approach to disability and the built environment was treated politically as a civil rights issue, their approach was to change how they regulated buildings directly rather than leaving the matter to persons with disabilities to fight by way of discrimination claims. Their efforts to improve physical accessibility finally culminated in the passage of national legislation, the *Americans with Disabilities Act* of 1990 (the ADA). The ADA went well beyond ensuring government buildings would be accessible by requiring all buildings open to the public to meet minimum standards of accessibility. Most importantly, the ADA provided enforcement mechanisms to ensure compliance.

In the next section I will explain how, in Canada, disability advocacy organizations first led the effort to include barrier-free design in the *National Building Code,* but then pivoted in the 1980s to focus on the inclusion of anti-discrimination provisions in human rights codes and the *Charter of Rights and Freedoms*. Because of this pivot, it was twenty years after the passage of the ADA before any similar legislation would be considered in Canada, starting in the province of Ontario with the *Ontarians with Disabilities Act*. Activists realized that anti-discrimination

[247] *Rehabilitation Act*, 1429 U.S.C. §§ 701-796 (2012).
[248] Roger W Andersen, "Private Housing for the Disabled: A Suggested Agenda" (1980) 56:2 Notre Dame Law 247 at 256.

approaches were only providing retroactive solutions on an individual basis, while legislation like the ADA required the construction of accessible buildings in the first place.

The Disability Rights Movement and Human Rights Legislation in Canada

Before the attention of disability activists became entirely focused on provincial and federal human rights codes and the *Charter of Rights and Freedoms*, there were some efforts aimed at changing provincial building codes to include barrier-free design. In 1973, at the National Conference for the Physically Disabled, one activist urged people with disabilities to put pressure on politicians to enforce those sections of the *National Building Code* that would make public buildings accessible.[249] Also in 1973, the Action League of Physically Handicapped Adults successfully lobbied the municipality of London, Ontario to adopt the "Building Standards for the Handicapped".[250] The Ontario Federation of the Physically Handicapped made recommendations to the provincial government in 1977 for revisions to the Ontario Building Code to improve the accessibility of public buildings.[251] However, in the late 1970s and early 1980s, before minimum standards of accessibility were enforced throughout Canada the fight to add disability as a prohibited ground of discrimination in new human rights legislation became the overriding goal of disability advocacy organizations.

David Lepofsky, a blind disability rights activist in Ontario, provides the most thorough account of the history of disability rights in Canada. Therefore, we know the most about activism and legislative history on disability in Ontario.[252] Ontario passed its *Human Rights Code* in the early 1960s, making it illegal to discriminate on the basis of grounds such as race and religion.

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[249] "Seek rights, handicapped urged" *The Globe and Mail* (5 November 1973) at 12.
[250] Kathleen Rex, "West moving ahead of Ontario aiding disabled, Toronto man says" *The Globe and Mail* (13 November 1973) at 14.
[251] Editorial, "Other disabled people need help, too" *The Toronto Star* (10 June 1977) B4.
[252] Lepofsky, 2004, *supra* note 20.

As Lepofsky details, it took until 1979 for the provincial government to address discrimination against persons with disabilities.[253]

At first, instead of adding disability as a prohibited ground of discrimination, the Ontario government introduced the *Handicapped Persons Rights Act* in 1979, which essentially provided the same protections to disabled people as the *Human Rights Code*. This was based on a report from the Ontario Human Rights Commission recommending, after extensive public consultation, that the government address the issue of discrimination on the basis of disability.[254] The new legislation would prohibit discrimination against people with disabilities and "establish an office of the handicapped to provide information and to co-ordinate policies and programs designed to benefit and assist handicapped persons."[255]

Several disability activists formed the Ontario Coalition for Human Rights for the Handicapped to lobby against this "separate but equal" legislation, which they argued provided weaker protections for disabled people than for those in the *Human Rights Code*.[256] By 1982, the Coalition was successful in lobbying for the addition of disability as an enumerated ground in the discrimination provisions of the Ontario *Human Rights Cod*e. The drawback of this approach was that there would no longer be an "office of the handicapped" as had been provided by the separate disability discrimination law "to provide information on available services and co-ordinate policies and programs relating to handicapped persons".[257] Further, the amendments to the *Human Rights Code* precluded claims of discrimination solely on the basis of physical inaccessibility:

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[253] *Ibid* at 139.
[254] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31-3 (22 November 1979) at 2:15PM (Hon Mr Elgie) [Ontario 1979].
[255] *Ibid.*
[256] Lepofsky, 2004, *supra* note 20 at 141.
[257] Ontario 1979, *supra* note 255.

> (1) A right of a person under this Act is not infringed for the reason only,
> (a) that the person does not have access to premises, services, goods, facilities or accommodation because of handicap, or that the premises, services, goods, facilities or accommodation lack the amenities that are appropriate for the person because of handicap.[258]

Complainants would have to prove attitudinal discrimination. Inaccessibility of a building was not considered discrimination in and of itself. During legislative debate on the amendments, Liberal MPP Sheila Copps argued that this approach would be too permissive of discriminatory practices. She pointed out that employers that did not want to employ disabled people would easily be able to exclude them by making sure the office is physically inaccessible.[259] She said that one employer had told her that even if he received government assistance to renovate his building to make it accessible, he had no interest in hiring people with disabilities and so would not accept the funding.[260]

The Minister of Labour in the Progressive Conservative provincial government, Robert Elgie, defended the legislation from Copps' concerns by arguing that, "human rights legislation should address itself to discrimination and not to whether an owner of a building or an employer happens to be in facilities that are inaccessible."[261] He asserted that the "great majority of society" would not consider physical inaccessibility to be discrimination and that the legislation was meant to target "attitudinal discrimination" rather than forcing accommodations related to physical infrastructure.[262] In earlier legislative debates, Elgie had pointed to the *Canadian Human Rights Act* and Saskatchewan's *Human Rights Code* as precedents for the approach that there must be a *prima facie* finding of attitudinal discrimination before dealing with the question

[258] *Human Rights Code*, *1981,* SO 1981, c 53, s 16.
[259] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 32-1 (1 December 1981) at 5:40PM (Ms Copps).
[260] *Ibid* at 5:50PM (Ms. Copps).
[261] *Ibid* at 5:40PM (Hon. Mr. Elgie).
[262] *Ibid*.

of physical access. He stressed that the Ontario legislation would go further than the *Canadian Human Rights Act* because the adjudicator would have the power to order physical access as long as it would not cause undue hardship. [263]

In 1985, after the Liberals became the governing party, the provincial government commissioned a study of section 15 of the new *Charter of Rights and Freedoms.* The resulting report discussed the issue of "constructive discrimination", which focused on the effects of the impugned law or conduct rather than the intent, and concluded that section 15 would condemn adverse effects, regardless of intent.[264] One of the cases discussed in the report involved the application of the Saskatchewan *Human Rights Code* and its prohibition on complaints based on physical inaccessibility alone (which Minister Elgie referred to during the legislative debates on Ontario's *Human Rights Code*). The human rights complaint in this case, *Canadian Odeon Theatres Ltd. v. Human Rights Commission (Sask.) and Huck*, was brought by a wheelchair user on the basis that the theatre did not have any spaces for wheelchair users to view a movie except the area in front of the front row.[265] The Saskatchewan Court of Appeal rejected the theatre's argument that intent would be the determining factor for a finding of discrimination:

> The question to be determined in this case is whether the physical arrangements for the viewing of a movie which are available to all members of the public but which have the practical effect or consequence of discriminating against one or more members of the public because of a prohibited ground, i.e., physical disability, is discrimination…The absence of a motive to discriminate is not determinative of whether there has been discrimination. It is not discrimatory intent which is prohibited by the legislation but the discriminatory result.[266]

[263] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 32-1 (25 May 1981) at 5:30PM (Hon Mr Elgie).
[264] Government of Ontario Ministry of the Attorney General, *Sources for the interpretation of equality rights under the Charter: a background paper* (Toronto: Government of Ontario, 1985) at 295.
[265] *Canadian Odeon Theatres Ltd. v Human Rights Commission (Sask) and Huck*, 1985 CanLII 183 (SK CA).
[266] *Ibid* at 24.

Pursuant to the commissioned section 15 report, the provincial government introduced the *Equality Rights Statute Law Amendment Act*, which, among other revisions, repealed section 16(1) of the Ontario *Human Rights Code,* thus allowing complaints of discrimination based solely on physical inaccessibility.[267] The primary purpose of the *Equality Rights Statute Law Amendment Act* was to ensure that Ontario legislation, including the *Human Rights Code,* would be in conformity with section 15 of the new *Charter of Rights and Freedoms*.[268]

Copps had also raised the question of whether the guarantee of non-discrimination for disabled people would override the province's construction code. Elgie was of the view that the primacy provision in the *Human Rights Code* that allows the government to determine when the *Code* does and does not apply.[269] This was in reference to section 47(2) of the *Code*, which provides that the *Code* applies and prevails over other legislation unless the legislation in question specifically exempts itself from the *Code*'s application. Copps' concern was later addressed in *Quesnel v. London Educational Health Centre*, where the Ontario Board of Inquiry held that "[c]ompliance with Building Codes does not, in itself, justify a breach of human rights legislation."[270]

When the Trudeau government introduced the first version of the *Charter* in October 1980, the section 15 equality rights did not include persons with disabilities and so disability advocacy organizations now directed their efforts at the *Charter* negotiations.[271] Over the next few months disability rights activists pushed the federal government to add disability as an enumerated ground in section 15. These efforts were successful and, in January 1981, the federal

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[267] *Equality Rights Statute Law Amendment Act*, *1986,* S.O. 1986, c 64, s 10(9).
[268] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 33-1 (11 June 1985) at 2:30PM (Hon Mr Pope); Lepofsky, 2004, *supra* note 20 at 144.
[269] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 32-1 (29 May 1981) at 10:40AM (Hon Mr Elgie).
[270] *Quesnel*, *supra* note 18 at para 5.
[271] Lepofsky, 2004, *supra* note 20 at 145.

government introduced a new draft of the *Charter*, making the protection against discrimination on the basis of disability the only substantive right that was added to the *Charter* during the legislative debate.[272]

The *Charter* does not, on its own, require that all public and private buildings be accessible to persons with disabilities. However, one federal policy change was attributed directly to the *Charter*: the Treasury Board's Accessibility of Real Property policy, which was instituted in 1990.[273] This policy requires barrier-free access in the buildings both owned and leased by the federal government. Rather than implementing the standards in the *National Building Code*, the Treasury Board policy uses the barrier-free specifications published by the Canadian Standards Association (CSA) in 1990 (and in subsequent revisions).[274] The federal government does not indicate why the Treasury Board policy uses these standards instead of those found in the *National Building Code*, but it may be that the CSA standards are used because they are broader.

Despite this Treasury Board policy requiring accessibility, there are many federal buildings that remain inaccessible. In 2005, a parliamentary standing committee studying issues related to disability reported that there were significant gaps in what the federal government knew about the accessibility of its own buildings because there had never been a comprehensive audit.[275] One of the committee's most startling discoveries was that the federal Office for Disability Issues was located in premises that were not accessible.[276] After also noting the

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[272] *Ibid* at 146.
[273] Public Works and Government Services Canada, *Ensuring Access: A Duty to Accommodate* (Ottawa: Government of Canada, 1999) at 3.
[274] CAN/CSA-B651-95 Barrier-Free Design: A National Standard of Canada (Ottawa, Canadian Standards Association, 1995).
[275] Standing Committee on Human Resources, Skills Development, Social Development and the Status of Persons with Disabilities, *Accessibility for All* (Ottawa: Government of Canada, 2005) at 4.
[276] *Ibid* at 4.

inaccessibility of the Confederation building, the committee stressed that if there were problems in these buildings with such symbolic value then there ought to be concerns about the rest of the federal inventory.[277] Though the committee recommended that the Department of Public Works and Government Services Canada start an ongoing accessibility audit program, it took another 15 years for any such audit to take place. As of February 2020, Public Services and Procurement Canada has committed to conduct accessibility assessments in 24 federal buildings.[278] To put this commitment into context, the federal government owns or leases around 37,000 buildings.

Even though the Treasury Board's accessibility policy originated in response to the *Charter*, it appears to have had little impact on the accessibility of federal buildings as a proactive measure. As I explain in the next section, disability activists soon realized that in order to achieve structural changes to the problem of physical inaccessibility new legislation would be required, otherwise persons with disabilities would continue to have to fight barriers one at a time. Even the new federal legislation, the *Accessible Canada Act*, contains no legal requirement that federal buildings meet a particular standard of accessibility.

Current Legislative Approaches to Disability in Canada

David Lepofsky explains that even though disability rights activists were successful in adding disability to provincial human rights codes and the *Charter,* they found that these laws had weaknesses and limitations.[279] Some of the most significant issues with the anti-discrimination approach were based on the requirement that people with disabilities fight barriers

[277] *Ibid* at 5.
[278] Public Services and Procurement Canada, "Accessible federal government built environment" (briefing material to the Standing Committee on Procedure and House Affairs), (27 February 2020) online: *Public Services and Procurement Canada* <https://www.tpsgc-pwgsc.gc.ca/trans/documentinfo-briefingmaterial/proc/2020_02_27/p13-eng.html>.
[279] Lepofsky, 2004, *supra* note 20 at 149.

and bear the costs of the fight individually.[280] Bringing a human rights complaint every time one faces a barrier in the built environment or hiring a lawyer to bring a *Charter* claim are unacceptably burdensome for people with disabilities, many of whom live in poverty. Further, these cases often take years to make their way through courts, commissions or tribunals.[281] Lepofsky argues that the process requires disabled people to be "private human rights cops", which they do not have the time, energy or resources to be.[282]

Judith Mosoff argues that bringing a claim of discrimination on the basis of disability is more difficult than one based on sex or race because of the practical difficulties of completing the tasks required to bring a complaint (depending on the disability) and that discrimination against disabled people may seem a "benign or legally insignificant event" as compared to racism or sexual harassment.[283] Further, she points that most cases of discrimination on the basis of disability are in the context of employment but that lack of access to public facilities such as restaurants or stores persists for people with disabilities even though it is almost unheard of any longer for people to be denied goods and services on the basis of race or sex.[284] Mosoff also finds that courts, commissions and tribunals provide highly individualized remedies or financial compensation for what are often systemic problems.[285]

Even though the *Charter* and provincial human rights code processes can attempt to compensate for discrimination after the fact, they only offer organizations limited guidance on how to avoid a complaint in the first place.[286] Disability rights activists decided that they needed to lobby for legislation like the *Americans with Disabilities Act*, which provides specific

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[280] *Ibid.*
[281] *Ibid.*
[282] *Ibid* at 152.
[283] Mosoff, *supra* note 20 at 265.
[284] *Ibid* at 266.
[285] *Ibid* at 273.
[286] Lepofsky, 2004, *supra* note 20 at 153.

minimum standards for organizations to follow. In Ontario, activists decided to focus on lobbying the provincial government for new legislation since most of the areas of concern, like health, education and housing, are within provincial jurisdiction.

In 1998, the provincial government introduced the *Ontarians with Disabilities Act* after several years of debate over previous drafts that had merely confirmed the protections found in the *Human Rights Code* and the *Charter*.[287] Amongst other things, the bill provided that the provincial government would be responsible for accessibility in the built environment and to that end the government would develop barrier-free design guidelines for buildings and that the municipalities could make accessibility a prerequisite for licensing buildings.[288] Disability activists were not satisfied with the original draft of the bill, identifying the lack of mechanisms for input from people with disabilities, no timeframes for the creation of regulations that would remove barriers and no enforcement mechanisms.[289]

Even though modifications were made in response to these concerns, the activists continued to argue that the legislation lacked strong enforcement mechanisms. This fear was confirmed when the government repealed the section establishing offences under the Act and prescribing monetary penalties before it was even brought into effect.[290] Activists also pointed out that the legislation provided insufficient opportunities for input from people with disabilities. For example, the Accessibility Directorate of Ontario, an office of civil servants established to support the administration of the statute under the direction of the responsible minister, did not require that persons with disabilities be among the employees appointed to this office.[291]

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[287] *Ibid* at 223.
[288] *Ibid* at 282-5; Laverne Jacobs, "'Humanizing' Disability Law: Citizen Participation in the Development of Accessibility Regulations in Canada" (2016) International Journal of Open Governments 93 at 100 [Jacobs, 2016].
[289] Lepofsky, 2004, *supra* note 20 at 296.
[290] Jacobs, 2016, *supra* note 289 at 98.
[291] *Ibid* at 102.

As a result of these concerns, the Ontario government introduced new legislation, the *Accessibility for Ontarians with Disabilities Act* of 2005 (AODA), which created a concrete deadline for full accessibility in Ontario of January 1, 2025. It included enforcement mechanisms for accessibility in both the public and the private sectors. It mandated the creation of standard development committees to create standards in the following five areas: customer service, transportation, information and communications, employment, and the built environment.[292] The accessibility standards created by the built environment committee were incorporated into the Ontario Building Code with effect as of January 1, 2015. However, their inclusion in a building code rather than the AODA meant that these standards would not be enforced pursuant to the AODA. Further, the Ontario Building Code does not require retrofitting of existing buildings to improve accessibility and most of the accessibility provisions do not apply to houses.[293] Therefore, the promise of the AODA is somewhat weaker than disability activists had hoped for when lobbying for enforceable standards for accessibility.

Manitoba modelled its provincial accessibility legislation on Ontario's laws. The *Accessibility for Manitobans with Disabilities Act* of 2013 (AMDA) similarly aimed to achieve accessibility in five main areas of social interaction: employment, accommodation, the built environment, the delivery and receipt of goods, services and information, and prescribed activities or undertakings.[294] Because Manitoba had the benefit of seeing how Ontario's legislation was received, the drafters were able to learn from Ontario's mistakes. For example, Manitoba's Accessibility Advisory Council must contain 6 to 12 members chosen from the disability community and sectors, persons or organizations that may be affected by accessibility

[292] *Ibid* at 105.
[293] Government of British Columbia, Mayo Moran, *Second Legislative Review of the Accessibility for Ontarians with Disabilities Act, 2005* (Government of Ontario, 2014) at 13.
[294] Jacobs, 2016, *supra* note 289 at 108.

standards.[295] Further, the AMDA creates a set of inspectors who may issue remedial orders to individuals or organizations found to be contravening accessibility standards.[296]

The provinces of Nova Scotia and British Columbia have also adopted or are in the process of adopting legislation like that in Ontario and Manitoba. However, because only some provinces have taken the initiative to create mandatory and enforceable accessibility requirements, disability advocacy organizations have been lobbying the federal government to take leadership in this area.

The federal Liberal government made national legislation on disability a campaign promise in the 2015 general election. In the summer of 2016, the federal government began nationwide consultations with disabled people and found that their priorities that fall under federal jurisdiction include employment; access to buildings and other public spaces through a built environment; transportation by air, train, ferry and buses; program and service delivery; information and communications; and procurement of goods and services.[297] However, the Minister of Persons with Disabilities indicated that the main goal of the new legislation would be employment, with increasing the number of accessible buildings as a way to increase the number of available workplaces to persons with disabilities.[298] This rhetoric on the importance of employment mirrors the post-World War II arguments for legislation to support persons with disabilities.

The resulting legislation, the *Accessible Canada Act*, which came into force in 2019, purports to remove, identify and prevent barriers for persons with disabilities in federally

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[295] *Ibid* at 112.
[296] Laverne Jacobs, Victoria Cino & Britney DeCosta, "The Accessibility for Manitobans Act: Ambitions and Achievements in Antidiscrimination and Citizen Participation" (2016) 5:4 Can J Disability Stud 1 at 14.
[297] Employment and Social Development Canada*, supra* note 23 at 16.
[298] Michelle McQuigge "Canadians with Disabilities Act to focus on employment: minister", *The Canadian Press* (5 February 2017) online: *Global News* <globalnews.ca/news/3228515/canadians-with-disabilities-act-to-focus-on-employment-minister/>.

regulated entities.[299] It ended up neither creating minimum standards for accessibility at the national level nor improving access to employment for persons with disabilities. Instead, the legislation created a new federal body to draft accessibility standards, seemingly ignoring the role of the National Research Council in doing this work since the early 1960s. This new entity, the Canadian Accessibility Standards Development Organization (which has now been renamed Accessibility Standards Canada), will research and potentially draft new accessibility standards that will apply to the federal government. However, there is nothing in the legislation that requires these standards to become law. As I described in the introduction to this thesis, almost 100 disability organizations across Canada urged the federal government to make several changes to Bill C-81 (which would become the *Accessible Canada Act*).[300] One of these recommended changes was to replace the word "may" with "shall" in various provisions, such that Cabinet would be required to make certain regulations to operationalize the commitments in the legislation. This recommendation was not implemented. The only part of the *Accessible Canada Act* that addresses whether any accessibility standards will become law is section 117, which states:

> the Governor in Council may make regulations…(c) establishing standards intended to remove barriers and to improve accessibility in the areas referred to in section 5 [one of which is the built environment].[301]

As a result of the decision to leave the word "may", contrary to the concerns of the disability community, the federal government avoided any duty to bring the work of Accessibility Standards Canada into effect in its own buildings.

[299] *Accessible Canada Act, supra* note 30 at s 5.
[300] Council of Canadians with Disabilities, *supra* note 29.
[301] *Accessible Canada Act, supra* note 30 at s 117.

Since Accessibility Standards Canada has not published any standards on the built environment yet, it is still too early to know what action the federal government will take in order to implement these standards, at least in its own buildings. Accessibility Standards Canada is required to make any standards that it recommends to the Minister available to the public so there will be some accountability in this regard.[302] However, there is nothing in the Accessible Canada Act that formalizes a relationship between Accessibility Standards Canada and the National Research Council. Nor is there any requirement that the standards developed by Accessibility Standards Canada will be included in federal model building code.

Accessibility Standards Canada is tasked with a mandate that has been under the purview of the National Research Council since the 1960s but now the work will be performed separately from standards development related to the needs of the able-bodied public. Because the federal government has been drafting accessibility standards in the form of model building codes since the 1960s, only drafting more standards is not just redundant. This approach purports to be a proactive response to inaccessibility while actually shirking the federal government's ability (and responsibility) to give these standards the force of law for federally regulated entities and, at the very least, in its own buildings.

The history of the building code that I have presented in this chapter shows not only that able-bodied people have been privileged by legally enforceable buildings standards but it also belies the claim that what is needed is more standards that consider the mobility and safety of disabled people. Accessibility Standards Canada and the Canadian Standards Association (CSA) have both published reports identifying three priority areas that require further research: emergency services and response; recreational and green spaces; and, wayfinding and navigation

[302] *Accessible Canada Act, supra* note 30 at s 34.

systems.[303] The reason these are priority areas is that we already have many published standards, in Canada and internationally, that address how disabled people mobilize in the built environment. In the CSA report, the authors identify 89 documents published at the federal or provincial level that contain standards for accessibility in the built environment at the federal and provincial level.[304] The CSA report also pointed out that standards may be an important tool but that the variations in legal requirements across Canada require a national policy response.[305] This national policy response could have been the purpose of the *Accessible Canada Act*. But the legislation treats the problem as informational, that it requires more research and standard drafting, rather than treating the problem as legal one that requires federal leadership.

In another policy area, the response to climate change, the federal government has recently initiated a national response to legally enforceable building standards. As I mentioned above, environment was added as an objective to the National Building Code in 2015. Even though it is a relatively new objective, the federal government has taken steps not only to research and prepare model building codes for sustainability and to deal with the effects of climate change, but also to work with the provinces and territories to develop a "retrofit code" and to provide funding for these retrofits.[306] Without taking anything away from the importance of these efforts, they evidence the true capacity of the federal government to take effective and definitive action and to invest in a national retrofitting program.

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[303] S-T Lau et al, *A Canadian Roadmap for Accessibility Standards* (Toronto: Canadian Standards Association, 2020) at 7; Accessibility Standards Canada, A Together Toward an Accessible Canada (Ottawa: Government of Canada, 2020).
[304] *Ibid* at 14.
[305] *Ibid* at 35.
[306] "Home and buildings: Saving money and making our buildings more energy efficient" (11 January 2018), online: *Government of Canada* <https://www.canada.ca/en/services/environment/weather/climatechange/climate-action/federal-actions-clean-growth-economy/homes-buildings.html>.

While the history of the NRC's role in drafting accessibility standards was forgotten when the *Accessible Canada Act* was introduced, stakeholders in the disability community did emphasize the importance of monitoring the implementation of the federal legislation in whatever form it may take. Further, the majority of those consulted wanted a complaint process that could be initiated by anyone if the legislation was not followed and monetary penalties as an enforcement mechanism.[307] The Accessibility Commissioner has the power to conduct inspections in order to ensure compliance with the federally regulated entities obligations to draft accessibility plans, progress reports and feedback processes.[308] If the federal government eventually enacts any regulations that require minimum accessibility standards in buildings (as discussed above) then this inspection power could also expand to the built environment. When and if the federal government does enact these regulations, the Accessible Canada Act provides a right of complaint to an individual who suffers "physical or psychological harm, property damage or economic loss as the result of — or that ha[ve] otherwise been adversely affected by" the contravention of the regulations.[309] This complaint is to be filed with and adjudicated by the Accessibility Commissioner. Until any regulations are enacted this complaint process will remain untested.

Conclusion

The themes and conclusions that emerge from the history of construction codes and persons with disabilities in Canada will inform my analysis in the next two chapters of this thesis. The first insight from this historical analysis is that model building codes began as a project to serve the interests of the construction industry and prioritize the safety of able-bodied

[307] Employment and Social Development Canada*, supra* note 21 at 21 & 23.
[308] *Accessible Canada Act*, *supra* note 30 at s 73.
[309] *Ibid* at s 95.

members of the public, while treating accessibility for disabilities as a subordinate objective. Second, much of Canadian government policy to serve the interests of people with disabilities has been (and remains today) focused on legislation and programs designed to get persons with disabilities into the workforce. This has led to a focus in policy making on the economics of accessibility. This can lead to policies that only benefit persons with disabilities that are able to become as productive as their able-bodied counterparts. Further it can frame the issue of accessibility in the built environment as a cost benefit analysis of what will make people with disabilities better participants in the economy whether as employees or consumers.

As far as I know, there were no people with disabilities involved when the federal government tasked the National Research Council with drafting a model building code for the provinces in 1937. Thirty years later, disability advocacy organizations began to take a role in drafting design standards that would allow people with disabilities to enter buildings and navigate them safely. Disability advocacy organizations also took a role in the drafting of human rights codes and the *Charter* so that disability would be explicitly included as a prohibited ground of discrimination. These successes in self-advocacy have led to some changes in provincial regulation of the built environment and have provided legal remedies for people with disabilities to cause the removal of barriers that are not covered by provincial building regulation. However, these legal remedies are highly individualized because they require a person with a disability to bring a human rights complaint or initiate *Charter* litigation. In the next chapter I will provide a present-day case study of the human rights complaint process and address the potential for this remedy to require the law of the built environment to include people with disabilities as members of the public.

Chapter Two – The Fight to Access Summer Patios in Montréal: Human Rights Complaints and the Built Environment

Since 1965, when the federal government first published "Building Standards for the Handicapped", Canadian provinces have followed different timelines and approaches to the inclusion of minimum requirements for barrier-free design in their building codes. As discussed in Chapter One, each of the provinces, including Québec, drafted and passed into law some form of minimum accessibility requirements in the late 1970s and early 1980s.[310] But because of the significant variations in provincial construction regulations and municipal bylaws that continue to this day, navigating the sidewalk, finding an accessible workplace or school, and performing other tasks in public life are quite different for people with disabilities depending on where they live in Canada. For example, in British Columbia, the leadership of people with disabilities at the municipal level led to a bylaw requiring minimum standards of accessibility in Vancouver's buildings as early as 1973.[311] By contrast, in Montréal, vast exemptions to the applicability of barrier-free design provisions in the provincial building code have resulted in keeping much of the city inaccessible to people with disabilities.

In this chapter I will present a case study about how human rights complaints alleging discrimination on the basis of disability can influence the provincial and municipal regulation of the built environment. The setting for this chapter is Montréal, Québec, and more specifically, in the borough of Plateau-Mont-Royal. This is where I lived during the majority of my doctoral studies and I, unfortunately, spent most of those years in my home because of the extreme barriers faced by wheelchair users in the Plateau-Mont-Royal and throughout Montréal. Some of

[310] Champagne, *supra* note 168 at 311.
[311] *Building Access Handbook, supra* note 207.

the barriers I experienced daily on the sidewalks alone (beyond the general state of disrepair) included the lack of curb cuts at many intersections, road/sidewalk construction with no thruway for wheelchair users, and un-cleared snow or snow removal operations that created snow banks that would block the sidewalk and/or curb cuts. Even though there was a bus stop right outside my door, I was rarely able to use the bus because the ramps to get on most buses would not function. I never used the underground metro because there is no elevator in the station nearest to where I lived or in the vast majority of Montréal's metro network. The only methods of transportation I could reliably use when I was not a pedestrian were Transport Adapté, the public transit service for persons with disabilities, and private accessible taxis, both of which must be booked at least 24 hours in advance and are not available in inclement winter weather.

The most significant barrier in my life in the Plateau-Mont-Royal was that I could not get inside almost any building other than my own home. Other than the homes of other wheelchair users, I never went inside the homes of my friends in Montréal because everyone else lives in a home with stairs at the entrance.[312] This is a problem applicable to housing across Canada, because accessibility reqirements in every jurisdiction do not apply to homes. Montreal is not remarkable in this regard.

What makes Montreal different from most other Canadian cities is that I could not go into many of the public buildings because the majority, particularly in the Plateau-Mont-Royal, have one or two stair steps at the entrance. In a two-block radius from where I lived there are at least 85 commercial establishments and out of these I could only go inside eight of them: five restaurants, one gas station, a small store selling olive oil and tomato sauce, and the famous Fairmount Bagel shop. This means that nearly 95% of the public buildings in my neighbourhood

[312] I was also once carried up and down a flight of stairs in my wheelchair by two people to visit a friend's apartment for an afternoon.

were inaccessible to me because I cannot walk and I must use a wheelchair. The consequence for me was that I lost much of my independence. I relied heavily on family, friends and paid caregivers to make necessary purchases on my behalf. I carefully planned any social engagements to make sure that not only would I be able to get in the door but that there would also be an accessible washroom (which is the case at only two of the five restaurants in the two-block radius mentioned above).

My experience in the Plateau-Mont-Royal borough before becoming a wheelchair user was much different. As an able-bodied person, I enjoyed the incredible number and quality of restaurants, bars, and boutiques that this area of Montréal is known for internationally. In the summer, I observed how the streets and sidewalks of Plateau-Mont-Royal transform into a myriad of patios built and operated by the area's restaurant and bar owners. After becoming a wheelchair user, I discovered that these summer patios were actually the centre of a legal dispute about how they not only excluded wheelchair users but often blocked sidewalk access for anyone using a mobility device.

In the case study that follows I will give a detailed account of how a group of disability activists, the *Regroupement activistes pour l'inclusion Québec* (RAPLIQ), identified the ableism inherent in the Plateau-Mont-Royal permit requirements for summer patios.[313] I interviewed the founders of RAPLIQ, Laurence Parent and Linda Gauthier, and used local newspapers as the sources for understanding the summer patio dispute.[314]

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[313] RAPLIQ's name roughly translates in English to the *Quebec Activist Group for Inclusion.*

[314] Interview with Laurence Parent (31 July 2018), audio of interview and transcript on file with author [Parent Interview]; Interview with Linda Gauthier (14 August 2018), audio of interview and transcript of interview on file with author [Gauthier Interview].
The information in this section about the founding of RAPLIQ is based on personal interviews I conducted with Linda Gauthier and Laurence Parent in 2018.

The leadership of RAPLIQ, mostly wheelchair users themselves, discovered that when the borough decided to begin issuing summer patio permits in 2009, restaurant and bar owners were not required to make their patios accessible to wheelchair users nor were they required to leave enough space on the sidewalk for pedestrians who use mobility devices. The activists challenged the permit requirements for these summer patios by way of human rights complaint and, after mediation, the Plateau-Mont-Royal agreed to add accessibility requirements to the permit application for future summers.

This case study illustrates the significant impact that legal instruments like municipal permitting bylaws can have on the daily experiences of persons with disabilities in the urban environment. Though the human rights process in this instance led to some changes in the permit application, I argue that their impact on the barriers in the built environment more broadly was minimal because it had no effect on provincial construction code. A wheelchair user may now be able to sit on the summer patios in the Plateau-Mont-Royal but still have no access to the interior of the bar or restaurant to use the washroom or take shelter during inclement weather. The provincial building code in Québec, as I will explain below, has very weak accessibility requirements because of vast exemptions that, as currently written, will perpetuate inaccessibilty indefinitely. The consequences of these barriers for wheelchair users in Montréal includes, among other things, systemic exclusion from most commercial establishments, both as customers or potential employees, and sparing access to washrooms outside their own homes.

This case study also shows how, in the absence of municipal and provincial regulation requiring minimum accessible design standards, a human rights complaint initiated by disability activists led to uncertainty and resentment from restaurant and bar owners about who must bear the costs of accessible renovations. When policy on accessibility becomes overly focused on the

issue of cost it trivializes the history of segregating people with disabilities away from public life. It is also short sighted, because we can prevent the constant renovation and retrofitting of the built environment if we change the laws that have been allowing us to build as if people with disabilities do not exist or are not members of the public.

Introduction to Montréal's Built Environment and Québec Disability Law

By 1978, Québec was the first province in Canada to enact legislation specifically designed to address the marginalization of persons with disabilities. Yet the major urban developments in Montréal in the late 1960s and throughout 1970s were built only for the able-bodied. During this time Montréal underwent three major urban projects that are still central to the city's infrastructure – the Metro, the Indoor City (a set of underground tunnels connecting most of downtown) and the International and Universal Exhibition known as "Expo 67". These projects were thought to be modernizing the city and Architectural Forum declared Montréal the "first twentieth century city in North America."[315] However, of these three major projects only the temporary one – Expo 67 – was built to be accessible to persons with disabilities. The Metro and the Indoor City remain to this day, over 50 years later, practically inaccessible to many persons with disabilities.

When planning for Expo 67 began in 1962, the mayor of Montréal, Jean Drapeau, had recently announced that the city would build an underground Metro. The construction of the Expo 67 site and Metro took place simultaneously and the Metro opened in October 1966, just in time for Expo 67 the following summer. In 1968, Architectural Forum claimed that Montréal's Metro was the "best subway system in North America and the one to which all others [had] henceforth to measure up."[316] For inspiration, the Metro planners had looked to Paris as role

[315] Peter Blake, "Downtown in 3-D", *The Architectural Forum* 125:2 (September 1966) 31 at 31.
[316] "Subways Need Not Be Sewers", *The Architectural Forum* 128:1 (January 1968) 68 at 70.

model. Paris' metro, which had opened in 1900, was and remained accessible only to passengers who could use stairs until renovations in the late 1990s.[317] This decision to use the Paris metro as a model has had lasting consequences in Montréal. Even today, Montréal's Metro only has 9 stations with elevators out of a total of 68, which is the subject of a class action lawsuit that has been brought by persons with disabilities.[318] In response to complaints and the successful class certification against the Société de transport de Montréal (STM), its president emphasized how difficult it is to install elevators in stations that were never designed to have them.[319] In 2017 the STM committed funds towards installing elevators in 23 of its stations by 2022, which would still only bring the total of accessible stations to less than half the Metro network.[320]

The second major project in Montréal's urban environment in the 1960s and 70s was an under-/above-ground network of the city's downtown buildings. This network, today known as the Indoor City (or RÉSO- réseau de ville souterrain), began at the same time as the planning for the Metro and Expo 67, with the 1962 construction of Place Ville Marie, a landmark building in downtown Montréal. As various buildings and Metro stations were added to the Indoor City over the next several decades, there was no attention to usability for persons with disabilities. According to a 2009 study, the majority of the Indoor City is still inaccessible to persons who cannot use stairs.[321] The City of Montréal has acknowledged the obstacles in the Indoor City for persons with disabilities, including "variation in levels and the lack of adequate signage", and

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[317] Zachary Poste, "Annexing the Subterranean: Montreal's Metro and the Reconfiguration of Urban Space" (2016) 30:2 Historical Discourses 3; Muriel Larrouy, "Invention of Accessibility: French Urban Public Transportation Accessibility from 1975 to 2006" (2014) 2:2 Rev Dis Stud Int'l J.
[318] RAPLIQ, the disability activist group at the centre of the case study in this chapter, is also spearheading this class action lawsuit.
[319] "STM Metro accessibility plan will mean more elevators, ramps", *CBC* (7 March 2017), online: <https://www.cbc.ca/news/canada/montreal/stm-metro-accessibility-plan-will-mean-more-elevators-ramps-1.4013361>
[320] *Ibid.*
[321] Matthew Hagg, *Making Montréal's Indoor City Accessible for People with Disabilities* (Master of Urban Planning, Mcgill University, 2009) [Hagg].

has made a vague commitment to move towards universal access, but no concrete plans have been announced to begin the renovations required to make the network universally accessible.[322]

The 2009 study of the Indoor City concludes that the reason it is so unuseable for persons with disabilities is that the majority of it was constructed before the concept of accessibility.[323] However, the design and construction of the Expo 67 grounds, which took place when the Metro and Indoor City were being developed, proves that the accessible design was already in practice. The Expo 67 project was a joint venture of the federal and provincial governments, along with the city of Montréal, and the planners decided to implement the recently published "Building Standards for the Handicapped." This meant there were curb cuts, ramped entrances, wheelchair accessible washrooms, and elevators to allow persons with disabilities, particularly wheelchair users, to visit the Expo 67 grounds. Most country pavilions were designed with barrier-free features because the organizers issued a copy of the "Building Standards for the Handicapped" to each of the participants and strongly encouraged compliance.

In 1971, just following Expo 67 in Montréal, the province of Quebec created the Commission of Inquiry on Health and Social Welfare. This was the first time the issue of social isolation amongst the population of persons with disabilities was a matter of public policy in Québec.[324] The Commission described the "deplorable living conditions of handicapped in Québec" and identified the main problem as their exclusion from the labour market.[325] The

[322] Montréal, Ville de Montréal, *Bilan 2004-2005: Mise en œuvre de plan d'urbanisme de Montréal* (Montréal, May 2005).
[323] Hagg, *supra* note 322 at 4.
[324] Government of Québec, Office des personnes handicapées du Québec, *On Equal Terms. The Social Integration of Handicapped Persons; A Challenge for Everyone*, (Drummondville, QC: Publications du Québec, 1984) at 16 [*On Equal Terms*]; Patrick Fougeyrollas & Yan Grenier, "Monitoring Disability Policies and Legislation towards Effective Exercise of Rights to Equality and Inclusive Access for Persons with Disabilities: The Case of the Quebec Model" (2018) 8:2 Societies 41 [Fougeyrollas & Grenier].
[325] *On Equal Terms, supra* note 325.

Québec government decided to begin with collecting statistics and replacing religious organizations in the provision of financial aid and social services to people with disabilities.[326]

In 1976, the first attempt to draft legislation on disability, Bill 55, focused almost exclusively on employment because of the recommendations of the 1971 Commission. However, members of the disability community criticized Bill 55 for being overly paternalistic because it was focused on protecting people with disabilities instead of taking a rights-based approach. Similar to the federal approach in the 1950s and 60s, as I discussed in Chapter One, Bill 55 created vocational supports for people with disabilities, including sheltered workshops. Disability organizations demanded a broader approach to services for people with disabilities and insisted that the provincial government consult with them on a redraft of Bill 55.[327]

Over a period of two years, disability organizations were successful in expanding proposed disability legislation to include provisions for educational and social supports. A redraft of Bill 55 was unanimously adopted by the Québec National Assembly in 1978 as an *Act to secure handicapped persons in the exercise of their rights with a view to achieving social, school and workplace integration*. This Act created the Office of Disabled People of Québec (OPHQ) to coordinate its implementation amongst the provincial and municipal governments. The duties of the OPHQ included promoting access to housing and goods and services for persons with disabilities, as well as facilitating their mobility, labour market integration and participation in socio-cultural and recreational activities.[328] The OPHQ also consults with a committee made up of key disability rights advocacy organizations and government ministries to evaluate the implementation of the law.[329]

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[326] Fougeyrollas & Grenier, *supra* note 325.
[327] *On Equal Terms, supra* note 325 at 16-21.
[328] *Act to secure handicapped persons in the exercise of their rights*, RSQ 1978 c E-20.1 at art 25(a).
[329] Fougeyrollas & Grenier, *supra* note 325.

The most important potential impact of the 1978 legislation on the built environment in Québec was that it attempted to redress the fact that accessibility standards which were introduced in Québec's 1976 Construction Code did not apply retroactively. All buildings constructed before 1976 were exempt from these minimum standards unless they underwent renovations, in which case only the renovated portion of the building would need to conform to accessibility standards. The 1978 law required owners of public buildings built before 1976 to prepare a five-year development plan for making their buildings accessible and provide this plan to the OPHQ within one year of the enforcement of the law. However, no regulations to enforce this section were ever passed and so these development plans were never produced.[330]

About twenty-five years later, in 2004, Québec amended the 1978 law to provide further direction to governmental bodies and to give concrete deadlines for its goals. One of the OPHQ's new policy directions, as provided in the amendments, is to facilitate "the adaptation of the built environment to the needs of handicapped persons and their families without discrimination or privilege, the regional self-sufficiency of resources, and the effective linking of local, regional and Québec-wide resources."[331] The amendments also created a new requirement for government departments and public agencies larger than 50 persons, and municipalities of more than 15,000 inhabitants to adopt action plans by December 2005. These action plans must identify the barriers to integration of persons with disabilities (in the sector of activity of the department, agency or municipality) and measures to reduce those barriers.[332]

The 2004 amendments to the 1978 law contained another attempt to deal with the inaccessibility of buildings constructed prior to 1976. Rather than put the onus on the owners of

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[330] *On Equal Terms, supra* note 325 at 224.
[331] *Act to secure handicapped persons in the exercise of their rights with a view to achieving social, school and workplace integration*, SQ 2004, c 31 at art 1.2(d) [2004 Amendment].
[332] *Ibid* at art 61.1.

buildings to draft development plans, the 2004 amendments required the Québec Minister of Labour to report on the accessibility of public buildings by December 2006. The report was to deal with not just the problem of inaccessibility but also to identify the categories of building that should be subject to or exempt from accessibility standards, along with the cost of renovations.[333] Ultimately the Minister of Labour went further and conducted a study of buildings constructed before 1976 by evaluating a sample size of approximately 300 buildings in Montréal, Québec City and Shawinigan.[334]

The resulting report, published in time for the deadline of December 2006, provided only a partial portrait of the inaccessibility in Québec's buildings.[335] Instead of reporting on how many buildings were accessible or had barrier-free design features, the study estimated the average degree of accessibility in each building category (such as schools, government buildings, offices, etc.). This means that there was no data provided on how many buildings in the sample size were completely inaccessible to persons with disabilities. Further, there was no explanation of what accessibility features were considered, such as washrooms, entrances, elevators, visual and audio alarm systems. Even with this approach there were very striking findings about buildings constructed before 1976, including that the degree of accessibility was only 13% in schools, 58% in municipal buildings, 45% in large places of assembly (e.g., restaurants, theatres and bars), and 30% in office buildings.[336] The report concluded that it would cost approximately $2 to 3.7 billion to renovate these buildings to make them fully accessible.[337]

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[333] 2004 Amendment, *supra* note 332 at art 69.
[334] Government of Quebec, Ministre du Travail, *Pour une meilleure accessibilité: rapport du ministre du travail sur l'accessibilité aux personnes handicapées de bâtiments à caractère public construits avant décembre 1976,* (Québec: La régie du bâtiment du Québec, 2006) [*Pour une meilleure accessibilité*].
[335] *Ibid.*
[336] *Ibid* at 10-11.
[337] *Ibid* at 9.

Beyond the confusing, and potentially misleading, way that the 2006 report explained the accessibility of buildings in Québec, there were two groups of buildings not even included in the study at all: small offices and commercial establishments. Most crucially the report did not lead to any changes in Québec building regulations or to any financial commitments from the Québec government to fund accessibility renovations.

The Case Study: RAPLIQ and the Summer Patios of Plateau-Mont-Royal

There are several organizations that advocate on behalf of people with disabilities in Québec. Two of the most prominent of these – Ex Aequo and RAPLIQ – are led by individuals with visible disabilities, most of whom are wheelchair users. Ex Aequo, which was founded in 1980, promotes the rights of persons with disabilities in Québec through research and advocacy at the municipal and provincial levels of government. RAPLIQ is a much newer organization that was founded in 2009 by Linda Gauthier and Laurence Parent. Ex Aequo primarily advocates for persons with disabilities by participating in public consultations and presenting its research to government bodies.[338] I will discuss public consultations in depth in Chapter Three and explain the role of organzations like Ex Aequo in this type of advocacy. By contrast, RAPLIQ directs its resources to assisting individuals with making human rights complaints in cases involving discrimination on the basis of disability.

Linda Gauthier, the co-founder and President of RAPLIQ, is a wheelchair user and she began to challenge inaccessibility in the built environment by way of human rights complaints on her own behalf in 2005. By 2009 she was assisting others with several of these types of complaints every year.[339] Linda's experience in drafting human rights complaints was useful because she educated other people with disabilities about the complaint process and she could

[338] Ex Aequo, "À propos" online: Ex Aequo, <https://exaequo.net/a-propos/>.
[339] Gauthier Interview, *supra* note 315.

provide support, including speaking on their behalf at the Commission. Since many complaints are resolved by way of mediation and the results of these mediations are usually private, due to the use of non-disclosure agreements, Gauthier was able to rely on her personal experience with many cases as a form of precedent.[340] As she developed her expertise and became well known in Montreal for her advocacy, Gauthier began to consult with human rights lawyers about how to be effective at the Commission, including the range of remedies available. One of the most important pieces of advice that Gauthier received was that she could ask for damages. In her first complaints, Gauthier had only asked for remedies that would require businesses to install a ramp or to clear their aisles to allow wheelchair users freedom of movement. Once she learned about the availability of damages, Gauthier began to bring complaints requesting moral, and sometimes punitive, damages.

When Gauthier first began this type of advocacy, she discovered that there were even barriers for her to get into the building where the Québec Human Rights Commission was (and still is) located. At the time, the only way for wheelchair users to access the Commission from its building's front entrance was to use a small freight elevator. The small size and limited weight capacity of the freight elevator meant it was not useable for certain types of wheelchair users, such as those using a heavy power-operated wheelchair, those accompanied by a service dog, and those whose body weight and wheelchair weight combined exceeded the safety limit. The freight elevator had a heavy door to exit, it would often break down and its intercom was too high for operation by a person sitting in a wheelchair. In 2012 RAPLIQ was successful in obtaining a settlement of $15,000 each for Linda Gauthier and another wheelchair user who had

[340] Gauthier Interview, *supra* note 315.

both been stuck on various occasions in the freight elevator when attending meetings at the Québec Human Rights Commission.[341]

Even before the complaint about the Québec Human Rights Commission's building, Gauthier had received significant local media attention for her work on human rights complaints. The first complaint to get media coverage was her complaint regarding access to her polling place in the November 2009 municipal election in Montréal. Gauthier had arrived to vote at her polling place on the day of the election and found the only options to get inside were an entrance with 21 stairs or a steep temporary ramp. She refused to use the ramp because she found it too unsafe for her to use and she also noticed that she would not fit through the door to the building in any case.[342] Gauthier brought her complaint immediately after the election but the matter did not make any significant headway until January 2016 when the Québec Human Rights Commission asked the Superior Court to strike down section 188 of the Act respecting elections and referendums in municipalities because it does not guarantee universal accessibility of polling stations.[343] The case is still pending.

Gauthier filed her second prominent human rights complaint in December 2009 against Pharmaprix because of inaccessible card readers at their cash registers.[344] The complaint was resolved through mediation in June 2010 and Pharmaprix agreed to ensure that all of their stores' cash registers would have moveable card readers for use by wheelchair users or those of short

[341] Marie-Michèle Sioui, "Accès pour handicapés: poursuite de RAPLIQ", *Journal Métro* (13 August 2012) online: < https://journalmetro.com/actualites/montreal/138614/acces-pour-handicapes-poursuite-du-rapliq/>; Gauthier Interview, *supra* note 305.
[342] Carole le Hirez, "Empêche de voter", *Le Plateau* (19 November 2009).
[343] *Act respecting elections and referendums in municipalities*, CQLR c E-22; John Meagher, "Human rights commission takes disabled voter's case to court", *Montreal Gazette* (13 January 2016)
[344] Allison Lampert, "Card readers draw complaint", *The Gazette* (19 February 2010) B1.

stature. The President of the Québec Human Rights Commission also urged other retailers to make their card readers accessible to people with disabilities.[345]

In the midst of her individual work on human rights complaints, Gauthier met Laurence Parent, a critical disability studies scholar, at a meeting of disability-related organizations in October 2009.[346] Gauthier encouraged Parent to make her first human rights complaint that same month. Parent, also a wheelchair user, had been denied entry to a public bus because the bus driver refused to deploy the ramp due to snow even though she did not see any snow near the bus stop.[347]

During their discussions of Parent's human rights complaint, the two discussed advocacy for persons with disabilities in Québec. In December 2009, they decided to create a new organization, RAPLIQ, to focus at the municipal level, use the media effectively to hold local government to account, and provide a more formal body for consulting on human rights complaints as Gauthier had been doing informally for years.[348]

RAPLIQ's first two public initiatives in the summer and fall of 2010 addressed all of these priorities. One was a public education project called "Accessibility Days" that they organized throughout Montréal.[349] These events were an opportunity to raise awareness about inaccessibility by bringing activists and politicians together for public lectures. RAPLIQ also used these events to get attendees involved in audits of the businesses, parks, sidewalks and other public spaces in the neighbourhood. These audits were useful to provide data to RAPLIQ for the purposes of lobbying but they also served to educate the participants about the barriers in the

[345] Allison Lampert, "Victory for the Disabled", *The Gazette* (15 July 2010).
[346] Parent Interview, *supra* note 315.
[347] *Ibid.*
[348] *Ibid.*
[349] *Ibid.*

city. For example, out of the 300 businesses audited during the Plateau-Mont-Royal Accessibility Day, 175 were deemed inaccessible.[350]

RAPLIQ's second public initiative in 2010 is the subject of this case study – an organized campaign, including several human rights complaints, to combat inaccessibility on and around the temporary summer patios in the borough of Plateau-Mont-Royal (the Plateau).

The current structure of municipal governance in Montréal dates back to 2002 with the "merger" that created 27 boroughs out of the previous municipalities on the island of Montréal. Each borough has a locally elected mayor who sits on the city council and at least four borough councillors, some of whom also sit on the city council. This devolution of powers, amongst other things, was meant to allow the boroughs to meet local concerns and give citizens greater influence in municipal politics. The services that became the purview of borough councils were, for example, urban planning, fire safety, roads, garbage, parks, culture, community services and issuing local building permits.[351] The boroughs also were given the power to change regulations related to urban planning in their jurisdiction and to conduct public consultations.

In 2009, the Plateau began issuing permits to restaurants, particularly along Avenue du Mont-Royal, for the construction of summer patios on the sidewalk directly in front of their establishments. For the purpose of facilitating the summer patios the borough decided to relax the bylaw that normally required a 1.8 metre passageway on the sidewalks for pedestrians. After the summer of 2009, the borough received many complaints, including from Linda Gauthier, about the patios blocking the sidewalk. Initially the borough resisted taking any action. Alex Norris, the councillor responsible for accessibility (who is now the Deputy Mayor of the

[350] "175 commerces inaccessibles sur la rue Mont- Royal", *Le Journal de Montreal* (11 September 2010) online: <https://www.journaldemontreal.com/2010/09/11/175-commerces-inaccessibles-sur-la-rue-mont-royal-1>.
[351] *Charter of Ville de Montréal, Metropolis of Québec,* CQLR c C-11.4 at art 130 [*Charter of Ville de Montréal*].

Plateau), argued that wheelchair users and others who could not fit on the sidewalks with patios could just cross to the other side of the street. However, the borough relented to the pressure of complaints, particularly since Gauthier had developed a reputation for bringing media attention to issues of accessibility, and decided it would return to enforcing the 1.8 metre rule the following summer.

For the summer of 2010, any Plateau business that did not comply with the 1.8 metre passage would not receive a permit to construct a summer patio. Further, any business that encroached on the passageway with furniture or that allowed its customers to do so would receive a fine of $600. Some organizations representing Plateau business owners were unhappy about what they considered to be flip flopping because it meant that they would have to completely redesign their patios. For some, the concern was that the width of the sidewalk in front of their establishment would prevent the construction of a patio as an extension of the restaurant. The Société de développement du boulevard Saint-Laurent advocated for a 1.5 metre passageway, which had been the standard in the past.[352] However, the Plateau maintained its position that a 1.8 metre passage on the sidewalk would be the rule.

Among the leadership of the newly formed RAPLIQ there was a certain level of satisfaction about the Plateau's decision to protect the accessibility of the sidewalks. Yet the fact that most if not all of the summer patios were inaccessible to wheelchair users seemed unacceptable. At first, RAPLIQ used the same strategy that had been successful with the sidewalks and reached out to Councillor Alex Norris to complain. This time Norris was even more resistant to the accessibility concerns. The businesses with summer patios had already been

[352] Stéphanie Saucier, "Assez larges, les trottoirs?", *24 heures* (8 June 2010) 5.

required to invest in new designs because of the Plateau's bylaw changes so to ask them to redesign their patios yet again seemed unfair and potentially too financially burdensome.

RAPLIQ has video footage of a gathering of its members in front of an inaccessible patio to protest in the summer of 2010.[353] Councillor Norris attended the protest and explained the Plateau's position on summer patios on camera. Rather than raise the issue of cost Norris argued that accessibility in these patios would be impossible architecturally and that there was no way to make them safe for wheelchair users. He also pointed out that there had been a lot of resistance from restaurant and bar owners. Norris also argued that it was a "net positive" that he had been able "to return the sidewalks to the general public".[354] It is as if Norris was asking RAPLIQ and others in the disability community to be grateful that the borough started enforcing the 1.8 metre passageway and not make any further demands. Norris even went so far as to say that the reason that some patios were raised structures, and therefore not accessible, was to comply with the sidewalk rules and keep the patio furniture from blocking the sidewalk. Linda Gauthier then directly asked Councilor Norris who was responsibility for the inaccessibility: the business owners or the municipality. Norris said that he did not know but he believes that, in principle, it is the borough's responsibility to provide universal access. Gauthier asked if this responsibility stems from the fact that it is borough inspectors who deliver the permits. Norris agreed with her and said "we cannot rely on the businesses to do this of their own goodwill, it is the role of the state to intervene to protect the rights of persons who are the most vulnerable in society, including people with reduced mobility."[355] These comments take on signifance in light of the what would eventually take place at the Quebec Human Rights Commission and the policy

[353] Laurence 416. "Nous n'aurons pas d'été cette année [We will have no summer this year]" (13 August 2010), onli ne: YouTube <https://www.youtube.com/watch?v=pZvDeF_n0eU>.
[354] *Ibid*. (this is my translation from the French in the original).
[355] *Ibid.*

response from the borough and the province. As I will discuss below, accessibility has largely been left to the "goodwill" of business owners.

Following the exchange at the protest with Councilor Norris, RAPLIQ began developing its legal strategy. Parent felt that it would be much more complicated and require more resources to go beyond municipal bylaws and try and challenge the provincial laws that would determine access to the interior of restaurants and, in particular, the washrooms. One of RAPLIQ advisors, Louise Harel, was a former provincial MLA and so they discussed advocacy at the provincial level with her. Since they were located in Montreal and primarily directed their resources at engaging in municipal politics, challenging provincial law was beyond their capacity at the time. Parent felt that it was probably one of the easiest battles to win and that since the summer terrasses were new, they created an opportunity to draw attention to the issue of accessibility.[356] Gauthier told me that changing provincial building code was the top priority for RAPLIQ but that lawyers advising the group did not think this would be a successful case. For example, she was advised that even if smaller boutiques were not accessible, wheelchair users had many choices of places to shop in large malls.[357]

By the spring of 2011, after trying informal complaints and public protest, RAPLIQ decided to file six complaints with the Quebec Human Rights Commission (Commission) against restaurants that had inaccessible summer patios. Instead of dealing with the complaints one by one, the Commission decided that the best way to proceed would be to formally involve the Plateau administration along with a representative of all restaurant owners in the neighbourhood. The Commission established a mediation process between RAPLIQ, the Plateau and a representative of the restaurants, the Société de développement de l'Avenue Mont-Royal

[356] Parent Interview, *supra* note 315.
[357] Gauthier Interview, *supra* note 315.

(SDAMR). Initially, when interviewed by local media, Councillor Norris continued to argue that "technical challenges" prevented accessibility and it would be impossible to overcome these challenges.[358] Not only did he indicate that it would be impossible but he also indicated that the Plateau administration was not at fault: "It was our objective all along (to have accessible terrasses), but technical people say it's not possible."[359]

The official opposition at the municipal level, Vision Montréal, supported changes citywide to improve the accessibility of restaurant and bar patios. At a Montréal City Council meeting in May 2011, Vision Montréal presented a motion that Montréal boroughs be asked to amend their *By-law on the occupation of public property* so as to make universally accessible terraces a legal requirement throughout the City. While this motion did not pass, in June 2011 the Montréal City Council adopted a Politique municipale d'accessibilité universelle, which included a $2 million annual investment to improve the accessibility of municipal buildings, including libraries, community centers, sporting places, public spaces and city communications.[360] The boroughs were also invited, but not required, to adopt their own accessibility policies by the end of the year.[361]

By the end of July 2011, the Commission's mediation had arrived at a settlement requiring the Borough to adopt a normative framework for redesigning 32 out of 90 patios that were not yet universally accessible and that these patios would need to be ready for the 2012 summer season. Plateau mayor Luc Ferrandez would not comment as to the specifics of the settlement when asked by a journalist because the parties signed non-disclosure agreements.

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[358] Sarah Bélisle, "Toujours pas d'accès aux terrasses de l'avenue Mont-Royal pour les personnes à mobilité réduite", *24 heures* (15 May 2011).
[359] Sue Montgomery, "Wheelchair access to terrasses needs to be addressed: activists' group" Montreal Gazette (16 May 2011).
[360] Jennifer Guthrie, "L'accessibilité universelle à Québec", *Journal Metro* (20 June 2011).
[361] Philippe Boisvert, "L'accessibilité universelle jugée insatisfaisante", *Le Plateau* (6 July 2011).

Councillor Norris continued to insist that even though there was a plan to make the patios accessible, there were still "technical difficulties".[362]

Other than the normative framework mentioned above, the aspects of the settlement that have become public are that between May 2011 and February 2012 the parties met four times to arrive at solutions for redesigning patios (with a firm of architects involved) and the result was several amendments to the *By-law on the occupation of public property*, the Plateau's bylaw governing permits for summer patios.[363] The first amendment is in the section on permit applications for an "occupation périodique du domaine public" (periodic occupation of the public domain). These applications must now include in their design plans "l'aménagement d'un accès pour personnes à mobilité réduite, le cas échéant" (the provision of access for persons with reduced mobility, where applicable).[364] Notably, this new requirement appears to apply beyond just summer patios. The City of Montréal's website describes permit requirements in all of its boroughs and it mentions that in the Plateau both summer patios and "placottoirs" must meet certain accessibility requirements. (Placottoirs are small extensions of the sidewalk usually built over parking spaces in the summer and may include benches, tables and plants/flowers.)[365] Despite the City of Montréal's description on its website, neither the Plateau's website nor the Plateau's official guide for placottoir permit applicants mention anything about accessibility, so it is not clear whether this requirement is enforced.[366]

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[362] Reynaldo Marquez, "Terrasses enfin accessibles", *le Journal de Montréal* (1 August 2011) online: < https://www.journaldemontreal.com/2011/08/01/enfin-accessibles>.
[363] Daphné Angiolini, "Victoire pour le RAPLIQ", *Le Plateau* (8 March 2012) 3.
[364] *Règlement sur l'occupation du domaine public*, RRVM 2017, c O-0.1 at 36(1)(f) (author's translation) [*Règlement sur l'occupation du domain public*].
[365] "Aménagement d'un placottoir", online: *Le Plateau-Mont-Royal* <http://ville.montreal.qc.ca/portal/page?_pageid=7297,129877587&_dad=portal&_schema=PORTAL>.
[366] *Ibid.*

While the requirements for placottoirs may still be unclear, the specific standards for summer patios are found in the amendments to the *By-law on the occupation of public property* and in the materials published by the Plateau. The amendments now require summer patios to comply with the following:

- its access, including the access ramp for persons with reduced mobility, must be located on the front of the establishment it serves and must not overlook a traffic lane;[367]
- it must be on a single level, unless the applicant demonstrates that it is impossible, because of its size or the topography of the land, to develop it on a single level. In this case, each level must allow for the installation of a table and four chairs accessible to persons with reduced mobility;[368]
- a manoeuvring area for persons with reduced mobility of at least 1.5 m in diameter must be provided inside the patio;[369] and,
- it must include at least one table that can accommodate persons with reduced mobility.[370]

These new requirements actually go beyond the demands in RAPLIQ's initial complaints about ramped access to patios and are meant to ensure that the patio is spacious enough and has at least one accessible table. The official guide for summer patios provides further clarification about the required dimensions for wheelchair ramps. They must have a minimum width of 1.2 metres and a maximum slope of 1:12, which means that for each inch of height there must be 12

[367] "son accès, y compris la rampe d'accès pour les personnes à mobilité réduite, doit être situé en façade de l'établissement qu'il dessert et ne doit pas donner sur une voie de circulation"
[368] "il doit être sur un seul niveau, sauf si le requérant fait la démonstration qu'il est impossible, en raison de sa superficie ou de la topographie du terrain, de l'aménager sur un seul niveau. Dans ce cas, chaque niveau doit permettre l'emplacement d'une table et de quatre chaises accessibles aux personnes à mobilité réduite"
[369] "une aire de manœuvre pour les personnes à mobilité réduite minimale de 1,5m de diamètre doit être prévue à l'intérieur du café-terrasse"
[370] *Règlement sur l'occupation du domaine public*, *supra* note 355 at 40.1(7), (16), (17) and (19) (author's translation) "il doit comporter au moins une table pouvant accueillir des personnes à mobilité réduite"

inches of length.[371] The guide does not contain specifications for how to construct a table that will accommodate those with reduced mobility, which could have been things like a minimum table height and removeable chairs (rather than picnic table-style).

Both media coverage and RAPLIQ's press releases described the results of the mediation as a win for persons with disabilities. The changes to the bylaw governing summer patios and other temporary installations met RAPLIQ's objectives when the organization decided to initiate the human rights complaints. However, as I will explain in the next sections, there are reasons to conclude that this victory may be hollow. First, the terms of the settlement were never released to the public, which clouds the issues of cost, responsibility for cost and the so-called "technical difficulties" mentioned by Councillor Norris. Second, even if wheelchair users and others with reduced mobility could now use the summer patios, there is still no legal requirement for restaurants and bars in the Plateau to provide an accessible entrance to their interior. This is a total barrier to wheelchair users and others with reduced mobility during the winter or during periods of rain or excessive heat in the summer.

Third, without access to the interior of a bar or restaurant with a summer patio, there remains an issue of access to washrooms. Use of the washroom is an obvious part of eating and drinking in public but it was never addressed publicly during the dispute over access to the patios.

Finally, framing the summer patio mediation as a win for RAPLIQ despite persisting barriers may have lasting negative consequences for people with disabilities. There have been no changes to the Québec Construction Code to address front door and washroom access. Furthermore, recent municipal solutions to barriers in the built environment have been policies to

[371] Ville de Montréal, Le Plateau-Mont-Royal, *Guide d'aménagement d'un café-terrasse sur le domaine public*, (Montréal: Ville de Montréal, 2019) at 7.

financially support businesses that choose to renovate out of, as Councilor Norris put it, their own goodwill. Certainly much of the business community's opposition to accessibility measures was a response to the Plateau changing the design requirements twice. They were first required to address sidewalk width and later required to take action regarding accessibility of the patio itself. However, optional financial support for accessibility renovations rather than legal changes undermines the significance of inaccessibility in lives of people with disabilities and leaves their fate to the benevolence of business owners.

Issue #1: The Non-Disclosure Agreement

The confidentiality of the process and results of a mediation in the human rights context can be beneficial to the parties, because it offers privacy and informality. But this confidentiality also precludes public knowledge of the outcome of a complaint because the parties usually sign a non-disclosure agreement (NDA) upon settlement. When parties keep the mediation process and terms of settlement private, the public does not know if there has been any compensatory payments or apology to complainants.[372] There is political significance to such actions when the respondent to a complaint is the government. Members of the public cannot scrutinize the outcome and those who may experience similar discrimination will not be able to rely on the case as precedent. Without the benefit of precedent, many aspects of the consequences of a human rights complaint are unpredictable for potential complainants, respondents, legal professionals and organizations like RAPLIQ that are involved in advising or supporting complainants. As a result, mediations may benefit the parties involved but have no benefit to other people in similar situations.[373]

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[372] Tara Parker, "Human Rights Dispute Resolution: Protecting the 'Public Interest'" (1999), online: Canadian Forum on Civil Justice <http://cfcj-fcjc.org/sites/default/files/docs/hosted/17464-rights_dr.pdf> at 14-15.
[373] Jacobs, 2016, *supra* note 289 at 95.

In addition to the absence of legal precedent, legal scholars Philip Bryden and William Black identify many others ways that a confidential settlement can undermine the public interest:

- it may "incorporate terms that are contrary to human rights principles";
- it may "fail to provide a remedy to third parties who have been harmed by the same conduct";
- it may provide the complainant with "pure monetary compensation instead of requiring changes to practices that cause ongoing inequality"; and,
- it "may prevent public discussion about governmental conduct allegedly causing discrimination."[374]

The use of an NDA in the summer patio mediation raises some of these concerns but not all. We do not know whether there was a monetary settlement, but the public aspects of the settlement, and primarily the bylaw change, provide a remedy to anyone who was affected by the inaccessibility of the summer patios. However, the NDA in this mediation may have other negative consequences related to the issue of government conduct.

First, because this mediation included both public (the Plateau) and private (the SDAMR) respondents, the use of an NDA prevented the public from knowing which entity took responsibility for the financial cost of renovating the summer patios. Part of the reason for a confidential settlement is that no party takes public legal responsibility. One of the terms of settlement could have been that the Plateau would cover the cost of redesigning and construction of the patios that were the subject of the six complaints. If this became public knowledge, it could have led to businesses demanding funding from the borough in order to comply with the changes to the bylaw that would be in effect for the next patio season. This may be the very

[374] Philip Bryden & William Black, "Mediation as a Tool for Resolving Human Rights Disputes: An Evaluation of the B.C. Human Rights Commission's Early Mediation Project" (2004) 37:1 UBC L Rev 73 at 87-88.

reason that the Plateau would have wanted the terms of the settlement to be protected by an NDA.

The second negative consequence of the NDA is the uncertainty concerning business owner financial responsibility. This created antagonism towards the concept of accessibility. The costs of creating an accessible built environment were perceived as an unfair burden on business owners. Just before the start of the patio season in 2012, when restaurants and bars were required to construct accessible patios, business owners began to publicly express concern about the new requirements for a wheelchair ramp and other accessibility features. The Director General of the SDAMR, which had been a party to the mediation at the Commission, complained that the borough did not do the work of planning for accessibility when it first issued permits for summer patios and now businesses were suffering for this error. The SDAMR emphasized that it was not opposed in principle to accessibility but that the changes in the design requirements would increase their costs and thus could have been avoided if accessibility had been required from the beginning. The SDAMR wanted the Plateau to delay the application of the regulation or assist with the costs. When interviewed by a local paper Councillor Norris said it was the borough's intention to assist with the costs but that it would not be too expensive for business owners to comply.[375]

Third, since the terms of settlement are confidential, the actual costs of the redesigning and rebuilding of the summer patios are unknown to the public. This makes it impossible to assess if Councillor Norris' assertions about costs were correct. Without any knowledge of the costs, the public cannot judge whether they are burdensome on private businesses or adequately assess whether government programs offering financial assistance are sufficient. This is

[375] Sarah Bélisle, "Personnes à mobilité réduite: <<Enfin>>, les terrasses du Plateau accessible", *24 heures* (5 March 2012).

important because, as I will describe in further detail below, soon after the summer patio complaint the City of Montreal started a program to offer funding for businesses interested in renovating to improve the accessibility of their premises.

The overall effect of the NDA is that while summer patios would now be required to be wheelchair accessible, the concept of accessibility was tied to economic considerations rather than treated as a matter of justice or law. In fact, the focus on access to temporary summer patios not only created resistance from the business community but it also allowed Québec lawmakers to avoid dealing with the underlying regulations that endorse inaccessibility in Montréal's built environment year round.

Issue #2: Interior Access

While the use of the NDA in the summer patio mediation created uncertainty and resentment about the cost of accessibility, there was also a more practical problem with the outcome. RAPLIQ was successful in getting the Plateau to require accessible summer patios – but where would patrons who use wheelchairs or have reduced mobility go if it started raining and how would they get to the washroom after eating and drinking on these patios?

As mentioned above, the informal audit during the Plateau-Mont-Royal Accessibility Day found that 175 of the 300 audited commercial establishments were inaccessible. As I will explain below, the reason for this broad inaccessibility in the Plateau (and throughout Montréal) is not just non-compliance. The majority of the blame may be placed on the broad exceptions in Québec's Construction Code to minimum accessibility requirements for older buildings (built before 1976) and inadequate accessibility requirements for new buildings. The summer patio mediation did not put the provincial building code into issue. It was only about the municipal requirements for a summer patio permit applications. As a result, RAPLIQ's victory may have

done very little to ensure that the bars and restaurants of the Plateau are truly accessible for people who use wheelchairs or who have reduced mobility.

Exemptions

As I explained at the beginning of this chapter, the Québec government included some accessible design requirements in the 1976 provincial building code. These new design requirements, focussed on improving access for wheelchair users, were only applicable to buildings constructed after 1976. In 2000, the Québec Building Code was amended to apply accessibility standards to pre-1976 buildings undergoing renovation but only in those parts of the building renovated or added. Otherwise, the exception for buildings constructed before 1976 continues today.

A 2017 OPHQ report on the problem of inaccessibility in Québec blamed the exemptions for pre-1976 buildings and inadequate municipal building inspections.[376] However, the provisions of Québec's Construction Code actually exempt new buildings from minimum standards for accessibility. It is also questionable whether the specifications for barrier-free design in the Code are effective in creating accessibility in the built environment.

As I discussed in Chapter One, the general public and even lawmakers spend very little time engaging with the technicalities of building codes. Québec, like other provinces, publishes a guide to explain the barrier-free standards required by its Construction Code. Both this guide and the Construction Code itself require careful reading to understand how all of the provisions work together.

[376] Government of Québec, Office des personnes handicapées du Québec, Évaluation de l'efficacité de la politique gouvernementale À part entière : pour un véritable exercice du droit à l'égalité : les déplacements des personnes handicapées : l'accès aux transports et l'accessibilité des bâtiments et des lieux publics (Drummondville, QC: Publications du Québec, 2017).

There are two sections in the Construction Code that set our barrier-free design requirements: one for new buildings (3.8) and one for pre-1976 buildings undergoing renovations (10.3.8). There are some significant differences between them. Some of the substantive differences are:

- while newer buildings must ensure at least 50% of their entrances are accessible, older buildings undergoing renovation must only provide one accessible entrance (and only in the renovated part of the building;
- wheelchair ramps may be steeper and have less space at the top and bottom in older buildings undergoing renovation than in new buildings; and,
- new buildings that contain seating areas, showers, service counters, telephones and drinking fountains must provide wheelchair accessible options while older buildings have no similar obligations.[377]

In addition to the less stringent accessibility requirements, any renovations or additions to older buildings do not need to conform to any accessibility requirements in the following situations:

- the main floor has less than 60 person occupancy;
- the main floor is less than 250 m^2 (2700 square feet);
- the ramp required to make the building accessible will encroach on the public way (sidewalk or street);
- the main floor is more than 900mm (5 or 6 steps) from street level or 600 mm from its entrance (3 or 4 steps); or,

[377] Québec, Régie du bâtiment du Québec, *Quebec Construction Code, Chapter I - Building*, (Ottawa: National Research Council, 2010) at 3.8 and 10.3.8.

- there is more than 600mm (3 or 4 steps) between the entrance and the elevator that services the main floor.[378]

Considering that many of Montréal's buildings were constructed before 1976, the exemptions from accessibility for these buildings, even when they are renovated, leave most inaccessible. In the Plateau, the majority of buildings are pre-1976[379] and small commercial establishments, whether boutiques or restaurants, are the norm. So even when they are renovated, the exemptions regarding occupancy and size preclude these establishments from ever having to become accessible.

In a February 2018 report, the OPHQ acknowledged extensive inaccessibility in Québec's commercial establishments because of the pre-1976 exemptions and it committed to begin an audit of these businesses to get concrete statistics and to begin to assess the costs of making them accessible.[380]

Substantive accessibility requirements

Even in new buildings where the barrier-free standards are required, it is not clear that they are effective in ensuring the built environment will be useable and safe for persons with disabilities. The focus in this chapter is on disabilities that relate to mobility, since that was the subject of the summer patio mediation. The accessibilty requirements in Québec's Construction Code are also almost exclusively related to the design needs of persons with reduced mobility, in particular, wheelchair users. This, however, is not the norm in Canada or internationally. As mentioned in Chapter One, Canada's *National Building Code* has included design standards for

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[378] *Ibid* at 10.3.8.1.
[379] Roberto Rocha, "Montreal is 375 years old, but how old are its buildings?", online: *CBC* <https://www.cbc.ca/news2/interactives/montreal-375-buildings/>.
[380] Government of Québec, Office des personnes handicapées du Québec, *Portrait sur l'accessibilité des commerces: Rapport d'étape de l'Office des personnes handicapées du Québec présenté à la Commission de l'économie et du travail*, (Drummondville, QC: Publications du Québec, 2018).

auditory and visual emergency signals since 1965. Further accessibility requirements related to visual impairments were added in 1985.

Keroul, a non-profit that promotes accessible tourism in Québec, has published a detailed comparison of the barrier-free minimum requirements in Québec's Construction Code with those of other jurisdictions. [381] Québec has much fewer substantive requirements and many more exceptions from barrier-free design than the comparators in Kéroul's study: Ontario, the United States and France, along with the model code published by the International Standards Organization and the Standards Council of Canada.

The fact that Québec's barrier-free design requirements are minimal as compared with national and international standards is not addressed by the OPHQ's reports on inaccessibility. The OPHQ identifies the exemptions for pre-1976 buildings as the only reason for persistent inaccessibility in Quebec. However, the substance of the barrier-free design requirements now has media attention. In the fall of 2018 two newly built hospitals, the McGill University Health Centre (MUHC) and the University of Montréal Health Centre (CHUM), announced they would need to start retrofitting their washrooms to make them accessible for persons with disabilities.[382]

At the MUHC a patients' committee had initiated an audit of the hospital washrooms in 2016 and found that only 7 out of 72 were fully accessible. Some of the problems include heavy doors without automatic door buttons, soap dispensers and grab bars too high for wheelchair users, and baby changing surfaces that block wheelchair users from getting into a washroom stall. A patients' committee at the CHUM identified similar design problems right after the hospital opened in 2017. None of these design features are mentioned or required by the Québec

[381] Kéroul, *Revue des norms et règlements en matière d'accessibilité des établissements touristiques*, (Montréal: Kéroul, 2014).
[382] Aaron Derfel, "MUHC upgrading public bathrooms to better accommodate disabled users", *The Gazette* (20 September 2018) A1.

Construction Code and so both hospitals were "built to code". The cost for renovations at the MUHC has been reported to be anywhere between $9,000 and $100,000 per washroom.[383] The executive director of the CHUM pointed out that the cost of retrofitting the washrooms is higher than if the accessibility features had been installed from the beginning.[384]

Another design feature that is not addressed by the Québec Construction Code is the accessibility of permanent patio structures. This means that even though RAPLIQ was successful in changing the municipal bylaw about permit requirements for temporary summer patios, the Québec Construction Code does not require accessible patios for any permanent construction. The absurdity of this gap in the provincial law became apparent in the summer of 2017 when the Institut de tourisme et d'hôtellerie du Québec (ITHQ), a public corporation located in the Plateau borough, opened its renovated headquarters and its restaurant patio was not accessible to wheelchair users. RAPLIQ's President, Linda Gauthier, immediately reacted by threatening to bring a human rights complaint.[385] The Plateau's mayor, Luc Ferrandez, also requested that ITHQ provide an accessible entrance to its restaurant patio.[386] These tactics were successful and in July 2018 the ITHQ installed a small lifting platform for wheelchair users to access its restaurant patio.[387] However, there were no changes to the Québec Construction Code, which means there is still no legal requirement that new or renovated buildings (even those owned by the province) have accessible patios.

Issue #3: Washroom access

[383] *Ibid*.
[384] *Ibid.*
[385] "Une Autre Terrasse Bientôt Accessible À Tous", *Journal de Montreal* (5 July 2017) 20.
[386] *Ibid.*
[387] "La terrasse de L'ITHQ accessible à tous" (18 February 2019) online: *Institut de tourisme et d'hôtellerie* <https://www.ithq.qc.ca/institut/actualites/article/la-terrasse-de-lithq-accessible-a-tous/>.

The cost of renovating a washroom or creating an accessible washroom on the main floor of a restaurant (where the washrooms are up or down a set of stairs) may be so prohibitive that restaurant owners would not be able to afford it even if they could afford the cost of an accessible entrance.[388] Gauthier said that, from a strategic perspective, she was concerned about raising the issue of access to washrooms because she believed it might make restaurant owners hesitant to invest in barrier-free entrances to their establishments at all.[389]

The gaps and exceptions in Québec's Construction Code allow for many commercial establishments in the Plateau to remain inaccessible even while they are now required to meet accessibility requirements if they install a summer patio. This means that if a wheelchair user eats and drinks on an accessible patio, there is no guarantee that this individual will be able to go inside the restaurant or bar to use the washroom. Even if the entrance happens to be accessible the washroom itself may be down a set of stairs or too small for a wheelchair user to get inside. The issue of washroom access was never publicly mentioned or after the mediation with the Plateau and the SDAMR, so we do not know if it was formally raised during the mediation process. However, requiring restaurants and bars to provide access to their washrooms would have been beyond the borough's jurisdiction since it would require changes to the provincial legislation, the Québec Construction Code, rather than the municipal bylaw at issue in the complaint. However, without access to a washroom, a summer patio, even with a ramp, might be impracticable for a wheelchair user or a person with reduced mobility.

The absurdity of the washroom access issue soon became apparent when in June 2017 the owners of Bar Renard in the borough of Ville Marie built an accessible patio at the same height as the entrance to its interior, and in particular, its washroom. Following the resolution of the

[388] Gauthier Interview, *supra* note 315.
[389] *Ibid*.

dispute in the Plateau, Ville Marie had made similar changes to its bylaw governing the construction of summer patios. Municipal officials ordered Bar Renard to rebuild its patio to be closer to the ground because it violated the borough's restrictions on the height of a summer patio. The borough also deemed Bar Renard's wheelchair ramp to be too steep. The changes demanded by the borough would bring the patio into compliance with the borough's standards but would no longer provide a step-free entrance to the inside of the bar and its washrooms. The owners of Bar Renard argued that the ramp met "accessibility standards" but not the borough's standards. They also took the position that the borough should change the bylaw to require that wheelchair users have access to washrooms.[390] The borough ultimately decided not to force Bar Renard to change its patio for the summer of 2017, but municipal officials said they would not issue a permit the following year unless the owners lowered the patio.

The conflict over the patio at Bar Renard emphasizes the point that RAPLIQ's human rights complaint about summer patios did not lead to substantive access for wheelchair users. For many of us in the disability community that use mobility devices (wheelchairs, walkers, scooters, crutches, etc.) time spent outside of our homes is based on careful planning about where we will use the washroom. My practice in Montréal has been to memorize Starbucks locations when I plan my day because of their company policy to have wheelchair accessible washrooms (which is influenced by the accessibility requirements of the ADA because it is an American company). The invisibility of access to washrooms during the summer patio dispute was shocking to me because of how central this issue is for many members in the disability community.

This invisibility is echoed in the academic scholarship on washrooms. There is increasing attention regarding certain types of access to washrooms, like for transgender people and for

[390] Dan Spector, "Bar owner defies Montreal's terrace rules on purpose", *Global News* (29 June 2017) online: < https://globalnews.ca/news/3566705/bar-owner-defies-montreals-terrasse-rules-on-purpose/>.

individuals experiencing poverty and homelessness.[391] The politicization of access to washrooms will certainly increase access for persons with disabilities as a whole, not just those who are also part of any or all of these aforementioned communities. Gender-neutral washrooms that are accessible can be beneficial for cisgender people with disabilities who need help using the washroom. Any increase in outdoor public washrooms (that are also accessible) would also benefit people with disabilities that cannot afford to spend money at an establishment just to get access to a washroom.

However, there are some aspects of the disability experience and access to washrooms that merit their own attention in scholarship and as a matter of public policy. For one, the issue of washroom access emphasizes the importance of conceptualizing disability as embodied experience and not just about external factors that cause a person to be disabled. It is not simply a matter of fitting a wheelchair into a washroom stall. Individuals who use mobility devices or have reduced mobility also experience bodily conditions that can require them to use the washroom more frequently than the average person, which only intensifies the need to access a washroom. [392] Second, as I discussed in Chapter One, the dearth of accessible washrooms in public (whether outdoor or in restaurants, shops, schools, etc.) is a direct result of the historic segregation of persons with disabilities from public life. As Jonathan Paul Katz puts it: "being able to use a public bathroom is, essentially, tacit approval for presence in [public] space."[393]

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[391] Rae St. Clair Bridgman & Wins Bridgman, "Public toilets, accessibility, and human rights: A Winnipeg pop-up campaign", *Plan Canada* 58:3 (2018) 40.
[392] Jonathan Paul Katz, "Facilitating Movement: Assessing the Adequacy, Accessibility, and Usability of Public Toilet Infrastructure" online: *Greater Greater Washington* <https://ggwash.org/files/FacilitatingMovementPublicVersion.pdf> at 6.
[393] *Ibid* at 4.

One of the only academic treatments of disability and access to washrooms is an Irish study conducted by geographers Rob Kitchin and Robin Law.[394] Kitchin and Law draw historical connections between access to public washrooms and the concept of citizenship. They argue that the "provision of accessible public toilets provides the minimum conditions under which disabled people can participate in social and political life."[395] Another study from the UK, which describes the work of disability activists there, asserts that "[a]ccess to a toilet away from home is not only about gaining entry to the cubicle, toilets also grant access to wider community, public spaces and opportunities."[396]

There are two Canadian studies on public toilets that mention the potential social isolation and detrimental health effects for people with disabilities when there are limited accessible washrooms in public.[397] Both refer to a government report from the UK that identifies the fear of leaving one's home and not being able to find an accessible washroom in public as a common experience for persons with disabilities. This means many individuals decide to stay home or only make short and well-planned outings. To be clear, this is a fear of having a bowel or bladder accident in public while going to work, school, shopping, socializing, or using public transportation.[398] Kitchin and Law emphasize that because of societal taboos associated with

[394] Rob Kitchin & Robin Law, "The Socio-spatial Construction of (In)accessible Public Toilets" (2001) 38:2 Urban Studies 287 [Kitchin & Law].
[395] *Ibid* at 289.
[396] Charlotte Jones et al, "Pissed Off! Disability Activists Fighting for Toilet Access in the UK" in Maria Berghs et al, eds, *The Routledge Handbook of Disability Activism* (New York: Routledge, 2020).
[397] Rhonda Cheryl Solomon, "A comparative policy analysis of public toilet provision initiatives in North American cities: recommendations for the creation of a public toilet strategy in Toronto" (Toronto: Cities Centre at University of Toronto, 2013) at 18; Rachel Canham, "Talking Toilets: Assessing the accessibility of public toilet provision in Ottawa, Ontario" (Ottawa: Carleton University, 2014).
[398] UK, Department for Communities and Local Government, *Improving Public Access to Toilets Guidance on Community Toilet Schemes and SatLav* (London: Communities and Local Government, 2008).

washroom use, the consequences of limited access to washrooms are a matter of dignity – the individual has no choice but to relieve themselves in public whether purposely or by accident.[399]

The significance of access to a washroom for persons with disabilities has been affirmed by Canadian courts and human rights commissions. *Ripplinger v. Saskatchewan (Human Rights Commission)* involves a human rights complaint about inaccessibility at an art gallery.[400] The original complaint was made in 1991 and over the course of a decade the case went all the way to the Saskatchewan Court of Appeal twice. In the first decision from the Court of Appeal, in 1996, the Court deferred to the Board of Inquiry's finding that the art gallery must make its premises accessible to wheelchair users.[401] The second time at the Court of Appeal, in 2002, was a dispute over access to the art gallery's washrooms.[402] The art gallery had renovated to comply with the Court's first order but did not include an accessible washroom as part of the renovations. The gallery took the position that washrooms were not part of its "premises, facilities and services" that were the subject of the original order. Again the Court of Appeal deferred to the Board of Inquiry's decision that washrooms are part of the art gallery's facilities and the art gallery was required to renovate again. Because the art gallery in *Ripplinger* pursued so many appeals, there is now appellate precedent in Canada holding that accessible washrooms are a part of what is required to make a space accessible to persons with disabilities. However, it is difficult to assess the impact of the *Ripplinger* case because the vast majority of human rights complaints are resolved by mediation and, unlike RAPLIQ's complaint about summer patios, they do not receive media attention.

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[399] Kitchin & Law, *supra* note 395 at 290.
[400] *Saskatchewan (Human Rights Commission) v Ripplinger*, 1996 CanLII 4913 (SK CA)
[401] *Ibid.*
[402] *Ripplinger v Saskatchewan Human Rights Commission*, 2002 SKCA 56 (CanLII).

The Ontario, Quebec and Northwest Territories Human Rights Commissions have all made recommendations for private business owners and to provincial legislators about accessibility and human rights obligations.[403] In 2002, the Ontario Human Rights Commission specifically addressed the issue of accessible washrooms in its recommendations on the types of barrier-free design features that ought to be required when an older building is renovated.[404] The concern was that if renovations took place in the entryway of a building, the Ontario Building Code only required that the entryway would have to be accessible but that other facilities, like washrooms, could remain in their original (and inaccessible) form because they were not located in the renovated portion of the building. Eventually the provincial government decided to amend the Ontario Building Code such that, as of January 2015, any time "extensive renovations" take place, the installation of at least one "universally accessible" washroom is required.[405]

The Quebec Human Rights Commission has had some success by directly negotiating with grocery stores and pharmacies and convincing them to improve the accessibility of their premises beyond what is required by law.[406] More recently, in 2019, the Commission released a report recommending that the provincial government include amendments related to accessibility in new legislation that strengthened the powers of the Régie du bâtiment du Québec, which

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[403] Commission des droits de la personne et des droits de la jeunesse, News Release, "Bill 16 is an opportunity to expand access to justice and improve the accessibility of buildings for public use" (4 June 2019), online: Commission des droits de la personne et des droits de la jeunesse <https://www.cdpdj.qc.ca/en/news/bill-16-is-an-opportunity-to-e-2>; Ontario Human Rights Commission, *Submission of the Ontario Human Rights Commission concerning barrier-free access requirements in the Ontario Building Code* (Ontario Human Rights Commission 2002) [OHRC, 2002]; Ontario Human Rights Commission, *Dining Out Accessibly: An Accessibility Audit of Select Restaurant Chains in Ontario* (Ontario Human Rights Commission 2004); Ontario Human Rights Commission, *Policy on Ableism and Discrimination Based on Disability* (Ontario Human Rights Commission 2016).
[404] OHRC, 2002 *supra* note 404 at 10.
[405] Government of Ontario, "Fact Sheet – Barrier-Free Requirements for Renovations", online: Government of Ontario <https://v0.oboa.on.ca/news/files/Final%20Renovations%20Fact%20Sheet.pdf>.
[406] Commission des droits de la personne et des droits de la jeunesse, News Release, "Universal access to supermarkets and pharmacies: six major chains pledge to improve their practices" (11 September 2013), online: Commission des droits de la personne et des droits de la jeunesse <https://www.cdpdj.qc.ca/en/news/universal-access-to-supermarke-3>.

regulates the construction industry and enforces the Quebec Construction Code.[407] Specifically, the Commission recommended: 1) that the RBQ ought to determine accessibility standards for public buildings and, 2) that building owners should bring a building into compliance with the Construction Code in situations where the new use or purpose requires more stringent safety and accessibility measures for persons entering the building.[408] These provisions did not originate with the Commission. In fact, the new provincial government under the leadership of the Coalition Avenir Québec (CAQ) had removed these provisions from legislation that had been tabled by the previous Liberal government in 2018. The CAQ ignored the recommendations of the Quebec Human Rights Commission and passed the legislation without any accessibility measures.

The only other human rights commission to proactively address accessibility is the Northwest Territories commission. In November 2020 the Northwest Territories Human Rights Commission posted a statement on its website warning businesses that it would be a mistake for them to assume that they would be immune from a human rights complaint just because the building meets the requirements of the applicable building code.[409]

In addition to general recommendations from some of the provincial and territorial human rights commissions, there have been at least three public human rights complaints since

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[407] *An Act mainly to regulate building inspections and divided co-ownership, to replace the name and improve the rules of operation of the Régie du logement and to amend the Act respecting the Société d'habitation du Québec and various legislative provisions concerning municipal affairs*, SQ 2019, c 28.

[408] Commission des droits de la personne et des droits de la jeunesse Québec, *Mémoire à la commission de l'aménagement du territoire de l'assemblée nationale: Projet de loi n°16, Loi visant principalement l'encadrement des inspections en batiment et de la copropriete divise, le remplacement de la denomination de la regie du logement et l'amelioration de ses regles de fonctionnement et modifiant la loi sur la societe d'habitation du quebec et diverses dispositions legislatives concernant le domaine municipal* (Québec: Commission des droits de la personne et des droits de la jeunesse Québec, 2019) at 15.

[409] Northwest Territories Human Rights Commission, "Gap Between National Building Code and Accessibility Standards Risks Human Rights Complaint" (16 November 2020), online: Northwest Territories Human Rights Commission < https://nwthumanrights.ca/newspost/gap-between-national-building-code-and-accessibility-standards-risks-human-rights-complaint/>.

Ripplinger that have reinforced the importance of access to washrooms for persons with disabilities. The first involved a wheelchair user, Omar Lachheb, who brought a complaint against the Université de Montréal because while on campus for an eye exam he was unable to find an accessible washroom.[410] Lachheb searched the six floors of the building where the eye exam took place and by the time he left to look in the building across the street he had already urinated on himself. The University defended itself by pointing out that the building Lachheb was in had accessible washrooms but that the men's washroom was undergoing repairs so Lachheb should have used the women's washroom. This argument was not acceptable to the Québec Human Rights Commission. The Commission indicated that it would bring the case to the Human Rights Tribunal unless the Université de Montréal paid Lachheb $10,000: $7,500 in moral damages and $2,500 in punitive damages. The Commission also recommended that the Université de Montréal should ensure that all of its buildings have accessible washrooms.

The second case is a human rights complaint regarding inaccessibility at the legislative assembly building in the Northwest Territories.[411] The complainant had multiple sclerosis and used a cane to assist her when walking. She was attending a meeting at the legislative assembly building and when she tried to enter the washroom designated for persons with disabilities she found the door too heavy for her to open. The complainant decided to use the general women's washrooms but struggled because there was no grab bar for her to use in the toilet stall. There were several architectural concerns in this case but the issues with the washrooms were the central focus for the Human Rights Adjudicator in this case. The Adjudicator found that the doors to the washroom area were too heavy for the complainant and to require her to ask a

[410] "UdeM ordered to pay $10,000 over accessible bathroom complaint", *CTV News* (4 February 2017) online: <https://montreal.ctvnews.ca/udem-ordered-to-pay-10-000-over-accessible-washroom-complaint-1.3271204>.
[411] *Portman v Northwest Territories*, 2014 CanLII 21552 (NT HRAP).

security guard to open them and wait outside for her would adversely affect "her dignity, feelings and self-respect."[412] The Adjudicator ordered the Legislative Assembly to pay the complainant $10,000 for the injury to her dignity, feelings and self-respect.

In both of these cases it could be argued that part of the reason for the findings and the damages awarded was the higher standard expected of a public university or a provincial legislature. However, more recently, in *Reed v Province of Nova Scotia (Department of Environment)* the subject of a human rights complaint from five wheelchair users was the inaccessibility of washrooms in private restaurants across the Province of Nova Scotia.[413] The strategy, which was ultimately successful, was to bring a complaint against the provincial government rather than the individual restaurant owners. The complainants argued that the province's interpretation of food safety regulations was discriminatory against wheelchair users because the province would issue operating permits to restaurants that did not have accessible washrooms.

The complainants were quite persistent, despite resistance from intake officials at the Nova Scotia Human Rights Commission. The official that first processed the complaint refused to proceed with the case, taking the position that the matter was a building code issue not a human rights issue.[414] The complainants' application to the Commission for reconsideration was also refused. On judicial review of these decisions, the court found that the Commission should not have denied the complainants the opportunity to proceed with the complaint.[415] The case was

[412] *Ibid* at para 23.
[413] *Reed v Province of Nova Scotia (Department of Environment)*, 2018 CanLII 89418 (NS HRC) [*Reed*].
[414] Robert Devet, "Fight for what's right, disability activist tells Nova Scotia Human Rights Commission", *The Nova Scotia Advocate* (20 April 2018) online: <https://nsadvocate.org/2018/04/20/fight-for-whats-right-disability-activist-tells-nova-scotia-human-rights-commission/>.
[415] *Reed v. Nova Scotia (Human Rights Commission)*, 2017 NSSC 85.

then brought before a Board of Inquiry, but the Commission did not provide any support to the complainants and it appeared only as a neutral party.

The provision of the Nova Scotia's *Food Safety Regulations* at issue before the Board of Inquiry was section 20(1): "A food establishment must have washroom facilities for staff and washroom facilities for the public available in a convenient location, unless exempted by the Administrator."[416] The complainants argued that "convenient" ought be interpreted as a location that is accessible and that "the public" ought to include individuals who use wheelchairs.[417] The Province would routinely issue permits to restaurants that did not have accessible washrooms because they were located in buildings that were exempt from barrier-free requirements (because of their age, similar to the exceptions in Québec). The complainants' approach was to highlight the risk to public health if wheelchair users could not wash their hands before eating:

> The ability to wash one's hands is especially important for individuals who use wheelchairs for mobility. Their hands are in almost constant contact with dirt and germs because the palms of their hands rub against the rims of the wheels on their chairs, which are in contact with rainwater, mud, grime, dog excrement and other unpalatable substances. There are many restaurants in Halifax and in Nova Scotia that do not have washroom facilities that are accessible to individuals who use wheelchairs for mobility. When an individual who uses a wheelchair for mobility is at a restaurant that does not have an accessible washroom, they are unable to properly wash their hands before eating. This poses a health risk for the individual, and a potential health risk for others.[418]

The Province of Nova Scotia disagreed with the complainants' interpretation of the food safety regulations, arguing that accessibility is not a matter of food safety. The Province also argued that, in any case, it was not discriminating in the provision of a service (pursuant to the *Human Rights Act*) because issuing permits is an enforcement measure and even if it is a service, it is a service to restaurants not to their patrons. The Board of Inquiry dismissed this

[416] *Food Safety Regulations*, NS Reg 206/2005, at s 20(1).
[417] *Reed, supra* note 414 at para 73.
[418] *Ibid* at paras 23-25.

interpretation, holding that the inspection and permitting functions that the Province carried out are services to the public.

The Restaurant Association of Nova Scotia was granted intervenor status and took the position that requiring all restaurants to have wheelchair accessible washrooms would not only be a financial burden on restaurant owners, it would be "catastrophic to the food and beverage sector in Nova Scotia…[that] could have major impacts such as business closures, loss of jobs, and loss of tax revenue."[419] Despite these concerns, the Board of Inquiry agreed with the complainants' interpretation of the food safety regulations and made a finding that the Province had discriminated against wheelchair users. The Board of Inquiry ordered the province to pay each of the five complainants $1000 and to "interpret, administer and enforce" section 20(1) of the *Food Safety Regulations* such that washrooms in restaurants must be accessible to wheelchair users.

Since the Board of Inquiry released its decision in September 2018 the Province of Nova Scotia has been working with the five complainants in *Reed* to implement the decision. One of the complainants, however, left the process in August 2019 because of how long it was taking and because he found that the representatives from the government did not have the power to take any action.[420] In response to these concerns a spokesperson for the Nova Scotia Justice Department said that a working group would be created in the fall of 2019 to develop standards (and subsequent regulations) that would provide restaurants with minimum standards for accessible washrooms. The Province's approach could have been a delay tactic since specific standards for "Universal Washrooms" are already found in a section 3.8.3.12 of the Nova Scotia

[419] *Ibid* at para 103.
[420] Michael Gorman, "Lack of progress on human rights order frustrates accessibility activist", *CBC News* (9 August 2019) online: <https://www.cbc.ca/news/canada/nova-scotia/human-rights-accessibility-government-1.5240482> [Gorman].

Building Code Regulations.[421] In the end, no new substantive standards were developed. Instead, the Province compromised with current restaurant owners by requiring only new restaurants to provide accessible washrooms. To be sure, this result does not appear to meet the Board of Inquiry's order requiring accessible washrooms in all restaurant that receive an operating permit from the provincial government. However, given the turnover rate of restaurants in general, this new requirement will likely operate to improve accessibility in Nova Scotia's buildings at a faster rate than before. This is because the requirement of an accessible washroom is tied to the use of a particular space as a restaurant rather than the question of whether the building is new or undergoing extensive renovations. Restaurants Canada, a non-profit organization that represents the food serve industry, published an explanation of the new regulations in Nova Scotia on its website and advised its members:

> This would make some locations unsuitable for restaurants such as a historic building that has steps to enter the building and no ramp or other barrier-free access into the building, or a basement or 2nd storey locations within a building that is accessible on the entrance storey, but doesn't have a lift or elevator within a building to allow for barrier-free access to those floor levels above or below the entrance storey.[422]

Restaurant Canada's advice to its members represents a major tone shift on the issue of accessibility in two ways. For one, the advisory contained no language about the potential profitability of making restaurants accessible to people with disabilities. Instead, Restaurant Canada frames these regulatory changes as a response to the *Reed* decision and so no persuasion required. The second way that this advice is, in my view, quite radical is Restaurant Canada's description of certains locations as "unsuitable" for restaurants. Rather than equating accessibility with costly renovations, this shifts the mindset of the restaurant industry to look at

[421] *Nova Scotia Building Code Regulations*, NS Reg 179/2019 at 3.8.3.12.
[422] Restaurants Canada, "Upcoming changes to Nova Scotia's building code" (6 August 2020), online: Restaurants Canada < https://www.restaurantscanada.org/industry-news/upcoming-changes-to-nova-scotias-building-code/>.

inaccessible spaces as inappropriate for the type of business they plan to operate. If this approach caught on in other Canadian cities, it could have a profound impact by, for example, incentivizing the landlords of commercial spaces to make their premises accessible in order to attact tenants who, by the nature of their business, can only occupy accessible spaces.

As the Court in *Reed* acknowledged, public spaces that are partially barrier-free but do not offer an accessible washroom are actually not functional for many persons with disabilities. The invisibility of this issue in the summer patio mediation is one of the most significant reasons the settlement did not go far enough. Arguably, the changes that RAPLIQ pressured the Plateau to make in its policies and in its bylaw created ill will among the business that were required to redesign their patios two years in a row. As this next section will explore, since it appeared that the disability community had won, the focus shifted to how the government could ease the burden on business owners. The narrative of RAPLIQ's victory disguised how little actually changed in the built environment of restaurants and bars.

Issue #4: Government responses

In January 2017, a few years after the summer patio mediation, the Mayor of Montréal announced the Programme d'aide à l'accessibilité des commerces (PAAC) (business accessibility assistance program) to encourage local businesses to make their premises accessible to "people with reduced mobility". In total, the city committed $300,000 per year until 2021, then $100,000 for 2022. Under the PAAC, business owners in Montréal are eligible for a subsidy equal to 75% of the cost of accessibility renovations, to a maximum of $10,000, including work such as the installation of an electric door opener, a ramp or the replacement of toilets.

Linda Gauthier, speaking on behalf of RAPLIQ, pointed out that the PAAC's budget is relatively low because it would only be enough to assist 40 businesses annually, which is less

than 1% of Montréal's businesses.[423] To put this in perspective, in response to the *Reed* case in Nova Scotia, the provincial government started granting a total of approximately $1 million per year to fund accessibility renovations in restaurants to bring them into compliance with building regulations.[424] To match the Nova Scotia commitment, Montréal would need to spend $4.5 million each year funding accessibility renovations for restaurants, not $100,000.

There are other reasons that the PAAC in Montréal may have limited scope. The regulations that govern the program exclude the following types of buildings:

(1) federally, provincially and municipally owned buildings;

(2) a building that does not meet the barrier-free design standards of the Québec Construction Code; and

(3) a building or part of a building used for industrial activities.[425]

It is not apparent why the PAAC excludes business owners that lease space in government-owned or industrial buildings. Both types of buildings could be workplaces for people with disabilities or establishments that people with disabilities might patronize. More absurdly, the exclusion of buildings that do not meet barrier-free design standards in the Québec Construction Code essentially undermines the entire purpose of the program. It is difficult to imagine which business owners need funding from PAAC other than those that are in buildings that are not barrier-free. However, the program's website indicates that the PAAC funds are to be used only

[423] Romain Schué, "La Ville octroie 1,6M$ sur 6 ans pour l'accessibilité universelle des commerces", *Métro* (26 January 2017) online: <https://journalmetro.com/actualites/montreal/1081684/les-commerces-seront-plus-accessibles-aux-personnes-a-mobilite-reduite/>; "Montréal aidera les commerçants à accueillir les clients à mobilité réduite", *Radio-Canada* (26 January 2017) online: <https://ici.radio-canada.ca/nouvelle/1013333/aide-pour-aider-commercants-accueillir-clients-mobilite-reduite>.
[424] Gorman, *supra* note 421.
[425] *Règlement établissant le programme d'aide à l'accessibilité des commerces (PAAC)*, RCG 17-011 at art 3 (author translation).

in locations that met the Quebec Construction Code's barrier-free standards at the time of their construction but do not meet current minimum requirements.[426]

The limited eligibility may explain why the relatively small budget for the PAAC has largely gone unspent. In October 2018, the city published a report detailing the first year of the PAAC. Only 11 applications were received by the city in the first year of the project, and seven of those applications were approved.[427] This meant that only $50,000 of the annual $300,000 program budget was allocated. The city's report does not offer reasons why the business community's engagement with the PAAC was quite low, nor does it indicate whether any efforts will be made to improve participation. In its 2019-2020 report the city reported that there was an increase of 25% in businesses using the PAAC subsidy.[428] However this means that only two or three more businesses received a subsidy in the second year of the PAAC.

The strategy used in the *Reed* case to challenge provincial licensing practices, rather than complain about individual restaurants one by one, was successful in requiring the provincial government to legislate an overall solution to the problem of inaccessible washrooms in Nova Scotia's restaurants. As noted above, the provincial government in Nova Scotia spent approximately $1 million per year to assist restaurants and bars with the renovations required by the *Reed* decision. The PAAC in Montréal may be underutilized because, in contrast to Nova Scotia, businesses in Montréal are not required by law to make the accessibility renovations that the PAAC is meant to fund. And, absurdly, because the PAAC funds are only available for permanent renovations, a temporary summer patio would not be eligible.

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[426] City of Montreal, "PAAC – Retail business accessibility program", online: City of Montreal <https://ville.montreal.qc.ca/portal/page?_pageid=9537,143244075&_dad=portal&_schema=PORTAL>.
[427] Ville de Montréal, *Bilan de l'an 1 du Programme d'aide à l'accessibilité des commerces (PAAC) Période d'avril 2017 à avril 2018* (Montréal: Ville de Montréal, 2018) online: <https://www.realisonsmtl.ca/6768/documents/12158/download>.
[428] Ville de Montréal, *Plan d'action en développement social 2019-2020: Rassembler Montréal* (Montréal: Ville de Montréal, 2020), 14.

The weaknesses of the PAAC and the government's failure to regulate at the provincial and municipal levels in Québec means that very little will change in the built environment for the foreseeable future. The Québec Minister of Labour's 2006 report identified the costs of accessibility renovations as "a major constraint to be considered when developing regulations."[429] There is a long history in Canada of justifying discrimination against persons with disabilities on the basis of cost, including the debate about whether disability ought to be included in section 15 of the *Charter*.[430] Yet, apart from the human rights arguments and implications, there is the basic fact that health and safety regulations are part of the cost of doing business. Accessibility standards could be characterized as an extension of rules about maximum occupancy, fire prevention, evacuation, or earthquake protection.[431] As I explained in Chapter One, however, there is an equally long history in Canada of treating accessibility standards as separate from public safety. *Reed* is now precedent for the proposition that regulations pertaining to public health must include people with disabilities as part of the public and the next step may be to challenge the exclusion of people with disabilities from regulations pertaining to public safety, like provincial building codes.

It may require a human rights complaint that directly challenges the Québec Construction Code or related provincial regulations, as in the *Reed* case, to not only make an impact on accessibility in the built environment in Québec but also to attract sufficient government funds to pay for the renovations. Framing the issue as a challenge for the private sector, with minimal government support, mischaracterizes the problem of accessibility as individual discrimination

[429] *Pour une meilleure accessibilité, supra* note 335.
[430] M David Lepofsky, "The Charter's Guarantee of Equality to People With Disabilities - How Well is it Working?" (1998) 16 Windsor Y B Access Just 155 at 164.
[431] C G K Atkins, "A Cripple at a Rich Man's Gate: A Comparison of Disability, Employment and Anti-discrimination Law in the United States and Canada" (2006) 21:2 Can J L Soc 87 at 89.

rather than a systemic problem rooted in how able-bodied people have historically benefitted from the regulaton of the built environment.

Conclusion

After reviewing the history of building regulation and accesible design standards in Canada throughout Chapter One, this chapter provided an in depth case study of human rights complaints as a remedy to inaccessibility in the built environment. RAPLIQ's fight for accessible summer patios in the Plateau ended with a partial victory vis-à-vis temporary summer patios, but neither the municipal or provincial governments in Québec are responding to the problem of inaccessibility.

In the area of the built environment, the types of laws that have the most impact on the lives of persons with disabilities can be highly technical and hard to parse. While the broader Canadian population may understand that excluding someone who uses a wheelchair from a school, restaurant or a polling place is discriminatory, it is more difficult to explain why a building is designed to be inaccessible in the first place. Even legal scholars fail to address the specificities of the Québec Construction Code in favour of broader analysis of human rights institutions instruments at the domestic and international level. By delving into the minutiae of the various pre- and post-1976 Construction Code requirements, as I did in this chapter, I show that these regulations must be seen for what they are – the reason many persons with disabilities are and will continue to be socially isolated in Québec. Rather than study the effects of inaccessibility on the disability community, the Québec government decided to study the cost of renovations and assess which types of buildings should be considered for renovations.[432]

[432] *Pour une meilleure accessibilité, supra* note 335.

This case study shows that individual human rights complaints against the owner of a particular store or restaurant because of a physical barrier are quite different from complaints based on other types of discrimination. The reason that the barrier exists is because of underlying building regulations (or a failure of building inspection) rather than an attitudinal refusal of service based on race or sexual orientation, for example. As I explained in Chapter One, when disability was added as a prohibited ground of discrimination to the Ontario Human Rights Code, attitudinal discrimination was a necessary component. Ontario legislators were worried about the myriad of complaints that would arise based on physical barriers alone. Eventually, the prerequisite of attitudinal discrimination was removed but this distinction is important. Part of what Ontario legislators were concerned about is legitimate; systemic barriers in the built environment cannot be adequately addressed on a case-by-case basis or blamed on "bad actors" who are intentionally excluding disabled people. As in the summer patio dispute, building owners are often complying with the rules set by the municipality or the province when they construct inaccessible spaces.

The *Reed* case is an example of a successful human rights challenge because it targetted the province's interpretation of regulations that address public health without including wheelchair users as members of the public. Challenging each restaurant on a case-by-case basis may have been technically successful but would have done nothing to prevent restaurants from designing inaccessible washrooms in the future. The solution is not to give up on the human rights complaint process altogether when challenging barriers in the built environment but to bring a complaint that identifies a specific law or the government's interpretation of that law, particularly laws that are aimed at public health and safety, rather than complaining about the actions of one business owner.

This case study also emphasizes the importance of local governance in the lives of persons with disabilities. The push for a new federal law regarding disability did lead to new legislation in 2019, the *Accessible Canada Act*. However, this law does not create any legal requirements that would change the built environment, even for federal buildings. While there has been no meaningful effort to invest in accessibility at the federal level, there are still promising avenues to effect change in the built environment at the municipal and provincial level.

Before some of the more formal mechanisms for public consultation that exist today, people with disabilities appeared at open municipal meetings to advocate for the removal of barriers in their daily lives. The 1973 building accessibility bylaw in Vancouver that I mentioned at the beginning of this chapter is one example of a successful campaign at the local level by persons with disabilities. Another little-known example is the efforts of wheelchair users across Canada who lobbied for curb cuts on sidewalks at every intersection, something it would be hard to imagine city life without. The work done by RAPLIQ, as described in this case study and more generally, is another example of the importance of local activism. Though this chapter contains plenty of criticism of the patio mediation, I personally benefitted from their work to make summer patios accessible for wheelchair users in the Plateau and throughout Montréal. I enjoyed meeting friends in the summer on the accessible patio at Dieu du Ciel, a popular microbrasserie that I cannot get into because of stairs at its entrance. But I could usually only stay for one beer, after which I would have to say goodnight and race home to the washroom.

Chapter Three – Planning Law and Accessibility: Consultative and Contestatory Participation by Persons with Disabilities

Ideally, everyone should be able to take it for granted that there is infrastructure in place allowing them to go to work, school or the grocery store with ease. In my own experience, using a wheelchair in my daily life means I cannot take anything for granted. I always must think about (at least) three questions when I leave my home: Can I get there? Can I get in the entrance? Can I use the washroom? I never had to ask these questions when I was able-bodied, because the built environment had been planned to facilitate my mobility. For people with disabilities, coping with inaccessibility requires planning to navigate our communities just to accomplish basic daily tasks. The extra time and energy that disabled people must use to ensure that we know that our routes and the buildings (including washrooms) we plan to visit are accessible is a "planning burden" that able-bodied people do not experience.

One of the key insights from the preceding chapters of this thesis is that a physical obstacle, such as a step at the entrance of a building, is the product of the interplay of regulations that govern how we build and that those regulations have prioritized the needs of able-bodied people. The summer patio case study illustrates the complexity of these regulations. Even though RAPLIQ's human rights complaint led to changes to a municipal bylaw, this was only a minor tweak to an otherwise ableist regulatory framework. The moment that a wheelchair user drinking on one of the newly accessible summer patios needs to use the washroom the absurdity is exposed. Provincial and municipal building regulations work together to put people with disabilities out of place and out of the public. One potential next step for an organization like RAPLIQ would be to follow the example of the litigants in the Nova Scotia *Reed* case and bring a human rights complaint against Québec for licensing restaurant that do not provide wheelchair

accessible washrooms.[433] The litigants in the *Reed* case argued that if it is a precondition of a restaurant license that there be public hand washing facilities, then these facilities must be wheelchair accessible because wheelchair users are members of the public. The results of the *Reed* case demonstrate the effectiveness of human rights complaints directed at laws that purport to protect "the public" but only serve able-bodied people. Faced with the prospect of revoking a great number of restaurant licences because of the *Reed* decision, the province of Nova Scotia quickly set up a program offering funding for washroom renovations to restaurants owners and amended the provincial building code.

The human rights complaint process can provide a remedy to people with disabilities when they are excluded from public spaces. These complaints can lead to systemic changes. The *Reed* case resulted in new provincial building code requirements for the accessibility of restaurants. But there are limits to what can be accomplished by way of a human rights complaint. Most importantly, human rights commissions and tribunals are not competent to mediate or adjudicate complaints about accessibility before construction commences, because any alleged discrimination is only hypothetical. But just because human rights law is limited in this way should not mean that people with disabilities must wait to encounter inaccessibility before they can influence what and how we build. Planning law legislation in Canada, which is the subject of the present chapter, mandates public consultation and it also gives members of the public the right to contest planning decisions by way of an appeal. These two features of planning law – consultation and contestation – are procedural guarantees to the public that allow direct participation in the "process through which communities contemplate their ongoing

[433] *Reed, supra* note 414.

evolution".[434] These procedural aspects of planning law offer people with disabilities the legal means to ensure that our ways of mobilizing in the built environment are known during decision making processes and, if necessary, to challenge those decisions on appeal.

In the introduction to this thesis, I explained how critical disability theory and the work of Iris Marion Young would inform my approach to the concept of "the public", which is a heterogenuous and embodied public that explicitly includes people with disabilities. Chapters One and Two have illustrated some of the ways that the law of the built environment privileges able-bodiedness by failing to treat disabled people as members of the public. By looking at the history of building standards or how the state exercises its permitting and licensing functions, we can scrutinize whether the objectives of "public safety" or "public health" are limited only to an able-bodied public. I have argued that interrogating the ways that the law of the built environment defines "the public" is an effective strategy for challenging inaccessibility through law reform or a human rights complaint. In this chapter I will shift from this focus on law's substantive definitions of the public and, instead, explain the importance of the presence of disabled people and their perspectives in public decision-making.

Young warned about the ways that the life experiences of marginalized groups are erased or treated as matters of "special interests" when those with privilege universalize their own experiences as the norm.[435] Her ideal of a "heterogenuous public" requires acknowledging and respecting difference with attention to the fact that each of us cannot speak for or even fully understand the other.[436] This not only means that people with disabilities are best situated to

[434] Howard M Epstein, "Subsidiarity at Work - The Legal Context for Sustainability Initiatives at the Local Government Level: How an environmental agenda could be advanced by Canadian municipalities" (2009) 63 MPLR 56.
[435] Young, *supra* note 78 at 116.
[436] *Ibid* at 119.

convey their own experiences but that those who experience able-bodied privilege need to listen to them. Throughout her work, Young emphasizes the value of listening to others in a democracy:

> Speaking across differences in a context of public accountability often reduces mutual ignorance about one another's situations, or misunderstanding of one another's values, intentions and perceptions and gives everyone the enlarged thought necessary to come to more reasonable and fairer solutions to problems.[437]

Recent scholarship on deliberative democracy and persons with disabilities builds on Young's argument about the value of diversity in deliberation. Canadian political scientist Afsoun Afsahi argues that "the description of lived experiences that are radically and meaningfully different from ours can form the basis of a reason that we would not have had access to otherwise."[438] I argue that planning law offers an opportunity for disabled people to share their experiences in the built environment in settings where other members of the public, particularly those with decision-making power, are required to listen. Though this cannot guarantee particular outcomes for persons with disabilities, there is reason to believe that the situated knowledge of being disabled might improve decision-making about what and how we build. This knowledges allows communities to plan holistically with a view to the diversity of ways of mobilizing rather than adding accessibility features in a patchwork manner – like a restaurant with an accessible patio but no accessible washroom.

American legal scholar Robin Paul Malloy makes the case that disability scholarship and advocates ought to expand their scope beyond anti-discrimination laws because of the dangers of

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[437] Iris Marion Young, "Situated Knowledge and Democratic Discussions" in John Andersen & Birte Siim, eds, *The Politics of Inclusion and Empowerment: Gender, Class and Citizenship* (New York: Palgrave Macmillan, 2004) 19 at 39.
[438] Afsoun Afsahi, "Disabled Lives in Deliberative Systems" (2020) 48:6 Political Theory 751 at 760 [Afsahi].

what he calls "planning by litigation".[439] In the American context, the connection between race and disability-based discrimination is very important. The idea that segregation on the basis of ability was as unjust as segregation on the basis of race was a foundational argument for American disability activists. The civil rights movement is often credited for creating the political will in the United States to lead the way globally in 1990 by enacting the *Americans with Disabilities Act* and thereby requiring public and private facilities to be accessible to persons with disabilities.[440] However, among the many differences between segregation based on race and segregation based on disability, racial inclusion in public space requires a different type of retrofitting than what is required to include people with disabilities in public space. Policies requiring the separation of people on the basis of race can be revoked without conducting physical renovations, but you cannot make a building with stairs at the entrance accessible to a wheelchair user unless you add a ramp or elevator.

Malloy argues that the legacy of the anti-discrimination approach to accessibility in the United States has led to reactionary rather than proactive planning for an inclusive built environment. He calls this planning by litigation because, similar to human rights law in Canada, the *ADA* is a complaint driven.[441] The problem with planning by litigation is that even if the cumulative result of every complaint is that the built environment becomes more accessible, the practical effects on the lives of people with disabilities may be incoherent. The summer patio case study is the prototypical example of planning by litigation, where the result was that

[439] Robin Paul Malloy, *Land Use Law and Disability: Planning and Zoning for Accessible Communities* (New York: Cambridge University Press, 2015) at 7 [Malloy].
[440] Lindsey Patterson, "The Disability Rights Movement in the United States" in Michael Rembis, Catherine Kudlick & Kim E Nielsen, eds, *The Oxford Handbook of Disability History* (Oxford: Oxford University Press, 2018).
[441] Malloy, *supra* note 440 at 7.

wheelchair users may eat and drink on the summer patios but have no guarantee of accessible washroom facilities.

Malloy proposes that considering the needs of people with disabilities in planning law will enhance the civil rights of people with disabilities and will do so in a thoughtful and coherent fashion. He urges state and municipal elected officials along with professional planners to consider disability as a matter of good planning. Here I will build on Malloy's general premise about the undeveloped connections between disability and planning law and explain why post-construction human rights complaints are not the only or the best way to improve the accessibility of the built environment. The important difference between Malloy's argument and my own is that I will address ways that people with disabilities and allies can utilize planning law procedures themselves.

In Part One, I look at public consultations in the planning context and I explain their potential for including the perspectives of persons with disabilities. I start with a historical example of how disability activists across Canada successfully lobbied their municipalities to install curb cuts on sidewalks. The fact that this story has never been published before only emphazises their success. These activists not only permanently changed the bylaws regulating the design of sidewalks but now no one even questions why the curb cuts are there in the first place. These advocacy efforts took place in the 1970s at a time when it was very uncommon for wheelchair users to be in public and prior to the provincial planning laws that require public consultation. Given the legal and social context, the success of these curb cut initiatives illustrates the considerable impact of people with disabilities describing their experiences directly to municipal decision-makers.

Next, I provide an in-depth discussion of contemporary public consultations in the planning context, using Montréal's Office of Public Consultation to illustrate the typical procedures and content of these types of hearings. I explain some of the conditions that would be required to create inclusive consultations. I contrast the procedures of public hearings for planning purposes with the public hearings that all levels of government have been electing to conduct with disabled people. The comparison of these two types of consultations indicates that the catch-all consultations targeted at the disability community are not an effective substitute for including people with disabilities in the formal consultations required by planning law.

In Part Two, I consider third party permit appeals, which are a more adversarial option for members of the public who seek to contest decisions about what and how we build. For people with disabilities, this would mean challenging development and building permits that have already been issued if the proposed development is not accessible, according to the plans. I look at examples from case law to explain why the human rights complaint process is ill-suited to prevent inaccessible design before it is actually constructed. The law currently requires the complainant to wait until the physical barrier exists. Since permits are issued on the basis of plans and inspections by the municipality, the design features are knowable but also in flux, which makes the permitting stage well-suited for making design changes. The permit appeal process is the only way for people with disabilities and their allies to enforce accessibility before construction is completed. This type of appeal is already in use by disgruntled neighbours who simply do not want to live near a proposed development (known colloquially as"NIMBYism"). It has also been used by litigants that identify as public interest groups for the purpose of blocking projects on environmental grounds. Considerations about accessibility design features are

already being litigated in NIMBY cases and so persons with disabilities have much at stake in this area of law.

Part One: Consultation

In this part, I look at public consultations, which are one way for governments to obtain direct input from the public on a proposed law or policy. In the planning law context, as I explain below, public hearings are required as a matter of law prior to decisions about proposed construction projects, large or small. Government consultation is also a main feature of contemporary disability law and policymaking, except that these types of public hearings are designed only for people with disabilities and their representatives. Later in this part, I will discuss the advantages and disadvantages for people with disabilities of this type of "enclave" consultation.[442] But first I will explain the historical context for the significance of direct consultation with the disability community.

The slogan "nothing about us without us" is most closely associated with the disability activism, but it has become a guiding principle for policy making and research with other marginalized groups such as drug users, those who experience homelessness and indigenous people.[443] These groups have at least one thing in common. Historically, they have been left out of formal policy spaces and therefore have not been able to directly impact the decisions that are made for and about them. While the phrase "nothing about us without us" is now used by disability activists and all levels of government in Canada, it originated in the South African

[442] Afsahi, *supra* note 439.

[443] Sarah Funnell et al, "'Nothing About Us, without Us.' How Community-Based Participatory Research Methods Were Adapted in an Indigenous End-of-Life Study Using Previously Collected Data" (2020) 39:2 Can J Aging 145; Ralf Jürgens, "'Nothing About Us Without Us' Greater, Meaningful Involvement of People Who Use Illegal Drugs: A Public Health, Ethical, and Human Rights Imperative" (2005) Canadian HIV/AIDS Legal Network; Jessica Ball, "Restorative research partnerships in Indigenous communities" in Ann Farrell, ed, *Ethical research with children* (Maidenhead, UK: Open University Press, 2005) 81; Alex Nelson, "Nothing about us without us: Centering lived experience and revolutionary care in efforts to end and prevent homelessness in Canada" (2020) 2:2 Radical Housing J 83.

disability rights movement in the 1990s.[444] The slogan of the disability community in Canada when they first organized at the national level in the 1970s was "A Voice of Our Own".[445]

As I discussed in Chapter One, disability became a matter of public policy in Canada when the federal government initiated rehabilitation and income support programs for disabled veterans following the World Wars. For many years the medical professionals involved in the rehabilitation industry, along with the parents of children with disabilities, were treated as the experts on disability. By the 1970s the "independent living movement", which was started by disabled people in Berkeley, California, raised a consciousness among people with disabilities to self organize and self advocate. The philosophy behind this movement was the idea that people with disabilities "best know their own needs, and should have control over the direction of their own lives." [446] Small organizations defined by region and/or disability type began to emerge throughout Canada. In 1976 many of these groups decided to form a national body called the Coalition of Provincial Organizations of the Handicapped (COPOH), which would become what today is the Canadian Council for the Disabled. COPOH used the motto "A Voice of Our Own" to emphasize that it was an organization "of" not "for" people with disabilities.[447]

In one of its first major initiatives to get attention both from the federal government and the national media, COPOH sought recognition as a member in Rehabilitation International (RI), which was holding its world congress in Winnipeg in 1980. Though RI was founded in 1922 and

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[444] James I Charlton, *Nothing About Us Without Us: Disability Oppression and Empowerment* (Berkeley: University of California Press, 1998).
[445] Henry Enns, "The Role of Organizations of Disabled People: A Disabled Peoples' International Discussion Paper" Independent Living Institute, online: *Independent Living Institute* <https://www.independentliving.org/docs5/RoleofOrgDisPeople.html>; Diane Dreidger, "The Council of Canadians with Disabilities: a voice of our own, 1976-2012" in Nancy Hansen, Roy Hanes & Diane Driedger, eds, *Untold Stories: A Canadian Disability History Reader* (Toronto: Canadian Scholars, 2018).
[446] Lord, *supra* note 97 at 13.
[447] April D'Aubin, "Personal Services: A Challenge for the Nineties" (1990) 9:2 Can J Community Mental Health 9 at 9.

held a world congress every four years, people with disabilities had only participated at the 1972 congress in Sydney, Australia and the 1976 congress in Tel Aviv.[448] In both instances the disabled participants ended up protesting the proceedings from outside because the venues were not accessible to all of them and they had been offered no formal role. COPOH, along with organisations led by persons with disabilities from around the world, decided to collectively seek formal status at that the 1980 congress in Winnipeg.

The federal government was officially supporting and financing the CRCD's participation at the 1980 RI World Congress, as it had done in the past. When COPOH announced that it wanted to participate in RI as an equal member rather than as part of the CRCD delegation, the organization signalled that people with disabilities could and ought to speak for themselves rather than through the intermediaries of the rehabilitation professionals. In order to avoid a protest during its opportunity to host the RI World Congress, the Canadian federal government decided to not only mediate COPOH's membership status with RI and the CRCD, but it also funded 50 disabled delegates to represent Canada at the Congress.

During the 1980 RI World Congress, a vote was taken on whether the organization would start to require that 50% of its members and delegates at future congresses would be people with disabilities and their organizations. When the vote was overwhelmingly defeated, a group of 250 people with disabilities present at the Congress (including representatives from COPOH) decided to use the rare moment of the international gathering to form their own organization called Disabled Peoples' International (DPI), with Canadian Henry Enns as the chairperson of the steering committee. Like COPOH, DPI was based on a philosophy of self-representation. DPI

[448] Diane Driedger, *The Origins and History of Disabled Peoples International (DPI), 1945-1985* (MA Thesis: The University of Manitoba 1987) at 32-3.

was given consultative status at the UN and Henry Enns was part of the Canadian delegation organizing the UN's International Year of Disabled Persons in 1981.

Today, the idea that people with disabilities are to speak directly to the policies that affect their lives is now central to any legislative projects that the federal or provincial governments undertake. As I will discuss later in this chapter, the federal and provincial governments routinely conduct consultations with people with disabilities prior to any new disability-related laws or policies. Prior to drafting the *Accessible Canada Act*, the federal government conducted a series of consultations across the country with disabled people and the representatives. The *Accessible Canada Act* itself also requires consultation with disabled people by various federal agencies when drafting accessibility plans and by Accessibility Standards Canada when drafting new standards. These mandatory consultations are the legacy of COPOH and DPI's work to engage governments directly with the disability community rather than with medical professionals. However, I argue here that "nothing about us without us" should not be interpreted as limiting people with disabilities to participation in law and policy making that has been designated by government as disability-related.

People with disabilities advocated for the importance of their own expertise in the 1970s, because policymakers had been ignoring them. But just because COPOH and DPI advanced the idea that people with disabilities have expertise that ought to be considered along with the expertise of the rehabilitation industry does not mean that they saw this as the end goal of the self-advocacy movement. In the early days of the organization, COPOH agreed upon a list of underlying goals or values to guide its work, including:

> People with disabilities have the right to places, events, services and activities that are generally available to citizens
> …

> People with disabilities have the right to participate fully in the institutions of society…rather than segregating people with disabilities in exclusionary environments …
> people with disabilities have a unique and valuable self-help expertise that derives from their life experience of disability, and this expertise is beneficial to other people with disabilities and society as a whole.[449]

COPOH understood that people with disabilities had expertise that could be valuable not only to themselves as end-users of disability policies but also to non-disabled people. They also sought an end to the segregation of people with disabilities from the "institutions of society''. In the remainder of this part I explore the potential of this broader vision of self-advocacy by people with disabilities. In the next section, I look at the lobbying efforts of disabled activists in the 1970s to get municipalities to require curb cuts at intersections. This history emphasizes that these activists did not see themselves as experts only on "disability policy" but that they, as members of the public, had expertise to share about how to improve the rules governing sidewalks.

A History of Curb Cuts in Canada

Even in Ontario and Manitoba, where there is legislation providing enforceable minimum standards of accessibility, there are no means by which members of the public may bring individual complaints when they encounter inaccessibility in the built environment, other than a human rights complaint or a *Charter* claim. However, there are historical examples of other methods of improving accessibility that pre-date the availability of remedies under federal and provincial human rights legislation. I have already described this in Chapter One, which was the work of the Canadian Rehabilitation Council and other disability advocacy organizations in

[449] April D'Aubin, "'Nothing About Us Without Us': CCD's Struggle for the Recognition of a Human Rights Approach to Disability Issues" in Henry Enns & Aldred H. Neufeldt, eds, *In Pursuit of Equal Participation: Canada and Disability at Home and Abroad* (Concord, ON: Captus Press, 2003) 111 at 114.

lobbying for and then drafting what would become the "Building Standards for the Handicapped" in 1965.

Another example of a successful strategy for changing the built environment to be more accessible to persons with disabilities is the introduction of curb cuts to Canadian sidewalks in the 1970s. Without a curb cut (a slope) when a sidewalk ends at an intersection, wheelchair users are either not able to use sidewalks at all or require one or more persons to lift them off and onto the sidewalk at every intersection. The 1965 "Building Standards for the Handicapped" actually specified where to place and how to design curb cuts: "they should lead on to roads carrying the lesser vehicular traffic. The walk should be cut down, rather than building up the street pavement, and curbs should be provided on each side of the ramp to assist blind persons."[450] Even though not in use in Canada yet, the inclusion of curb cut design standards was because "Building Standards for the Handicapped" was, in part, based on Selwyn Goldsmith's *Designing for the Disabled*, which was one of the first publications to recommend curb cuts.[451]

Curb cuts are a slight modification to the built environment, but are one of the most important aspects to a wheelchair user's independence in public. One Canadian disability activist, when confronting a former Canadian Prime Minister at the UN headquarters in the 1990s, argued "If you come to a sidewalk and have no curb cut…what good is the Charter?"[452] Despite their obvious importance to wheelchair users, there is no literature, academic or otherwise, describing the process by which curb cuts were introduced in Canada. Using primary sources like newspapers and city council minutes, I have cobbled together a brief history of curb

[450] *Building Standards for the Handicapped, supra* note 183.
[451] Goldsmith, *supra* note 195.
[452] Erin Anderssen "Wheeling and dealing at the UN The 13 activists weren't all that keen on attending the ceremony in New York until they were promised an audience with the Prime Minister", *The Globe and Mail* (7 March 1998) D1.

cuts in Canada. This history serves to validate the work of individuals with disabilities and their allies in this little-known success story. It is also a good illustration of how Iris Marion Young's ideal of the heterogeneous public can work in practice because of how effective these activists were at conveying their experiences in a setting of public deliberation – the city council.

In North America, the lore around curb cuts is that they were first introduced in Berkeley, California in the early 1970s. This was achieved through the efforts of disabled student activists, including the well known pioneer of the Independent Living Movement, Ed Roberts.[453] However, the first recorded use of curb cuts is actually in 1945, when Jack Fisher, a disability activist and wheelchair user, successfully lobbied the city of Kalamazoo, Michigan, to install several curb cuts in its central business district as a pilot project.[454] In 1961, the mayor of Indianapolis, Indiana refused a request to install curb cuts. Instead the city offered to issue whistles to wheelchair users so they could blow them at intersections to summon city policemen to assist wheelchair users over curbs (ten years later the city decided curb cuts would be a better solution).[455]

For any American municipalities that had not yet installed curb cuts by the 1990s, the *Americans with Disabilities Act* explicitly required municipalities to install curb cuts when conducting new construction after January 1992 and provided a deadline of January 1995 for full compliance.[456] In 1993, the United States Court of Appeals for the Third Circuit addressed a municipality's obligation to provide curb cuts pursuant to the ADA in *Kinney v. Yerusalim*, a

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[453] Bess Williamson "The People's Sidewalks Designing Berkeley's Wheelchair Route, 1970–1974" (2012) 2:1 Boom 49.
[454] Steven E Brown "The Curb Ramps of Kalamazoo: Discovering Our Unrecorded History" (1999) 19:3 Disability Stud Q 203.
[455] H Hawkins "Ramped Curbs Help Wheelchair Users", *Toronto Star* (21 January 1972) 7.
[456] See 28 CFR § 35.151: "New construction and alterations. (i)(1) (Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway); (i)(2) (Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways)".

case brought by a disability rights organization against the City of Philadelphia.[457] The issue was whether Philadelphia should have installed curb cuts whenever it resurfaced a street rather than only when roadwork was specifically directed at the sidewalk. The Court agreed with the disability rights organization and required Philadelphia to go back and install curb cuts at every location where the road had been resurfaced since January 1992, at an cost of $140 million.

Canada still has no legislation comparable to the ADA and there has never been a court case regarding curb cuts. Instead, through the work of advocates, most of them wheelchair users themselves, each Canadian municipality eventually committed to adding curb cuts at intersections, either when installing a new sidewalk or renovating the old. Curb cuts are now a universal feature of pedestrian walkways in Canada[458] and yet only 40 years ago they were more of the exception rather than the rule.

While Toronto may not be the first Canadian city to install curb cuts, it is where we can find the earliest information about how an initative for curb cuts began. In 1969 a group of approximately 10 disabled people, most of whom were living together and unemployed (not by choice), decided to use their free time to organize a disability advocacy group. They created the Action League for Physically Handicapped Advancement (ALPHA) and the first project they decided to take on was to lobby the City of Toronto for curb cuts at intersections. There were none in the city at the time.[459] Based on ALPHA's presentations to city council, Toronto agreed

[457] *Kinney v Yerusalim,* 9 F 3d 1067 (3d Cir 1993).
[458] For example, studies on urban accessibility in Halifax and Quebec City analyze the quality of curb cuts rather than their existence: Sean Bennett, "Wheelchair accessibility: Descriptive survey of curb ramps in an urban area" (2009) 4:1 Disability and Rehabilitation: Assistive Technology 17; Amin Gharebaghi et al "The Role of Social Factors in the Accessibility of Urban Areas for People with Motor Disabilities" (2018) 7:4 Int'l J Geo-Info.
[459] Susan O'Hara, "William Stothers: Journalist and Managing Editor for Mainstream Magazine" in Cynthia Jones and William Stothers, eds*, Mainstream Magazine: Chronicling National Disability Politics* (Berkeley: University of California, 2000) 122 at 177-184 [O'Hara].

to install one experimental curb cut at the intersection of Bayview and Millwood.[460] The matter was referred to the Department of Public Works and ALPHA was invited to work with city bureaucracy to assess the feasibility of the project.[461]

Toronto's Director of Works, J.D. Near, initially opposed the curb cuts saying that installing them would endanger other pedestrians who, while looking at cars, could stumble on the ramp, fall beneath the traffic, and then sue the city.[462] The members of ALPHA pointed to an example of curb cuts that had already been installed without incident in North York, not for wheelchairs, but for snowplows.[463] ALPHA showed Toronto bureaucrats several designs for curb cuts that were in use elsewhere and responded to the other objections raised by city staff.[464] ALPHA's persistence over the course of several meetings ultimately led the Department of Public Works to officially recommend to city council that Toronto begin to install curb cuts as a matter of policy any time the city repairs or installs a sidewalk.

ALPHA was emboldened by the success of the curb cut project to recommend that Toronto also address the transportation and housing needs of people with disabilities. They recommended the creation of an advisory group made up of persons with disabilities. Two of the members of ALPHA who had prominent positions during the curb cub lobbying efforts, Bill Owen and Bill Strothers (both wheelchair users) were appointed to the Mayor's Task Force on the Disabled and Elderly, which met monthly at City Hall.[465] The city's curb cut program

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[460] Bernard Weil, Rick Madonik & Boris Spremo, "City Limits: Barriers to the Disabled", *Toronto Star* (17 September 2000) NE6.
[461] *Ibid.*
[462] Catherine Dunphy, "The Disabled Still Face a World of Barriers", *Toronto Star* (16 September 2000) NE28.
[463] Morris Duff, "The Physically Disabled are Trapped in a Prison of Our Indifference", *Toronto Star* (9 May 1970) C5.
[464] There is no record of what objections there were – just that there was a lot of initial resistance based on many different concerns: O'Hara *supra* note 460.
[465] Catherine Dunphy "A Crusader for Street-Level Change: Bill Owen Fought to Make Toronto More Accessible", *Toronto Star* (12 December 2005) B5; O'Hara *supra* note 460.

continued to formalize and beginning in 1974 the Department of Public Works started to proactively renovate intersections to incorporate curb cuts at the rate of 50 per quarter.[466]

In Vancouver, the first time curb cuts are mentioned in city council minutes was in 1970 when an alderman raised the possibility of installing curb cuts on all new sidewalks "to facilitate travel by handicapped persons."[467] There is no record of how this alderman became aware of this issue but credit for lobbying Vancouver city council for curb cuts has been given to Ed Desjardins, a wheelchair user who was injured in World War Two.[468] In 1949 Desjardins became the first director of the G.F. Strong Rehabilitation Centre, which was the first freestanding rehabilitation centre in North America for individuals with disabilities.

Desjardins became involved in advocating for persons with disabilities at the municipal level in Vancouver as the chairman of the architectural barriers committee of the Social Planning and Review Council (SPARC), a nonprofit organization created in 1966.[469] Desjardins appeared before city council on behalf of SPARC not only to push for curb cuts but to lobby for a new city bylaw incorporating the federal "Building Standards for the Handicapped". His efforts made Vancouver, in 1973, the first jurisdiction in Canada to legally require minimum standards of accessibility for all new or renovated buildings. While the new bylaw did not mandate curb cuts, the City of Vancouver continued to honour its policy commitment to install curb cuts whenever repairing old sidewalks or installing new ones.[470]

The installation of curb cuts in Winnipeg was also the result of an organized group of persons with disabilities lobbying city hall. Over a period of three years, from 1974 to 1977,

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[466] Rex MacLeod "A Champion in a Wheelchair Goes to Bat for Handicapped", *Toronto Star* (8 March 1975) B5.
[467] Vancouver, City Council Minutes, (1 September 1970) 13.
[468] *Building Access Handbook*, *supra* note 207.
[469] Jeff Lee "A Parallel Dream: Paralympics are about Sports, but also Human Rights", *Vancouver Sun* (12 March 2009) E4.
[470] Vancouver, City Council Minutes, (18 January 1977) 56.

thousands of curb cuts were installed across the city when new sidewalks were constructed or old ones repaired. Winnipeg was the only city for which I found evidence of budgetary objections to curb cuts. The spokesman for the Streets and Transportation Department gave an interview with a local newspaper warning of the costs of installing curb cuts, particularly because people with disabilities were pushing for curb cuts on private paths and at both ends of the sidewalk, even where there was no traffic intersection.[471]

Montréal also began to install curb cuts in the 1970s. Its history differs from the other cities I looked at because it involved an initiative led by able-bodied city employees (or at least any role played by persons with disabilities is not in the public record). Montréal's city council (the *Communauté Urbaine de Montréal*) created a committee in 1975 to study the needs of people with disabilities with regard to architectural access, hiring, housing, sports and transportation.[472] The committee had a full-time public employee as director and was composed of approximately 100 people who were divided into subcommittees tasked with researching its five mandates.[473] Amongst many of its recommendations after its first year of work was that the city begin installing curb cuts.[474]

By 1981, Montréal had built curb cuts at 530 intersections (of 7300). They had made the design choice to put them 15 feet from the intersection, which meant 8 ramps per intersection (two at each corner). This decision was based on the concern that people with visual impairments might walk into traffic without a clearly defined curb. This balancing of the needs of persons with different types of disabilities is another unique aspect of the Montréal story, likely because

[471] Cathy Schaffter "What They Want: Freedom Through Mobility", *Winnipeg Tribune* (3 September 1977) 10.
[472] Bernard Descôteaux "Les handicapés devront attendre un an leur service de transport en commun", *Le Devoir* (27 May 1976) 2 [Descôteaux].
[473] Florian Bernard "La CUM se propose d'intégrer les handicapés à la vie urbaine" *La Presse* (12 November 1975) D17.
[474] Descôteaux, *supra* note 473.

the committee studying the project had a wide mandate. However, the city discovered this type of design did not work well, because the purpose of the curb cuts was not widely known to the public and parked cars would block the ramps. One idea proposed to solve this problem was to paint an accessibility sign at the curb cut to identify its purpose. Ultimately the city decided to move the curb cuts to the actual intersection and place bumps on the surface of the cement to notify people with visual impairments (which is the common practice throughout Canada today).[475] Other cities in Québec followed Montréal's lead by beginning to install curb cuts in the late 1970s and Québec City went even further by immediately replacing all curbs at its busiest intersections.[476]

Without federal or provincial legislation (like the ADA) requiring the construction of curb cuts or a national organization to coordinate efforts by persons with disabilities, it is quite incredible that Canadian municipalities universally adopted policies to install curb cuts at every intersection. The successful interventions by local disability activists or municipal officials to change municipal policies evidences the importance of attention at the planning stage rather than only by way of reactive complaints. The concept of curb cuts, and information about how to design them, in each of the examples I discussed, did not come from planning professionals. Rather, people with disabilities self-advocated directly to municipal planners with a design solution that would facilitate their mobility. The result was a change to the underlying rules or policies that determined the literal shape of the sidewalk.

Disability activists lobbying for curb cuts in the 1970s were offering unsolicited advice on how they thought the cities could do a better job of designing their sidewalks for wheelchair

[475] Guy Pinard, "Efforts louables de la Ville pour les handicapés", *La Presse* (27 May 1981) A3.
[476] Germain Tardif "Les p'tites nouvelles", *La Presse: Rive Sud* (5 September 1978) 4; Yves Bernier "Monsieur Québec", *Le Soleil* (26 May 1977) A7.

users. In the forty years since these curb cut initiatives, Canadian municipalities have begun using a broad range of formal and informal mechanisms for consulting the public on planning law matters.[477] In particular, these public consultations can provide a forum for those who participate to advocate for their design needs and explain how a proposed construction project will impact their lives, for good or bad.[478]

By the 1980s, provincial laws began to require regular public consultations for planning matters. Ontario's approach is typical of all provinces in that, since 1983, its *Planning Act* requires municipalities to hold at least one meeting to inform the public about development plans and that "any person who attends the meeting shall be afforded an opportunity to make representation in respect of the proposed plan."[479]. While in most of Canada public meetings are held by elected provincial or municipal officials, in 2002 Montréal decided to create an independent public body, the Office of Public Consultation (*Office de consultation publique de Montréal* (OCPM)). The OCPM conducts public hearings when required by city council. The majority of consultations conducted by the OCPM are about local planning matters.

In this part, I will look at the history of the OCPM and, based on a review of its post-consultation reports, assess the public consultations it conducts a forum for persons with disabilities to influence the built environment. While the OCPM is the only one of its kind, the lessons from its public hearings are applicable to other Canadian jurisdictions that conduct public consultations on planning matters. The advantage of studying the OCPM is that its

[477] Robert Shipley & Stephen Utz, "Making it Count: A Review of the Value and Techniques for Public Consultation" (2012) 27:1 J Plan Lit 22.
[478] Robert Mark Silverman, "Central city socio-economic characteristics and public participation strategies" (2006) 26:3/4 Int'l J Sociology & Social Pol'y 138.
[479] *Planning Act*, SO 1983, c 1, ss 17(2) and (3) [*Planning Act*, 1983].

commissioners draft a final report for each of its consultations and the entire archive of those reports is available online.

I contrast my findings about the OCPM, and public consultations on planning matters in Canada more generally, with another type of public consultation – those that are designed by governments to get feedback exclusively from people with disabilities. These consultations with the disability community are designed to collect feedback on every problem, or barrier, in the lives of people with disabilities. However, the general nature of these consultations means that they do not address concrete proposals from governments and they are largely disconnected from any specific context or imminent decision. This is the type of consultation that was conducted in 2016 by the federal government prior to the introduction of the *Accessible Canada Act*.

While there is nothing objectionable about a general public consultation with disabled people, this type of hearing should not be the only forum directed at obtaining their input. Governments ought to expect people with disabilities at the public consultations regarding the specific projects that provincial and local governments assess in the planning context. This is, of course, because people with disabilities are members of the public too. But it is also because of the value of non-disabled people hearing directly from people with disabilities when decisions about what we build are in the process of being made. As I will discuss more fully below, the procedures and settings of "public hearings" signal a particular definition of the public. It may be that procedural changes might be required to make planning hearings accessible to everyone but none of provinces have any statutory requirements for the accessibility of these hearings. I conclude this section with a brief discussion contrasting two personal experiences I have had at public consultions: 1) the federal government's general consultion with persons with disabilities in November of 2016; and 2) a public hearing on a planning matter in Calgary in July of 2020.

While these experiences are anecdotal, they illustrate my contention that consulting with the disabled community should not be separated from consulting with the general public.

Montreal's Office of Public Consultation

In 1978, just prior to the initial wave of provincial laws requiring public consultation in land use planning, Québec revised its *Environmental Quality Act* to provide for public participation in determining the environmental impacts of a variety of public works. The province created the Bureau of Environmental Public Hearings (BAPE) to carry out the work of seeking formal input from the public.[480] In 1979, the province enacted the *Land Use Act* requiring public hearings where individuals and organizations could learn about and speak to the impacts of new land use plans or bylaws. However, Montréal and Québec City were exempt from this requirement.[481] From 1988 to 2002 the province created, abolished and then re-established an office for public consultation in Montréal, what is now the OCPM, following the BAPE model of an independent public office.[482]

While Montréal's city council has the power to refer any project to the OCPM, section 89 of Montréal's City Charter requires the OCPM to conduct the public consultation anytime the City plans to pass a bylaw to permit a development project :

(1) public buildings like hospitals, schools, universities, convention centres, gardens and cemeteries;

(2) major infrastructure projects such as an airport or water treatment facility;

(3) residential, commercial or industrial establishments in the business district (and outside the business district if the building is larger than 15,000 m^2);

[480] M Gauthier & L Simard, "Le Bureau d'audiences publiques sur l'environnement du Québec : genèse et développement d'un instrument voué à la participation publique" (2011) 17:1 Télescope 39.
[481] Jean Paré, "Le rôle de l'Office de consultation publique de Montréal" in Mario Gauthier, Michel Gariépy & Marie-Odile Trépanier, eds, *Renouveler l'aménagement et l'urbanisme : Planification territoriale, débat public et développement durable* (Montréal: Presses de l'Université de Montréal, 2008) 201.
[482] *Ibid.*

(4) housing intended for persons requiring assistance, protection, care or lodging; and,

(5) historic buildings and sites.[483]

The reason for the special status of the types of projects listed in section 89 of the City Charter is their impacts on the city as a whole rather than on a particular borough alone. Montréal's city council may still hold its own consultations on projects other than those listed in section 89 of the City Charter and decide whether the OCPM, the city or the borough will conduct the consultations on a particular project.[484]

Montréal's Charter gives the OCPM the power create its own procedures "so as to ensure the establishment of credible, transparent and effective consultation mechanisms".[485] These procedures prioritize three objectives: notifying the public, with particular attention to those who live in the neighbourhood of the proposed project; adequately informing the public about the details of the proposal; and, providing the public the opportunity to give feedback. While the OCPM is unique in Canada, legislation and case law in the other Canadian provinces also contain minimum requirements for public notice, the provision of information and meaningful feedback opportunities.[486] As I explain below, the major differences between public consultations in Montreal and those in the rest of Canada are the formal role of the OCPM commissioners during the hearings and the public reports issued after every public consultation.

The OCPM publishes its procedures on its website, so there is significant public transparency about how it conducts public consultations.[487] When the OCPM receives a mandate to hold a public consultation it notifies the public in local newspapers, on its own website, with

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[483] *Charter of Ville de Montréal, supra* note 352 at art 89.
[484] Raphaëlle Aubin & Lisa Bornstein, "Montreal's Municipal Guidelines for Participation and Public Hearings: Assessing Context, Process and Outcomes" (2012) 21:1 Can Plan & Pol'y 106 at 114 [Aubin & Bornstein].
[485] *Charter of Ville de Montréal*, *supra* note 352 at art 83.
[486] Howard Epstein, *Land Use Planning* (Toronto: Irwin Law, 2017).
[487] Office de consultation publique de Montréal, "English Resources", online: OCPM, <https://ocpm.qc.ca/fr/english>.

leaflets dropped off door-to-door in the affected area, and with direct notice to community or otherwise interested organizations.[488] In addition to providing a brief explanation of the proposed project along with the date, time and location of the meeting, the notice provides deadlines and the procedure for individuals or groups to file a brief with the OCPM.[489] For every public consultation the OCPM holds at least three meetings: 1) the preparatory meeting where developers and the City present the project for the OCPM's benefit (this meeting is open to the public), 2) the informational meeting where the promoter of the project and City officials explain the project to the public and answer questions (two per participant), and 3) the presentation of briefs meeting, where members of the public provide comments and opinions orally or in writing.[490]

One aspect that makes the OCPM hearings different from public meetings run by other municipalities and provinces is the role of the OCPM commissioners. There are approximately 30 commissioners at the OCPM. One or two commissioners will facilitate each public consultation and they have support staff to assist them with conducting the hearings and producing a final report. The OCPM commissioners are meant to serve as consultation "experts" in that they (arguably) have a superior capacity to clarify information, ask questions of developers or the city, and help members of the public articulate their questions. All of the questions asked by members of the public must be answered at the hearings or in writing within 21 days of the hearing.[491]

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[488] Montréal, Office de consultation publique de Montréal, *Public Consultation Procedures* (Montréal: Office de consultation publique de Montréal, 2011) at 4 [*Public Consultation Procedures*].
[489] *Ibid.*
[490] *Ibid* at 6-9.
[491] Aubin & Bornstein, *supra* note 485.

After conducting the public hearings, the OCPM produces a final report with a summary of the hearings and its recommendations, which it submits to the city and publishes on its website. This post-consultation report is a feature of the OCPM process that distinguishes it from city or borough-led public hearings in Montréal, which only produce final reports that summarize the proceedings. The OCPM also evaluates participants' concerns in light of the information presented by the city and developers. The commissioners then produce a list of recommendations which can suggest "changes to by-laws or qualitative architectural design and urban integration considerations, be aimed at the borough, the city, the developer or stakeholders, and highlight the need for further studies or possible partnerships between stakeholders to ensure the success of the project".[492]

After its report, there are no further steps in the public consultation process and the city has no obligation to respond or implement the OCPM recommendations. This lack of accountability is one of the main criticisms of the OCPM and I will return to this at the end of this section. First, however, I will address the potential of the OCPM as a forum for persons with disabilities.

There are a variety of practical considerations when facilitating the participation by persons with disabilities or atypical bodies in public hearings. There can be physical barriers to participation, such as a physically inaccessible meeting place or inadequate public transportation. The barrier to participation could be a failure to provide sign language translation. These are obvious concerns that ought to be addressed for any type of public consultation. But there are others, including initiatives suggested in the academic literature on citizen engagement, such as: hiring trained facilitators, holding small sessions, keeping track of whether some demographics

[492] *Ibid* at 114-5.

are monopolizing speaking time, and providing space on registration forms for participants to identify their needs.[493]

As a public institution specifically designed to support citizens in public participation, the OCPM appears uniquely situated (in all of Canada) to reduce barriers that prevent participation by persons with disabilities. The OCPM commissioners are present at all public hearings to facilitate communication and ensure that members of the public get their questions answered. Beyond the potential for these procedural supports, the public consultations that must be referred to the OCPM (pursuant to section 89 of the City Charter) consist of projects that have significant impact on the social inclusion of persons with disabilities, including: hospitals, public educational institutions, "housing intended for persons requiring assistance, protection, care or lodging" and heritage properties.[494]

In order to assess the potential of the OCPM for inclusive citizen engagement on some of the most impactful city development projects, I reviewed the OCPM's final reports from 139 public consultations held by the OCPM from its inception in 2002 up until 2018. I looked for evidence of participation by persons with disabilities and for any OCPM recommendations specifically related to disability or universal accessibility.

Out of the 139 reports, 28 reports mentioned submissions from the public regarding disability/universal design and 10 reports contained recommendations to change development projects for the benefit of persons with disabilities.

The recommendations that the OCPM has made regarding disability are as follows:

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[493] Amanda Sheedy, *Handbook on Citizen Engagement: Beyond Consultation* (Ottawa: Canadian Policy Research Networks, 2008) at 15-16; Toronto, Ontario Municipal Social Services Association, *Guide to Accessible Public Engagement* (Toronto: Ontario Municipal Social Services Association, 2013).
[494] *Charter of Ville de Montréal*, *supra* note 352.

- Improve sidewalk accessibility (consultations on developing the Plateau East business sector and constructing a new condo building);[495]
- Increase crosswalk times (consultation on developing the Plateau East business sector);[496]
- Ensure accessible terraces (consultation on redeveloping the Quartier des spectacles/entertainment district);[497]
- Consult community organizations representing persons with disabilities "in the design of the facilities, their detailed planning and the evaluation of the work" (consultations on redeveloping the *Quartier des spectacles*/entertainment district);[498]
- Improve snow removal on sidewalks (consultation on a new condo building),[499]
- Build more accessible housing (consultations on developing two new social housing projects);[500]
- Improve accessibility of metro stations (consultation on developing a new social housing project); and

[495] Montréal, Office de consultation publique de Montréal, *Secteur d'Emplois Plateau Est: Rapport du consultation publique* (Montréal: Office de consultation publique de Montréal, 2015) at 47-8 [*Plateau Est*]; Montréal, Office de consultation publique de Montréal, *Projet de développement résidentiel du site du Centre Raymond-Préfontaine: Rapport du consultation publique* (Montréal: Office de consultation publique de Montréal, 2011) at 31 [*Centre Raymond-Préfontaine*].
[496] *Plateau Est*, *supra* note 496.
[497] Montréal, Office de consultation publique de Montréal, *PPU du Quartier des spectacles – pôle du Quartier Latin: Rapport du consultation publique* (Montréal: Office de consultation publique de Montréal, 2015) 18.
[498] *Ibid* at 63.
[499] *Centre Raymond-Préfontaine, supra* note 496.
[500] Montréal, Office de consultation publique de Montréal, *Projet de développement immobilier du site Norampac: Rapport du consultation publique* (Montréal: Office de consultation publique de Montréal, 2010) at 19; Montréal, Office de consultation publique de Montréal, *Projet de Mise en Valeur du Site Des Ateliers Municipaux Rosemont: Rapport du consultation publique* (Montréal: Office de consultation publique de Montréal, 2006) at 21; *Public Consultation Procedures, supra* note 489.

- Include universal accessibility as a guiding principle (consultations on redeveloping Old Montréal and a new city-wide urban plan).[501]

Sometimes the subject of a public consultation referred to the OCPM is a proposed city-wide policy rather than a specific planning project. In 2004, the OCPM held a public consultation on Montréal's first *Charter of Rights and Responsibilities*, a document that is not legally binding but that the Montréal Ombudsman can use to make interventions in decisions made at the city or borough level. At the public hearing RAPLIQ (the disability rights activist group I introduced in Chapter Two) was very involved with making submissions regarding the inclusion of language to reflect the specific needs of persons with disabilities. RAPLIQ requested that the *Charter of Rights and Responsibilities* include specific commitments to increase accessible housing and pathways, for example.[502] The OCPM ultimately recommended that the *Charter of Rights and Responsibilities* ought to mention accessibility whenever physical spaces are referred to and include commitments to improve adapted transportation and accessibility of libraries.[503] However, none of RAPLIQ or the OCPM's recommendations were incorporated into the final draft. The only mention of anything related to accessibility in the final version of the *Charter of Rights and Responsibilities* was a general statement in Article 28:

> To foster the enjoyment by citizens of their right to a high quality municipal services, Montréal is committed to…Promoting universal access in developing its territory as well as universal access to municipal buildings, communications, programmes and services in general.[504]

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[501] Montréal, Office de consultation publique de Montréal, *Plan de Protection et de Mise en Valeur du Vieux-Montréal: Rapport du consultation publique* (Montréal: Office de consultation publique de Montréal, 2013) at 89; Montréal, Office de consultation publique de Montréal, *Le Nouveau Plan d'Urbanisme de la Ville de Montréal: Rapport du consultation publique* (Montréal: Office de consultation publique de Montréal, 2004) at 74.
[502] Montréal, Office de consultation publique de Montréal, *Proposition de Charte Montréalaise des Droits et Responsabilités: Rapport du consultation publique* (Montréal: Office de consultation publique de Montréal, 2004) at 53 and 63.
[503] *Ibid* at 48, 54 and 103.
[504] *The Montréal Charter of Rights and Responsibilities*, Montréal 2006, c 7, art 28.

In 2011, the City commissioned a public consultation on revisions to the *Charter of Rights and Responsibilities*. Again RAPLIQ appeared at the hearings to suggest changes regarding persons with disabilities, including adding: universal accessibility to community services for sport, a commitment to accessible housing in all new construction, accessibility at cultural sites like libraries (including more use of braille), and considering accessibility as part of protecting the environment and cultural heritage.[505] Other groups representing persons with disabilities requested that universal accessibility be added to the *Charter* in the articles on public consultations and communications from city officials, and in the *Charter*'s commitment to inclusivity.[506] In response, the OCPM only ended up recommended that the City commit to making cultural spaces and the knowledge therein accessible.[507] Ultimately none of the suggestions from the public or the OCPM recommendations made it into the revised *Charter of Rights and Responsibilities.*

The relative absence of disability-related recommendations (10 out of 139 post consultation reports, including the reports on the *Charter of Rights and Responsibilities*) from the OCPM could have a variety of explanations. Perhaps the majority of development projects had no special impact on persons with disabilities. Another simple explanation may be that persons with disabilities did not show up at the meetings (only 28 of 139 reports mention individuals or groups speaking about disability-related concerns).

As it turns out, the OCPM may be contributing to low participation by persons with disabilities. The OCPM acknowledged that its physical premises are not designed for wheelchair

[505] Montréal, Office de consultation publique de Montréal, *Révision de la Charte montréalaise des droits et responsabilités: Rapport du consultation publique* (Montréal: Office de consultation publique de Montréal, 2011) at 22-24 and 27.
[506] *Ibid* at 16, 19 and 33.
[507] *Ibid* at 58.

users in a report issued in 2017 to mark its 15th anniversary, ironically titled, *Participation Sans Exclusion: Rétrospective des 15 Ans de l'OCPM*. The report quotes a complaint from the representative of an unnamed disability advocacy group about the fact that wheelchair users cannot enter the OCPM through its main entrance. Even the alternative entrance requires wheelchair users to be accompanied in order to gain access to the OCPM premises.[508] The representative argued that everyone should be able to use the same front door to access the OCPM building.

The issue of accessibility at the OCPM headquarters is particularly concerning because many of the public hearings take place at this building. Further, the individuals who hold the leadership positions are the two most prominent disability advocacy organizations in Montréal, Ex Aequo and RAPLIQ, are all wheelchair users. Even worse, the present arrangements for an "accessible" alternative entrance are actually the result of a previous renovation to make the OCPM physically accessible.[509] This means that when the province of Québec created the OCPM in 2002, they originally chose to place the OCPM in an inaccessible building. While the OCPM's 15th anniversary report acknowledges the physical problems with its headquarters, the report contains no specific commitment to remedy this issue. The communication barriers particular to individuals in the deaf community (ASL/LSQ interpretation) are not mentioned on the OCPM website or materials at all, so it is not clear whether interpretation services are available.

Another concern with the OCPM's public consultation process is the role that the OCPM may perform as a gatekeeper rather than simply as a facilitator. This issue is not acknowledged

[508] Montréal, Office de consultation publique de Montréal, *Participation Sans Exclusion: Rétrospective des 15 Ans de l'OCPM* (Montréal: Office de consultation publique de Montréal, 2017) at 68.
[509] *Ibid* at 65.

by the OCPM or in the academic literature on the OCPM. The OCPM position on its role seems to be best articulated by one of its commissioners: "*Le rôle de l'Office n'est pas d'avoir un point de vue. C'est d'entendre les points de vue et de faire un rapport sur ces points de vue* [The role of the Office is not to have a point of view. It is to hear the points of view and to report on these points of view]."[510] Yet, the OCPM must have some internal policy on making recommendations after the consultation process. Even though the OCPM thoroughly explains the procedures for public consultation and its code of ethics in its annual reports, there is no public information on the criteria that the OCPM uses to determine which interventions from members of the public become recommendations in the OCPM's final report to the City. This gatekeeper function is, perhaps, best evidenced by the fact that out of the 28 final reports that mention the disability-related concerns of individuals or organizations, only 10 contain OCPM recommendations supporting these concerns.

Admittedly, this assessment of the OCPM as a forum for persons with disabilities to participate in consultations on development projects in Montréal is quite pessimistic. In fact, in 2018, the City of Montreal chose not to have the OCPM conduct public consultations for developing its Action Plan 2019-2020 for Universal Accessibility.[511] This was particularly conspicuous because one of the two city councillors in charge of this consultation, Eric Allan Caldwell, was also the city councillor assigned responsibility for the OCPM. Instead of using the OCPM, the city hired a non-profit educational organization, Centre St-Pierre, to facilitate the consultation process.

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[510] Myriam Arbour, *Le point de vue des parties prenantes sur les processus de consultation dans une demarche d'acceptabilité sociale de projets urbains: exemples de deux cas Montréalais* (MA Thesis: Université du Québec à Montréal 2016) at 111.

[511] "City of Montreal asks for citizens' help in developing universal accessibility plan" *CBC News* (5 October 2018), online: *CBC News* https://www.cbc.ca/news/canada/montreal/public-consultations-accessibility-1.4851688.

The City of Montreal and Centre St-Pierre specifically designed the six public hearings of the consultation process to promote participation by persons with disabilities. These design features included the provision of voice-activated software for participants with limited vision, sign language interpretation, online streaming of two of the six consultation hearings, and the option to submit a brief by way of e-mail.[512] The Centre St-Pierre produced a final report summarizing the content of the proceedings, but also provided a detailed list of all participant comments.[513] This means that when the City uses these submissions to prepare and implement a plan for universal accessibility in its own services and thoughout the boroughs, as it plans to do from 2020 until 2024, it will have the direct input of those who participated in the consultation process.[514] As this implementation process is ongoing, we do not know how the public consultation will influence the city's plans for and implementation of universal accessibility. However, even if we do not know the outcome, there are conclusions to be drawn from the way the City of Montreal treated the public consultation on universal accessibility so differently from the consultations routinely conducted by the OCPM on other city policies and development proposals. This is not to say that there is anything improper about the careful attention to procedural accessibility during the Centre St-Pierre consultations. Rather, I propose that this accessibility could and should be considered necessary for every public consultation.

Consulting Persons with Disabilities as an Enclave Public

[512] Ibid; "Montreal to launch public consultations on accessibility for all" (4 October 2018), online: Montreal Gazette, https://www.montrealgazette.com/news/local-news/montreal-to-launch-public-consultations-on-accessibility-for-all/.
[513] Centre St-Pierre, "Consultation en Accessibilité universelle intégrée dans la version préliminaire du plan d'action 2019-2020 en accessibilité universelle: Commentaires des participant-e-s et synthèse" (Montreal, Quebec: 2019).
[514] City of Montreal, "Chantier en accessibilité universelle 2020-2024", online: City of Montreal, https://www.realisonsmtl.ca/accessiblite.

Direct consultations between persons with disabilities and government representatives have become the norm in Canada. This is a direct consequence of the work of disabled activists in the 1970s who wanted to speak for themselves instead of through able-bodied intermediaries. These activists characterized their efforts as a consumer movement and this was a radical claim at the time, because it shifted away from a view of people with disabilities as "helpless".[515] Yet framing disabled people as consumers of government services can also run the risk of limiting their involvement in public deliberations to conversations about what governments deem in advance to be "disability-related". As I explained at the beginning of this chapter, those involved in the independent living movement and organizing advocacy groups led by disabled people did not intend to limit their voices in this way. In fact, their efforts to promote curb cut installations in Canadian municipalities constitute evidence of an expansive view about people with disabilities as public deliberators.

In this section I raise concerns about government consultations with disabled people that separate their deliberations spatially or temporally from everyday deliberatives spaces. This includes consultations that are legally required by planning law. Though there may be some benefits to "enclave" deliberations, both for people with disabilities and the governments conducting consultations, there is also the risk that the perspectives of those who experience disability will be viewed as non-public special interests and exclusively matters of social justice or social inclusion.[516]

The City of Montreal's public consultation on universal accessibility in 2018, which I discussed above, is one of many consultations directed at the disability community that have

[515] Lord, *supra* note 97 at 13.
[516] Claire Edwards, "Participative urban renewal? Disability, community, and partnership in New Labour's urban policy" (2008) 40 Environment and Planning A 1664 at 1665

been carried out in Canadian cities and provinces, particularly in the last decade.[517] The federal government's consultation with persons with disabilities, for the purposes of drafting what would become the *Accessible Canada Act*, is another example of this trend. The final reports produced to describe these disability-specific consultations contain introductory sections detailing the variety of measures used to support participation by persons with disabilities.[518] None of these consultations are required by law. This contrasts with legislatively mandated planning and land use development consultatios under, for example, Ontario's *Planning Act* or Montreal's City Charter. The *Accessible Canada Act* itself contains many statutory requirements for consultation with disabled people, but these consultations do not take the form of public hearings. Furthermore, there are at present no regulations setting out the details for these consultations and directing whether they will involve paid consultants.[519] The initiatives at all levels of government in Canada to consult persons with disabilities confirm that there is some institutional capacity and knowledge about how to implement procedural accessibility at all public consultations.

Even though there are many government initiatives to conduct public consultations with disabled people in Canada, there is no academic scholarship addressing the procedures of these hearings or assessing their value. As well, the Canadian scholarship on public engagement at consultations during planning processes does not specifically address the disability community. Because of the special duty of the Crown to consult when treaty rights are affected, there is

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[517] See, for example, Government of British Columbia, Ministry of Social Development and Social Innovation, *Disability Consultation Report: Moving Together Toward an Accessible B.C.* (Government of British Columbia, 2014) [BC Disability Consultation]; Government of Newfoundland and Labrador, *What We Heard: Inclusion for All: Consultations to Develop a Plan to Remove Barriers for People with Disabilities in Newfoundland and Labrador* (Government of Newfoundland and Labrador, 2011); *What We Heard: Accessibility Legislation* (Government of Newfoundland and Labrador, 2019) [Newfoundland Disability Consultation]; City of Ottawa, *Public Engagement Feedback Report, Accessibility Consultations* (City of Ottawa, 2019); City of Kamloops, *Accessibilty and Inclusion: Moving Together Towards a More Accessible Kamloops* (City of Kamloops, 2018).
[518] *Ibid.*
[519] *Accessible Canada Act, supra* note 30; Laverne A Jacobs et al, *The Annotated Accessible Canada Act*, University of Windsor, Faculty of Law, 2021 at 22.

scholarship on how to conduct consultations with indigenous people in the case of this formal duty (which usually involves natural resource extraction). There are also studies discussing the importance of engaging indigenous people in urban planning consultations.[520] Some planning scholarship identifies marginalized or under-represented groups at planning consultations, including low-income, racialized, immigrant and/or young populations.[521] These studies identify several strategies for increasing participation at public hearings by these populations: childcare, translation services, convenient venue locations, scheduling after work hours and support from advocacy organizations.[522] While none of the literature in Canada centres on the issue of participation by the disability community, there are a few brief comments regarding the importance of physical accessibility at public hearings.[523]

The reason that planning scholars are concerned about the participation from marginalized groups is that normally the types of people or groups that attend and present at these hearings are those who have a financial interest in the outcome, whether business interests or homeowners worried about their property values.[524] In this context, increased participation from marginalized populations may help lawmakers understand broader impacts of a particular planning decision and may also raise awareness among the general population for the purposes of electoral accountability. However, supportive services like childcare or translation are not

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[520] Jessica Clogg, *Land Use Planning: Law Reform* (Vancouver: West Coast Environmental Law Project, 2007); Sarem Nejad, et al, "'This is an Indigenous city; why don't we see it?' Indigenous urbanism and spatial production in Winnipeg" (2019) 63:3 Can Geographer 413.
[521] Tessa F Nasca, et al. "Participatory planning in a low-income neighbourhood in Ontario, Canada: building capacity and collaborative interactions for influence" (2019) 54:4 Community Dev J, 622 [Nasca]; Taranjeet Kaur Grewal. "Inclusive City Building: Public Engagement Processes in the GTA" (Working paper No. 2020/03) (Toronto: Ryerson University 2020) [Grewal]; Rae Bridgman "Criteria for Best Practices in Building Child-Friendly Cities: Involving Young People in Urban Planning and Design" (2004) 13:2 Can J Urban Research, 337 [Bridgman].
[522] Grewal, *supra* note 522 at 12; Nasca, *supra* note 522 at 637-638.
[523] Grewal, *supra* note 522 at 12; Bridgman, *supra* note 522 at 343.
[524] Marcia Valiante, "In Search of the 'Public Interest' in Ontario Planning Decisions" in Anneke Smit & Marcia Valiante, eds, *Public Interest, Private Property: Law and Planning Policy in Canada* (Vancouver: UBC Press, 2016) 104-134 at115.

proposed as changes to any procedural rules or other legal requirements of public consultations in the planning context. Instead, in the case studies reported in planning scholarship these supports are usually provided by community activist groups rather than by government.

Marian Barnes, a social policy scholar in the UK, argues that the inclusivity of public consultation depends on how government defines the concept of "the public".[525] The layout of the room in which the hearing takes place and the rules for the conduct of the proceedings set up expectations about the people who will participate at the consultations. Barnes explains that there are practical consequences if those who select the fora for public hearings limit their conception of the public to able-bodied participants. In one of her case studies, Barnes describes a consultation with older people in the UK at a city council meeting where the tiered seating and raised platforms at the front of the room excluded some participants because of their mobility limitations.[526] Barnes argues that even if marginalized populations receive support in order to attend a consultation, these hearings will not be inclusive unless there are changes to procedures and formal requirements regarding the spaces where hearings take place. Most radically, Barnes proposes that procedural rules about submissions from members of the public would have to allow for "the emotional, expressive and embodied aspects of experience as well as its rational cognitive aspects."[527]

Even though governments in Canada do not explain it in these terms, there is scholarship to support the idea that "enclave deliberations" are beneficial to enhance the participation of people with disabilities (and other marginalized groups) in democratic decision-making.[528] The

[525] Marian Barnes et al, "Constituting 'the public' in public participation" (2003) 81: 2 Pub Administration 379.
[526] *Ibid* at 393-4.
[527] Marian Barnes, "Bringing difference into deliberation? Disabled people, survivors and local governance" (2002) 30:3 Pol'y & Pol 319 at 330.
[528] Afsahi, *supra* note 439.

idea is that without the presence of those who are used to participating and exercising power in the public sphere, enclaves create comfortable spaces for people with disabilities to speak for themselves and express disagreement.[529] Based on the narratives of Canadian disability activists that I have included in this thesis thus far, it would be unfair to them to perpetuate a stereotype that people with disabilities are afraid of confrontation in public deliberative spaces. Another argument is that enclaves can "preserve the authentic and agential voice[s]" of people with disabilities who communicate in ways that are non-verbal or are otherwise unexpected by able-bodied people.[530] The idea is to create a space akin to a focus group, where people with disabilities directly express themselves using any tools or supports they require rather than having able-bodied caregivers or the leadership of an advocacy group speak on their behalf in a public forum. However, I am wary of this arrangement if it is actually meant to make decision-makers and members of the able-bodied public more comfortable. Setting aside the potential ableist motivations for relegating people with disabilities to enclave deliberations, even those who advocate for this type of deliberation do not see it as a replacement for including people with disabilities in traditional deliberative spaces as members of the public.[531]

Beyond the importance of enhancing the public nature of planning consultations, there are significant practical advantages to ensuring that people with disabilities are expected participants. As I explained above, Young's "heterogeneous public" deliberates with the benefit of more information. My earlier analysis of decades of OCPM public consultation reports provided several examples of accessible design concerns that were proposed at hearings that covered a wide variety of development and policy proposals by people with disabilities. These

[529] *Ibid* at 762.
[530] *Ibid* at 763.
[531] *Ibid* at 763.

proposals, including technical features like changes to crosswalk signals or larger projects like increasing accessible housing, could have waited for when the City of Montreal decided to hold the public consultations specifically designed to hear from people with disabilities. However, a public consultation meant to address all accessibility matters in an entire city or province will, by its nature, not be an appropriate forum for input on specific problems with, for example, a new hospital or a housing development. The public consultations required by planning law are designed to address these specific problems during the planning process.

There are broader implications to the idea that persons with disabilities should be expected at public hearings that are not specifically about accessibility. The activists that lobbied for curb cuts in the 1970s appeared before city councils and advocated directly to the councillors and administrators responsible for making decisions about sidewalks. The public consultations for development projects provide a similar opportunity for members of a community to speak directly to decisionmakers about its specific impacts and offer their own suggestions. As I explained above, during the OCPM public hearing process, developers and city officials directly interact with and answer the questions of the public. Similarly, in other provinces, the public consultation process for planning matters requires interaction between the meeting participants and decisionmakers. For example, the provisions of Ontario's *Planning Act* state that the purposes of the public consultations required by the Act are to give the public the opportunity to make representations, to review information about the proposal, and to ask questions.[532] These meetings are clearly meant to be interactive and they give members of the public a chance to consult on decisions about planning at the same time that they are being made. Lawmakers and other decisionmakers involved in planning our communities should not only hear from people

[532] *Planning Act*, 1983, *supra* note 468 at ss 17(15) and (16).

with disabilities when they choose to listen to them. Further, the general public consultations on disability do not bring these decisionmakers and people with disabilities together when it can have the most potential to impact policy outcomes – when there is a concrete plan and a decision is imminent.

Even outside of the planning context, the federal and provincial government set up consultations for "the public" in ways that are different from consultations specific to disability. The main difference is the distribution of a plan or proposal that provides the public something to deliberate about (comparable to a development proposal in the planning context). For example, from May 2020 until March 2021 the federal government conducted a public consultation on freshwater policy and the creation of a Canada Water Agency.[533] The consultation took place online, with a website for the public to review discussion aids and answer a survey, and several virtual live events involving presentations from experts and breakout small discussion groups. The federal government also published a 68-page discussion paper (including almost 30 pages of sources and summaries of policies from other jurisdictions) during the public consultation period in order to obtain specific feedback on the plan for the new Canada Water Agency.[534]

In November of 2016, I attended and participated in the federal government's public consultation for persons with disabilities in Montreal, one of 18 such meetings held across Canada to obtain input on new federal accessibility legislation. The in-person hearings were part of a year long consultation that also included a one day consultation for youth with disabilities, opportunities for sharing public input online, and the submission of reports from organizations

[533] "Protecting Canada's Fresh Water" (11 March 2021), online: *Government of Canada.* <https://www.canada.ca/en/environment-climate-change/corporate/transparency/consultations/protecting-canada-fresh-water.html>.
[534] *Ibid.*

representing persons with disabilities (90 in total).[535] The federal government also circulated a discussion paper beforehand to briefly educate participants on federalism and provide discussion questions regarding potential legislative approaches.

The public hearing in Montreal that I attended took place over the course of several hours on one evening. It was quite incredible how much organization had gone into this meeting. It involved ASL (American Sign Language) and LSQ (Quebec Sign Language) translators along with simultaneous English and French translation. The organizers ensured enough space for the portion of attendees using wheelchairs or scooters and those accompanied by a service dog. There were also options for participants to submit their presentations in writing, by email, or in a one-on-one setting with one of the facilitators. According to the federal government's report on the consultations, there were also intervenor services at consultations for participants who are deaf-blind and there was Inuit sign language translation in northern Canada.[536]

At the front of the room a few representatives from federal government, including the deputy minister of disability, introduced the intention of the consultation and emphasized to attendees that there are only certain areas over which the federal government had jurisdiction and, therefore, not every concern would fall under the federal government's responsibility. Nonetheless, the presentations offered throughout the night by participants touched on a variety of topics that overlapped between the provincial and federal jurisdictions.

I observed that many of the participants offered very personal and emotional stories about their lives and the challenges they faced. As for my own input, I discussed the impact of building codes in my life and suggested that the federal government could incentivize provinces and

[535] Employment and Social Development Canada, *Creating new national accessibility legislation: What we learned from Canadians* (Ottawa: Employment and Social Development Canada, 2017), 11 [*What we learned*].
[536] *Ibid* at 7.

municipalities to improve the minimum standards of accessibility in their building codes. The event also included a presentation from a well-known Canadian dancer who identifies as disabled. Attendees had the opportunity to come meet him and ask a few questions personally at the end of the event.

Overall, it appeared that the event had significant cathartic value to the disability community in Montreal. Many of us marveled that we had never been in a room with such a large group of people with disabilities involved in self advocacy. Despite the attempts by the organizers to explain the federal government's responsibilities, there was nothing connecting the broad range of concerns expressed by the audience members. Many of the presentations were quite moving, but it was hard to discern what laws or policies could fix or ameliorate the situation that the individual described.

When I read the final report, I found that it did not match my experience of what was shared at the Montreal consultation. A disability advocacy group from Ontario, the AODA Alliance, has expressed the same criticism.[537] It may be that the written submissions from disability advocacy groups, which were also source material for the final report, were easier to translate into concrete policy proposals than the highly personal stories that I heard at the consultation. The AODA Alliance criticized the federal government's conclusions in its report on the consultations. The report too closely mirrored the discussion paper that had been circulated beforehand, suggesting that the consultations had little impact on the federal government's plan for accessibility legislation.[538]

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[537] *What we learned, supra* note 536; AODA Alliance, "The Federal Government Releases Report of Its Public Consultation on What the Promised Canadians with Disabilities Act Should Include – Lots of Good Content But Some Areas Where The Federal Report Falls Short" (17 June 2017), online: AODA Alliance <https://www.aodaalliance.org/whats-new/the-federal-government-releases-report-of-its-public-consultation-on-what-the-promised-canadians-with-disabilities-act-should-include-lots-of-good-content-but-some-areas-where-the-federal-re/>

[538] *Ibid*.

In her introduction to the final report summarizing the results of the consultation, Minister Qualtrough highlighted the centrality of the participants' personal stories at the hearings but also pointed out that "many issues raised were beyond the reach of federal jurisdiction."[539] Several other reports on consultations conducted by provincial governments with the disability community contain similar comments that imply that participants do not understand the purpose of the deliberation or do not understand relevant laws or policies.[540] Apart from the patronizing tone of the comments, they seem particularly unfair given that the broad purpose of the consultations was to hear from the disability community about the "barriers" they experience.

A few years later, in July 2020, while writing this thesis in my hometown of Calgary, I had an opportunity to compare my experience at the federal consultation for persons with disabilities with a public consultation on a local planning matter. I read in the news about a controversy over a local developer's plan to build a twelve-story condominium and commercial building in the Inglewood neighbourhood.[541] The controversy centred on the height of the proposed structure and how it would potentially clash with the character of the Inglewood neighbourhood, which is considered historical by Calgary standards. The developers sought an amendment to the land use bylaw that limits the height of buildings in Inglewood to a maximum of six stories. The developer needed an amendment from the Calgary city council and one of the statutory requirements of such an amendment is a public hearing. Some of the residents and business owners in Inglewood who opposed the proposed construction had formally organized

[539] *What we learned, supra* note 536 at 3.

[540] Citizen Consultation Team, *Saskatchewan Disability Strategy Consultation Report* (Regina: Government of Saskatchewan, 2014) at 2; Newfoundland Disability Consultation, *supra* note 507 at 20; BC Disability Consultation, *supra* note 518 at 5

[541] Sammy Hudes, "Inglewood residents push back against proposed 12-storey development", *Calgary Herald* (12 July 2020) online: Calgary Herald <https://calgaryherald.com/news/local-news/inglewood-residents-push-back-against-proposed-12-storey-development/>.

themselves to get media attention, to distribute informational pamphlets in the neighbourhood and to present at the public hearing.

Based on my personal experiences of spending time in Inglewood before and after becoming a wheelchair user, I found the historic character of the neighbourhood aesthetically charming but largely inaccessible. I contacted the developer of the proposed building and asked about the general accessibility of the proposed project. The developer explained that they planned to include accessible units in the condominium portion of the project and that the public commercial and outdoor spaces would be entirely step-free, including renovations to sidewalks and to the historic building situated next door. I decided to attend and participate at the land use amendment public hearing to express my support for the proposal on the basis that it would make Inglewood more accessible to persons with disabilities.

The hearing took place on a weekday afternoon inside of the City of Calgary's council chambers. Because of the Covid-19 pandemic, some procedural aspects of the hearing had to be modified. In order to limit the number of people in council chambers, the City of Calgary changed the rules of the hearings to allow members of the public to make their submissions over the telephone. This made the hearing more accessible to participants than it was prior to the pandemic when only in person and written submissions were accepted. The only city officials attending in person were the mayor, Naheed Nenshi, and one of the city councillors. The remaining members of City Council attended by phone.

Procedurally, there were several similarities between an OCPM public consultation and the public hearing at the Calgary city council. Like the OCPM process, the Calgary hearing began with a presentation of the proposed project by the developer. However, since the hearing was to be followed by a vote on the land use amendment, only the members of City Council

could ask questions of the developer or of any person presenting at the hearing. Members of the public were allowed to make submissions (five minutes maximum) directed at City Council, either in support of or against the amendment that would authorize the construction of the proposed project.

During my presentation, I asked the city council to consider the importance of improving accessibility in the Inglewood neighbourhood and the impact of the new building on increasing housing, employment and social opportunities for people with disabilities, including elderly people. I listed the accessibility features of the proposed development and described some of my personal experiences with inaccessibility in the Inglewood neighbourhood. In response to my comments, Mayor Nenshi thanked me for participating and said, "we always talk about universal design and then we never talk about it when we're in the midst of our public hearings."[542]

Fortunately, there were no aspects of physical space or procedures at the Calgary city council public hearing that hindered my participation as a wheelchair user.[543] The Mayor's comments did, however, indicate that my comments were out of the ordinary for that type of hearing. One of the features of the planning consultation that was striking was that the Calgary city council hearing was several hours longer than the federal government's consultation with the disability community in Montreal. This is remarkable, because the consultation in Montreal, as in every major Canadian city, was intended to inform a major piece of federal legislation while the city council's hearing pertained only to a land use bylaw amendment that would permit the

[542] See Appendix 1 for full transcription, which is based on the video archive of the public hearing. City of Calgary, *Council and Committee Agendas, Minutes and Video*, online: *City of Calgary* <https://www.calgary.ca/ca/city-clerks/legislative-services/agenda-minutes.html?redirect=/agendaminutes>

[543] Beyond accessibility for wheelchair users, the City of Calgary provides captioning for City Council meetings, one can request an American Sign Language interpréter free of charge at any public meeting with at least two weeks advance notice, and all printed materials for public meetings can be obtained in Braille: City of Calgary, "Accomodations and Services for Accessibility", online: *City of Calgary* <https://www.calgary.ca/csps/cns/research-and-strategy/advisory-committee-on-accessibility/accomodations-and-services.html>.

construction of a single building. The length of the hearing allowed for a detailed discussion amongst community members and decision makers about a single city block and focussed on how a new condo and commercial development would impact the neighbourhood. There were many more attendees at the Montreal consultation on federal disability legislation, and the topics addressed were nearly equal to the number of participants. Save for the few government representatives at the disability consultation, those who made presentations were speaking (or venting) only to other members of the disability community.

As I describe above, the consultation I attended in Montreal was carefully designed to support participation by people with disabilities. The Calgary public hearing on the land use bylaw amendment did not have the same design but I did not personally experience any barriers to my participation as a wheelchair user. The location of the hearing in the Calgary City Council Chamber was accessible to me, as it had been renovated in 2010.[544] The City spent $1.725 million on these renovations, including: lowering the Council Chamber floor so that the entrances would not require ramps; adjusting the seating in the viewing gallery to accommodate space for six wheelchairs; installing a universally accessible public presentation podium; changing carpets and stairs to make them useable for those with vision impairments; installing AV hardware equipment for captioning and assisted listening devices; and constructing a universally accessible washroom.[545]

Further reasons that I found the public hearing accessible include: I had the choice to participate over the phone (because of COVID-19 accomodations), I live close enough to City Hall in Calgary that I used my power wheelchair to get there in 20 minutes, the event took place

[544] "Council Chamber Renovation" online: *City of Calgary* <https://www.calgary.ca/cs/cpb/projects-and-initiatives/council-chamber-renovation.html>.
[545] *Ibid.*

in the afternoon so it did not conflict with my caregiver schedule, and I was comfortable public speaking because of my legal and academic background. Yet, the confluence of circumstances that made it relatively easy for me to participate at the City of Calgary public hearing are not true for all persons with disabilities.

In 2016, a group of people with disabilities who were appearing before the City of Calgary's Committee on Planning and Urban Development identified many inaccessible aspects of Calgary's City Hall infrastructure, particularly when multiple wheelchair users attempted to attend the meeting together.[546] One of the participants, who was accompanied by his service dog because of his vision loss, could not be dropped off by his transportation at the entrance of the building and there were no braille signs to help him find the location of the meeting. There was also nowhere to take his service dog to relieve him. The room where the meeting took place was awkward for the wheelchair users in the group because it was only designed for one wheelchair user to be present to the Committee

There are many other municipal buildings in Canada that are not accessible to people with disabilities.[547] There are also public transit systems that remain inaccessible and specialized alternatives to public transit for people with disabilities can be unreliable with regards to timing and require scheduling 24 hours in advance.[548] The public hearing that I attended in Calgary took longer than anticipated to receive the developer's submission. This delayed submissions from

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[546] Annalise Klingbeil, "People who encounter barriers weigh in on city building standards" *Calgary Herald* (23 July 2016).
[547] Ronald Zajac, "Accessiblity cash sought: Advocacy group seeks extra $10k in municipal budget for accessible meetings" *The Recorder & Times* (3 December 2013); Phil Tank, "Advocate seeks true accessibility in city sites, jobs - Speaker with disability had to address committee from back of meeting room" *Saskatoon StarPhoenix* (5 September 2018); Tyler Kula, "Sarnia facing human rights complaint" *The London Free Press* (11 October 2018); "Manitoba to make renos to accomodate disabled politicians" *Medicine Hat News* (11 January 2016).
[548] Bryan Labby, "Disabled Calgarians ask why Calgary Transit Access doesn't 'treat us with respect'" *CBC News* (11 March 2019) online: <https://www.cbc.ca/news/canada/calgary/calgary-transit-access-complaints-foip-disabled-transportation-1.5049319>.

members of the public. If I had been relying on a booked trip to get home, I may have missed my opportunity to speak. I mention my caregiving schedule because of how it impacts whether I will be able to attend morning meetings. I require almost three hours of help each morning. For other people with disabilities who require caregiver support there can be many constraints on timing that are not within their control. These constraints may arise from limitations on caregiver funding, living arrangements, the involvement of home care agencies or the schedules of family or friends who provide this support. There are also those in the disability community who bring a support person when they go out in public and so this can require further coordination of schedules. In my case, I brought family members because I had never been to the City Council buildings in a wheelchair and I did not know what to expect. Most importantly, I needed to know whether I would be able to get in and out of the washrooms on my own.

Though I argue throughout this chapter that governments ought to plan for people with disabilities to participate in person at public hearings regarding planning matters, I know from my own experience with disability that there are many constraints on the lives of persons with disabilities that affect our ability to be present at events. Even if a hearing is in an accessible setting, people with disabilities may not participate because planning for, getting to and being present at a public meeting requires much more time and energy than an able-bodied person requires.

I discussed the idea of enclave deliberation earlier and expressed concern about the separation of people with disabilities from the able-bodied public for deliberation. However, given the constraints on the time and energy of people with disabilities, which is compounded by inaccessibility in the built environment, there is good reason to experiment with creative ways to hear from people with disabilities on planning matters. Legal scholar Mariana Valverde has

documented one such experiment, which took place in her own Toronto neighbourhood of Lesliville in 2013.[549] The city organized two public consultations regarding heritage designations in one part of the neighbourhood and guidelines for architecture and height restrictions in a commercial zone. In an effort to minimize the "exclusionary effects" of gentrification, a group of Leslieville residents (including Valverde) created an organization called Planning South Riverdale (PSR) in order to run their own public consultations alongside the city's hearings.[550]

PSR's main concern was that those who may be most negatively impacted by gentrification should be heard by the City but that they may not attend the official meetings in order to share their experiences because "the prospect of spending time in meetings discussiong new land-use planning rukes is eclipsed by the daily challenges of survival."[551] So PSR decided to hold their "shadow consultations" in places where the most marginalized groups of residents actually live or spend their time, including a residence for persons with disabilities, a health centre, and two different transitional housing settings. PSR asked similar questions to those being considered at the official city hearings and then presented the results to the city planners and elected officials at the city hearings. The main feedback from the PSR hearings from persons with disabilities related to the following concerns about:

- Pharmacies, banks, medical clinics and other commercial services that are accessible & welcoming to low income people, including Ontario Disability Support Program (ODSP) clients;
- Poor quality sidewalks with too many obstructions [which] prevent people who use mobility devices from being able to access neighbourhood resources; and
- Increasing the number of services for people with disabilities.[552]

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[549] Mariana Valverde, "A tale of two - or three - cities: community consultations and commercial gentrification" in Jay Pitter and John Lorinc, eds, Subdivided: city building in an age of hyper-diversity (Coach House: Toronto, 2016) 199-207.
[550] *Ibid* at 199.
[551] *Ibid* at 203
[552] Planning South Riverdale, "Results of Consultations about Local Development Issues with Marginalized Community Members" (2014), online: Spacing <http://spacing.ca/toronto/wp-content/uploads/sites/4/2015/11/PSR-CONSULTATIONS-REPORT.pdf> 3-4.

PSR's consultations demonstrate the benefits of enclave deliberation in planning matters, particularly since PSR brought the feedback they collected to the official public hearing to inform the larger deliberations.

These anecdotal experiences indicate that the issue of when and how governments consult persons with disabilities is understudied. We need to assess the impact of these general consultations that all levels of government in Canada have been conducting. Provincial and local governments that profess an interest in obtaining the perspectives of the disability community ought to consider whether organizing separate consultations for disabled people is always appropriate.

There is no evidence that people with disabilities are intentionally excluded from the public consultations that are part of the planning context. But we do need to know more about the accessibility of these hearings. If a public consultation is required by planning legislation, then it seems reasonable that it ought to be held to the procedural standards as the consultations that governments organize for the disability community, even though not required by law. Rethinking the types of public consultations that are designed to include the perspectives of persons with disabilities is one aspect of how we can ensure that the concept of "public" is not limited to the able-bodied public. However, participation in a public hearing about a proposed development does not guarantee a specific result. It only means that the perspectives of disabled people will not be completely absent during the planning process. In the next section I explain how interventions in the next step of a development project, the permitting process, could allow people with disabilities to seek a legal remedy to enforce accessibility before construction.

Part Two: Contestation

The public consultations that take place during the planning process are a statutory requirement, but lawmakers have no obligation to respond to or implement the recommendations from the members of the public who participate in the consultation phase. The developers of a proposed project may receive the requisite development and building permits to commence with construction despite opposition from members of the public. After a municipality issues a development permit, most jurisdictions in Canada allow for an appeal by a third party. There are also some jurisdictions that also allow for this type of appeal after the municipality issues a building permit. If successful in an appeal, members of the public who are opposed to a project, or some of its aspects, may block construction altogether or require modifications.

Disability advocacy groups have not yet used a third party appeal to challenge inaccessibility in a proposed development. However, environmental groups have illustrated how a third party permit appeal can be used to as an advocacy tool. As I will discuss below, in many of the reported cases the party bringing a permit appeal has already participated in the public consultation process but remains unsatisfied and therefore seeks a legal remedy. These appeal processes could offer an opportunity for people with disabilities to have a direct impact on how we construct the built environment beyond the consultation phase. An appeal at the permit stage is a promising complement challenges to inaccessibility brought by way of a human rights complaint, because it is prospective rather than retroactive.

There is no mechanism for making individual complaints about the built environment under the *Accessible Canada Act,* the *Accessibility for Ontarians with Disabilities Act* or the *Accessibility for Manitobans Act*. As a result, human rights complaints or *Charter* challenges are the only legal processes currently used by persons with disabilities to address specific instances of inaccessibility in the built environment. Yet, as I will describe below, case law prohibits the

use of a human rights complaint to challenge gaps in or improper application of building codes and other related regulations. Complainants must wait until construction is complete and all relevant permits issued and then, once the building is open to the public, can they initiate a human rights complaint. Therefore, an intervention at the permiting stage by way of an appeal offers a remedy that the human rights complaint cannot – the opportunity to build accessibly in the first place.

Before I explain third party appeal rights more fully, I will first provide an overview of case law that illustrates the limitations on the use of human rights remedies to address inaccessibility in the built environment.

The Limits of Human Rights Law Remedies to Inaccessibility

Developers and members of the public generally expect that when a municipality issues a building or development permit all legal requirements have been met, including those related to accessibility. The availability of the permit appeal process demonstrates that legislators acknowledge that there is potential for error or for differing interpretations of permit requirements. Case law contains examples of disputes over municipal negligence and liability when a building owner relies on the issuance of a building permit to conclude that they have met the requirements of the building code. Some of these cases are particularly relevant here, because they involve buildings that do not meet the accessibility requirements of the applicable code but were nonetheless issued a permit by the municipality.

In *Beutel Goodman Real Estate Group Inc. v. Halifax (City)*, a building owner sued the City of Halifax for issuing a building permit for the construction of a building that was later subject to a human rights complaint by a person with a disability.[553] Prior to construction, city

[553] *Beutel Goodman Real Estate Group Inc. v Halifax (City)*, 1998 CanLII 2244 (NS SC).

employees had specifically told the original developer's architect that access for persons with disabilities was not required for the second storey of the building. The municipality issued building and occupancy permits to the developer and the inspectors never addressed the inaccessibility of the second story. A few years later, a wheelchair user successfully brought a human rights complaint against the building's owner (who was not the original developer) and against the City, which resulted in the City electing to issue an order requiring the owner to install an elevator to make the second floor accessible. The owner then sued the City for negligence in erroneously issuing the building permit and claimed the cost of the elevator as damages, approximately $50,000. The Court held in favour of the City, finding that the owner did not reasonably rely upon the City's interpretation of the building code. The Court did leave open the possibility that the representations to the developer's architect could form the basis of liability but that there could be no remedy because the original developer had not brought the negligence claim.

The Court in *Beutel Goodman* treated the statutory right to appeal a building permit as evidence that the municipality is not the ultimate authority on whether the building code provisions are met.[554] The municipal employees involved in the inspection process had misapplied the building code requirements for elevator access to the second floor. Presumably, given the Court's acknowledgement of the appeal process available at the building permit stage, this misapplication of the building code could have been addressed before the building's construction had completed. Pursuant to legislation on standing, third parties affected by the misapplication can bring an appeal of the issuance of a building permit. This means that the wheelchair user, who successfully brought a human rights complaint years after the building was

[554] *Ibid* at paras at 9 and 14.

constructed, could have appealed the issuance of the building permit in the first place. Practically, retrofitting a building with an elevator is much more expensive than installing one during construction. This is part of the reason the developer tried to get input from the City on the accessibility requirements during the construction phase.

As a matter of efficiency and cost effectiveness, then, the permit appeal process may more effectively lead to the same outcome (namely, an elevator) as a human rights complaint. Importantly, the wheelchair user could not have brought a human rights complaint to challenge the misapplication of accessibility standards during the permitting stage and before the building had been constructed. This is because a human rights complaint cannot be brought until the complainant directly experiences discrimination, in other words until the wheelchair user physically encountered the stairs that prevented them from accessing the second floor of the building.

The requirement that a complainant experience the discrimination in the built environment also precludes any challenges to the substance of provincial building code by way of a human rights complaint. In *Shuparski v. Toronto (City)*, a disabled resident of a condominium building brought a human rights complaint about the absence of power door openers in the building.[555] The applicant sought an order requiring the condominium corporation to install power door openers, and sought damages from the City of Toronto and the Province of Ontario. The City had issued a building permit for the construction of the condominium building without power door openers because this feature was not required by the *Ontario Building Code*. The applicant argued that by issuing this permit, the City violated the *Ontario Human Rights Code* and failed to implement its own *Accessibility Design Guidelines,* which had been in place

[555] *Shuparski v Toronto (City)*, 2010 HRTO 726 (CanLII).

since 2004. The applicant's case against the province challenged the *Ontario Building Code* "on the basis that it is under-inclusive and therefore systemically discriminates against people with disabilities by authorizing inaccessible construction."[556]

By the time the case reached adjudication, the condominium corporation had voluntarily installed the power door openers and so the Tribunal dealt only with the case against the city and the province. The Tribunal rejected the applicant's case against the province on the basis that it would be outside its jurisdiction to modify or set aside provincial legislation, namely, the *Ontario Building Code*. The Tribunal also held that the City's action in issuing the permit had no temporal or causal link to discrimination against the applicant. The Tribunal put great emphasis on the fact that when the City issued the permit, the building did not yet exist:

> what if the applicant had filed his Application on the day the permit was issued (the date of the allegedly discriminatory action); how would the Tribunal address the issue of whether the building is accessible? It would be impossible to adjudicate. The building would exist only in theory and the City would not necessarily have any further involvement in the project. Any alleged discriminatory action would be prospective and by others, not the City.[557]

The Tribunal went on to cite many cases supporting the proposition that human rights codes are "not designed to protect against hypothetical or even anticipated violations" rather, they are "retrospective and remedial in nature."[558] The difference between the requirements of Toronto's *Accessibility Design Guidelines* and provincial building code was irrelevant to the issue of alleged discrimination. However, in the context of a permit appeal, the fact that the City's *Accessibility Design Guidelines* required power door operators may have been determinative. As I discuss in the next section, a third party permit appeal has been used successfully to block a permit where a municipality holds itself to a higher standard of accessibility than provincial

[556] *Ibid* at para 13.
[557] *Ibid* at para 36.
[558] *Ibid* at para 37.

building code but fails to implement the higher standard when issuing a building permit. The Ontario Human Rights Tribunal's analysis in *Shuparski* illustrates the inadequacies of a human rights complaint to address these substantive aspects of building code and any accessibility concerns about a proposed construction project.

Malkowski v. Ontario Human Rights Commission is another example of how the human rights complaint process cannot challenge the substantive accessibility requirements in provincial building code. The complainant had severe hearing loss and he alleged that the *Ontario Building Code* discriminated against him because it did not require the provision of a rear window caption board at movie theatres.[559] The *Ontario Building Code* did require assisted listening devices, but these were of no benefit to the complainant because he could not hear, even with the use of technology. The complainant argued that, in order to comply with the *Ontario Human Rights Code*, the *Ontario Building Code* ought to require theatres to install a caption board at the rear of a theatre such that a portable reflector, obtained on request from the box office and installed on the armrest, can be used to read the captions. At the time of the case, the rear window caption technology had been available for almost a decade and, six years previous, during a province-wide public consultation with the disability community, the Canadian Hearing Society had recommended that the *Ontario Building Code* ought to require this technology in all movie theatres.[560]

The Ontario Human Rights Commission refused to refer the complaint to a board of inquiry and the complainant appealed to the Divisional Court. The Divisional Court held that the complainant could not use the human rights complaint process to challenge the *Ontario Building*

[559] *Malkowski v Ontario Human Rights Commission*, 2006 CanLII 43415 (ON SCDC).
[560] The Canadian Hearing Society, *Response to The Ontario Ministry Of Municipal Affairs And Housing: A Consultation On Barrier-Free Access Requirements In The Ontario Building Code* (Toronto: The Canadian Hearing Society, 2002).

Code itself.[561] The Court did not address a hypothetical scenario wherein the complainant alleged discrimination on the part of an individual theatre for failing to provide rear window captioning. This ended up being a successful strategy a few years later, culminating in a settlement mediated by the Ontario Human Rights Commission requiring large film exhibitors to begin installing rear window captioning.[562] The Court did propose a different hypothetical strategy open to the complainant – bringing a constitutional challenge to the *Ontario Building Code*. However, perhaps because of the success of individual complaints against theatres, the complainant did not bring a Charter challenge and the *Ontario Building Code* does not require rear window captioning to this day.

There has been only one case where a human rights tribunal has been prepared to consider a municipality's decision to issue a building permit as evidence of discrimination.[563] The complainant brought a human rights complaint against an inaccessible restaurant and the municipality that issued the building permit for the restaurant's premises several years after the building had been constructed. The Tribunal would not assess the merits of the case against the municipality because the complainant failed to meet the six-month period of limitations required by the *Human Rights Code* in British Columbia. This meant that the alleged discriminatory action of the municipality, the issuance of the building permit, could not be considered and the Tribunal allowed only the complaint against the restaurant to proceed.

These human rights cases demonstrate the challenges of trying to hold provincial and municipal governments to account for their legislative and permitting functions in the

[561] *Ibid* at para 38.
[562] "Backgrounder: Settlement with respect to the exhibition of movies with closed captioning" online: *Ontario Human Rights Commission* <http://www.ohrc.on.ca/en/backgrounder-settlement-respect-exhibition-movies-closed-captioning>.
[563] *Miele v Pat Quinn's Restaurant and Bar and another*, 2017 BCHRT 244 (CanLII) at para 16.

construction of buildings. Part of the problem is that human rights adjudicators find it difficult to identify discrimination at the planning stage, when no building yet exists. If a complainant waits until there is a physical building, then it will almost always be too late to address the actions of the municipality because of the significant period of time between when a permit is issued and when the building is constructed and open to the public.

There is another limitation on the availability of a remedy under human rights law for inaccessibility in the built environment: the requirement that only people with disabilities who have been directly impacted can initiate a complaint. In the next example, I explain the limitations of addressing government responsibility for inaccessibility when the complainant cannot adequately prove their disability or cannot prove how the barrier affects them specifically even if the barrier affects other persons with different disabilities.

In a series of decisions, involving nearly 20 complaints by one individual against the town of Penetanguishene and some of its private businesses, the Ontario Human Rights Tribunal held that a human rights complaint cannot be used to enforce general compliance with the accessibility provisions of provincial building code.[564] Henry Freitag, the complainant, tried to use the human rights complaint process to improve accessibility in his community, like Linda Gauthier and RAPLIQ in Chapter Two. However, Freitag's complaints were dismissed by the Ontario Human Rights Tribunal because, unlike Gauthier and the people she assists, Freitag could not show that he was personally impacted by the inaccessibility that he identified in his complaints. It was not sufficient for Freitag to argue that the respondents to his complaints were in violation of the provincial building code if these violations would only impact a hypothetical

[564] *Freitag v Penetanguishene (Municipality),* 2010 HRTO 1704 [*Freitag* (2010)]; *Freitag v Penetanguishene (Town),* 2013 HRTO 554 [*Freitag* (2013)]; *Freitag v Penetanguishene (Town) et al*, 2015 HRTO 1275 [*Freitag* (2015)].

disabled person, but not Freitag himself. Freitag, who was in his mid-80s, asserted that his arthritis and heart condition qualified as disabilities affecting his mobility, but he did not submit any medical records as evidence and so the Tribunal did not accept this characterization.

Freitag's human rights complaints against Town of Penetanguishene alleged discrimination against persons with disabilities because of its inaccessible built environment and he specifically identified the following issues: steep sidewalk slopes, lack of curb cuts, absence of sidewalks, obstructions on the sidewalk, narrow doorways, inadequate parking for persons with disabilities, inaccessible washrooms, lack of power operated doors, and lack of a fire safety plan for the evacuation of persons with disabilities.[565] Freitag argued that even if the barriers did not affect him directly, they would still impact other people with disabilities.

When questioned about why he required power operated doors in municipal facilities, Freitag said he was "concerned more about disabled persons with walkers or wheelchairs, but agreed that he did not currently use either a walker or a wheelchair."[566] Even when Freitag was able to show that a municipality or private business did not actually meet provincial building code requirements, the Tribunal held that this was no basis for bringing a human rights complaint:

> [t]his Tribunal does not have general jurisdiction to enforce the Building Code, or regulations under other legislation, or non-legislative accessibility standards, although these things may be referenced in evidence in a Tribunal proceeding.[567]

In one of the decisions, the Tribunal commended Freitag for his otherwise legitimate aim in making his town more accessible but admonished him for selecting to do so in an overly litigious way. The Tribunal suggests that Freitag ought to work cooperatively with municipal officials and

[565] *Freitag* (2013), *supra* note 565 at paras 2-3.
[566] *Ibid* at para 98.
[567] *Ibid* at para 9.

raise his concerns in the processes available to him, such as formal presentations or petitions to the municipality.[568]

After Freitag's unsuccessful complaints, one of the respondents involved applied to have Freitag declared a vexatious litigant so that he would no longer be able to bring complaints without leave of the Ontario Human Rights Tribunal.[569] Freitag argued against the application on the basis that there was a public interest component to his various human rights complaints. The Tribunal refused to consider this argument, citing *Carasco v. University of Windsor*, on the basis that "[t]he [Human Rights] Code does not permit an individual to bring a public interest application, either on her own, or in conjunction with an individual case."[570].

Freitag's efforts to use the human rights complaint process to achieve accessibility in his community were unsuccessful, primarily because only people with disabilities may initiate these complaints and only about inaccessibility that affects them vis-à-vis their particular disability. Earlier in this thesis, I discussed some of the criticisms of human rights complaints in the context of the built environment, including David Lepofsky's concern that it requires people with disabilities to be "private human rights cops".[571] The Ontario Human Rights Tribunal's rejection of Freitag's complaints reinforces Lepofsky's critique that the burden of policing inaccessibility is on disabled people alone. However, the onus on people with disabilities to enforce accessibility is only true of the human rights complaint process. The availability of planning law remedies, such as a third party permit appeal, are promising because they can be preventative and they do not require litigants to prove their disability. The appellants in a PEI building permit appeal case, which I will discuss below, invoked the powerful legal remedy of quashing a

[568] *Ibid* at paras 53 and 135.
[569] *Freitag* (2015), *supra* note 565.
[570] *Carasco v University of Windsor*, 2012 HRTO 195.
[571] See text accompanying footnote 283.

building permit, preventing the construction of an inaccessible motel, and it was irrelevant whether the inaccessibility would affect them personally. The permit appeal process gives broad right of standing to persons or organizations, like Mr. Freitag, who seek to improve accessibility in their communities.

Third Party Permit Appeals

There are limits on what private landowners may build on their property and some of these exist to ensure that residents of a particular city or neighbourhood can influence the decisions about what is built in their community. As I explained in the previous section, the public consultations required by statute during the planning phase of a development project are one example of this type of input. While a public consultation provides the opportunity for participants to present their views, there is no formal legal requirement that decisionmakers in government or private landowners have to act on any of these views. In this section I will look at a formal legal intervention during the permit process, a third party permit appeal, that gives members of the public standing to challenge aspects of or to block the construction of a particular building project.

In the remainder of this section, I describe the permit appeal processes available throughout Canada and address the issue of standing as it could apply to people with disabilities challenging these permits as third parties. Permit appeals might close the current gap that prevents people with disabilities from proactively challenging inaccessibility before the construction phase. I discuss examples from case law where accessible design features are contested by able-bodied litigants by way of permit appeals. This area of law, which has direct impact on whether we build accessibly, is a new potential tool for disability activism.

Where a construction project involves a new building or a change in a building's use then prior to getting a building permit the landowner must obtain approval from the municipality. In most Canadian jurisdictions this approval is called a development permit (or sometimes a site plan approval).[572] The requirements for a development permit are set out in a municipality's land use (or zoning) bylaw and they include specifications like permitted uses, density or height. Typically, an application for a development permit will contain quite detailed information about the proposed project that are relevant to accessibility, including: floor plans, proposed changes to public sidewalks and a statement of existing and proposed uses.[573] If anything significant about the proposed project does not conform with the land use bylaw, then the landowner must apply to the municipality for an amendment to this bylaw. (This was the type of amendment sought by the Calgary developers in the example I described in the previous section.) In some cases, landowners can also apply for a variance or relaxation, which means that the project conforms with the bylaw in general but that a small exemption is required. For example, the mandated distance between neighbouring buildings may be impossible in some instances because of an odd lot shape.[574] Or, a building owner may apply to reduce the amount of barrier-free parking due to space restrictions.[575] If a municipality refuses to issue a development permit or variance it may effectively terminate a proposed construction project or add significant cost. Applicants have a right to appeal these decisions in almost every Canadian jurisdiction (as I explain in detail below).

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[572] Parks Canada, *National Planning Permit Process: Discussion Paper* (2018) online: *Parks Canada* <https://www.pc.gc.ca/en/agence-agency/lr-ar/consultations/discussion> at 6.
[573] *Ibid* at 7.
[574] Province of Manitoba, *Municipal Planning Guide To Zoning Bylaws In Manitoba: Component A* (Winnipeg: Province of Manitoba, 2015) at 31.
[575] *Barcis v Sault Ste. Marie (City)*, 2019 CanLII 2233 (ON LPAT).

After the development permit stage, or if none is required, the next step is to obtain a building permit. Before constructing a new building or conducting major renovations, landowners must show that they intend to comply with their jurisdiction's building code by submitting their plans in an application for a building permit. This may be a familiar process to those who have built or renovated their own home since building permits are required for almost any major construction project. The work of reviewing building plans, issuing a building permit and conducting inspections is also a municipal responsibility. Since building codes are provincial legislation, the municipal officials issuing building permits have almost no discretion to refuse a permit, if the applicant meets all legislated requirements. However, like applications for development permits, there are also instances where building permit applicants can seek a relaxation of or exception from the requirements of the building code, including accessibility requirements.[576]

Throughout the construction phase, further building inspections are usually required, depending on municipal regulations. After construction is complete, an inspector must issue an occupancy permit before the building may be used. As a result of the variety of permits and inspections required during a construction project, there are many opportunities for building officials to identify building code contraventions. At any point during construction, a building official may issue an order requiring changes to the design of the building or ceasing construction altogether. The permit cannot be issued if the proposed building will contravene certain laws and regulations. For example, Ontario's *Building Code Act* allows the chief building official to deny a permit if "the proposed building, construction or demolition will contravene this Act, the building code or any other applicable law".[577] Those who fail to comply with an

[576] See, for example, *Voropanov*, *supra* note 237.
[577] *Building Code Act,* SO 1992, c 23, s 8(2) [*Building Code Act* (ON)].

order or who contravene building code regulations may be subject to monetary penalties that can range from $10,000 to $100,000 depending on the province or municipality. There are differing interpretations of these requirements so, like for development permits, applicants have a right to appeal if the municipality denies their building permit application.

While development and building permit applicants are always entitled to appeal a decision not to issue a permit, most Canadian provinces and territories also allow third parties to apply to have an issued permit revoked. The third parties that bring these challenges are often neighbours unhappy with a nearby construction project on the basis that it will ruin their enjoyment of their own property. In a smaller number of cases, individuals or organizations appeal an issued permit on the basis of a "public interest". Canadian lawyers who advise developers take the risk of third party appeals very seriously and see them as very disruptive to a project even if the third party appeal is unsuccessful. This is because delays to a project are very costly. Lawyers advise their developer clients to adopt preventative strategies to ensure that there will be no delays – primarily through extensive consultation with the community during project development and learning from past third party appeals.[578]

The powerful incentive for developers to avoid third party appeals demonstrates the potential of this legal remedy for people with disabilities. Even one high profile appeal could influence the decisions of developers in the future because of the cost of delays to a construction project. Permit appeals, third party or otherwise, are rarely discussed in Canadian legal scholarship. Therefore, I will introduce the provincial and territorial legislation and case law that define who may bring such appeals and on what grounds. Before doing so, I first describe the

[578] Allan Wu, "Regulating Project Risk: Project Development in the Regulatory State" (2018) 2018 J Can C Construction Law 213 at 244-5.

rationale for third party appeal rights, along with some criticisms, by reviewing scholarship from Australia and the UK, where these issues have been debated by scholars and policy makers.

Stephen Willey, an Australian academic, has conducted broad comparative studies of third party appeals in various cities in the UK and Australia, and in Vancouver, British Columbia. Based on this research, Willey argues that appeal rights, for permit applicants and third parties, are "fundamental to ensure that decision-makers are held accountable and do not act in a capricious manner."[579] Whether the appeal is to a court or administrative tribunal, Willey finds that an independent and impartial adjudicator does not just correct mistakes in the interpretation and application of building regulations or land use bylaws, but also provides a check on corrupt relationships between municipal politicians and wealthy developers.[580]

In his comparative studies of the UK, Australia and Canada, Willey interviews government officials, planning professionals, developers, lawyers, academics and "environmental and resident action groups", which are the typical third party appellants in the jurisdictions he studies.[581] In general, interviewees representing government or developers tend to view third party appeals negatively and the interviewees from environmental and resident action groups, unsurprisingly, support the right to appeal as a third party. Willey uses Vancouver in his comparative study to illustrate a jurisdiction where third party appeals are very limited, in contrast to Australia (and other jurisdictions in Canada as I explain below). Rather than having the right to appeal permits, third parties may only appeal decisions related to zoning bylaws.[582] Willey observes that one consequence of limited appeal rights in Vancouver is that developers

[579] Stephen Willey, "Are planning appeal rights necessary? A comparative study of Australia, England and Vancouver BC" (2005) 63:3 Progress in Planning 265 at 266 [Willey, 2005].
[580] *Ibid* at 304.
[581] *Ibid.*
[582] *Vancouver Charter*, SBC 1953, c 55, s 573.

work closely with the municipality from the outset to ensure that projects will obtain necessary permits because most decisions are final. Some of those interviewed by Willey felt that this could potentially hurt the community, and minority interests in particular, because then the only accountability for planning decisions is the municipal elections that can be several years apart.[583]

In Victoria, Australia, where third party appeal rights are quite broad, Willey found that these appeals "draw the public into land-use planning, encourage greater participation and can often result in improved decision making."[584] The reason that the involvement of third parties improves decision making is that they can provide a "local level of knowledge" that was not considered during the initial planning or permitting decision.[585] Scotland does not give third parties the right to appeal planning decisions, but in 2006 Scottish legislators considered creating such a right. An environmental group that was strongly in favour of the proposed legislation argued that a third party right of appeal

> would establish a 'credible threat' for poor or disadvantaged communities otherwise hopelessly 'outgunned' by development interests (in terms of financial power, access to legal advice and lobbying influence). In this respect it could offer real accountability of planning authorities to citizens, and underpin genuine and meaningful participation.[586]

This understanding of a permit appeal makes it sound like a promising legal tool for people with disabilities, who have been and continue to be marginalized in the planning and construction process. However, as some critics point out, the very reasons that certain populations are not meaningfully represented in planning decisions in the first place also explains why they do not know about or have the resourcees to pursue a permit appeal either. One of the strongest

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[583] Willey, 2005, *supra* note 580 at 302-3.
[584] Stephen Willey, "Planning Appeals: Are Third Party Rights Legitimate? The Case Study of Victoria, Australia" (2006) 24:3 Urb Pol'y & Research 369 at 370 [Willey, 2006].
[585] *Ibid* at 378.
[586] Duncan McLaren "Third-party Rights of Appeal in Scotland: Something Rotten?" (2006) 7:3 Planning Theory & Practice 346 at 346.

arguments against third party appeals is the potential that they could be used to fight projects that are considered undesirable by the residents of a particular neighbourhood (so-called NIMBYism) and could thereby "become a tool to be exploited by elitist and capitalist interests at the expense of the vulnerable."[587] There are examples in Canadian caselaw of these types of appeals, including opposition to the construction of group homes for persons with disabilities in a particular community (which I will discuss further below).

The criticism about the co-optation of third party appeals by the powerful is also a compelling reason for marginalized communities to engage with the process. Whether it is developers or resident action groups that oppose or fail to consider the interests of the disability community, there are a variety of procedural opportunities to advance an accessibility agenda during a permit appeal. The public hearing that I attended in Calgary is an example of the potential complexities and conflicting interests involved in even a small construction project. As someone with a disability I was in favour of the developer's plan because it would offer accessible housing and commercial spaces, along with upgrades to a public heritage building and the sidewalk. The organization of Inglewood residents that opposed the project were concerned about the height of the building, which they argued would affect the aesthetics of the neighbourhood and reduce direct sunlight in a nearby park. Accessibility, even though it was integrated into the developer's plan, was not specifically addressed by the developer or by the Inglewood community group during the public hearing I attended. I was the only participant who spoke about accessibility and my experiences as a wheelchair user. Though this hearing did not involve an appeal, it illustrates the way that people with disabilities can self advocate in the

[587] Willey, 2006, *supra* note 585 at 380.

planning process and provide what Willey describes as a "local level of knowledge" that might otherwise not be presented to decision makers.

The limited third party appeal rights in Vancouver, the only jurisdiction in Canada that Willey studies, are not representative of other jurisdictions in Canada.[588] In fact, most provinces and territories in Canada offer a broad right of appeal to third parties. Each of the provinces and territories that provide for a third party appeal require some connection between the third party and the decision to issue a permit. Nova Scotia, Newfoundland and Nunavut give third parties the broadest right of appeal because it is not limited to the building or development permit decision alone. In Nova Scotia, "any person adversely affected by an order given or decision made by a building official" may bring an appeal.[589] Third parties in Nova Scotia may also appeal the decisions of the Building Advisory Committee. This committee makes rulings where there is a dispute between a permit applicant and a building official "respecting the technical requirements of the Building Code or the sufficiency of compliance with such requirements"[590] Newfoundland gives a right of appeal to anyone aggrieved by a decision regarding an application or a permit to undertake a development.[591] Third parties can also appear and make representations at an appeal brought by the permit applicant if the third party is affected by the subject matter of the appeal.[592] In Nunavut, any "person aggrieved" by the decision of the chief building official may bring an appeal regarding "an interpretation of the technical requirements of the [Nunuvut Building] Code or the sufficiency of compliance with those requirements".[593]

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[588] Even though there is no right of appeal for building or development permits in British Columbia, third parties that qualify as public interest litigants can apply for judicial review on the basis that the decision to issue the permit was unreasonable: *The Architectural Institute of British Columbia v Langford (City)*, 2020 BCSC 801.
[589] *Building Code Act*, RSNS 1989, c 46, s 16.
[590] *Ibid* at s 15.
[591] *Urban and Rural Planning Act*, 2000, SNL 2000, c U-8 at s 42.
[592] *Ibid*.
[593] *Building Code Act*, SNu 2012, c 15, s 17(1).

The rest of the provinces and territories limit a third party appeal to a decision regarding the issuance of a permit. Alberta allows "any person affected" and Prince Edward Island allows "any person who is dissatisfied" with a development or building permit to appeal the issued permit.[594] Ontario provides a right of appeal to any "person who considers themself aggrieved" by the decision to issue a building permit.[595] Manitoba uses similar language, allowing "[a]ny person who feels aggrieved" by the issue of a building permit to bring an appeal.[596]

The language used in New Brunswick's *Community Planning Act* appears to require a higher threshold than merely being affected or aggrieved. The appellant must show that the approval of the permit "would cause him or her special or unreasonable hardship."[597] Saskatchewan and the Northwest Territories explicitly require third parties to prove not only that they are affected but that the permit was incorrectly issued. In Saskatchewan "a person affected" can appeal a permit only if there is "an alleged misapplication of a zoning bylaw."[598] Similarity, in the Northwest Territories any person who is "adversely affected" by the decision to issue a building permit can appeal only where the building would contravene a zoning bylaw.[599]

There is some variation between jurisdictions as to in which type of adjudicating body will hear an appeal of a permit decision. In Nova Scotia, appeals are heard by application to the provincial superior court. In Ontario, New Brunswick, Saskatchewan, Newfoundland, Alberta, Prince Edward Island and the Yukon, the appeal is first heard by an administrative board rather than by a court (the parties can apply for judicial review after the board makes a determination). In Manitoba the appellant must first apply for a hearing with the Minister charged with

[594] *Municipal Government Act*, RSA 2000, c M-26, s 685(2); *Planning Act*, RSPEI 1988, s 28.
[595] *Building Code Act* (ON)*, supra* note 566 at s 25(1).
[596] *Buildings and Mobile Homes Act,* CCSM 1987, c B93, s 12 [*Buildings and Mobile Homes Act*].
[597] *Community Planning Act*, SNB 2017, c 19, s 120(1)(b)(ii).
[598] *The Planning and Development Act*, SS 2007, c P-13.2, s 219.
[599] *Community Planning and Development Act*, SNWT 2011, c 22, s 62.

administration of the *Building and Mobile Homes Act*. The Minister may make any order as he or she "sees fit".[600] It is only after the Minister makes an order that the appellant (or respondent) can apply to the Court of Queen's Bench.[601] In Nunavut, where third parties have the broadest right of appeal, the appeal is heard by the Building Advisory Committee. The composition of the committee is mostly representatives from the construction industry but also includes "a representative nominated by Nunavummi Disabilities Makinnasuaqtiit Society."[602]

In Québec, third parties do not have an explicit right to appeal an issued development or building permit, but the *Act respecting land use planning and development* contains a provision that has a similar effect. Any "interested person" may apply to the Superior Court "to order the cessation of (1) a use of land or a structure incompatible with [zoning or other municipal bylaws]…It may also order, at the expense of the owner, the carrying out of the works required to bring the use of the land or the structure into conformity with [applicable bylaws]".[603] This provision has been used by third parties to challenge the issuance of a building permit.[604]

Since the majority of Canadian jurisdictions have an administrative body that hears planning appeals, the online access to the archives of these decisions varies and written reasons can often be sparse.[605] Despite these limits, I have been able to find a case from Prince Edward Island that illustrates the use a building permit appeal to challenge inaccessibility.[606] The Town of Montague had issued a building permit for the construction of a new motel and the appellants, who were neighbours to the proposed site, appealed this permit to the Island Regulatory and

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[600] *Buildings and Mobile Homes Act, supra* note 597 at 12(4).
[601] *Ibid* at 13.
[602] *Building Code Regulations,* Nu Reg 009-2018*,* s 46.
[603] *Act respecting land use planning and development*, CQLR, c A-19.1 at 227.
[604] See, for example, *Bell c Mount-Royal (Town of),* 2011 QCCS 6011; *Fontaine c Lapointe-Chartrand*, 1996 CanLII 6264 (QC CA).
[605] Thomas W Wakeling, "Frederick A. Laux, Q.C., Memorial Lecture" (2018) 55:3 Alberta L Rev 839.
[606] *Keir & Marion Clark v Town of Montague*, (1997) Order LA97-08 - LA97003 (PEI Regulatory and Appeals Commission).

Appeals Commission, arguing that the Town misapplied its own bylaws in issuing the permit. One of the grounds of the appeal was that the building plans for the motel, which would be composed of several individual cottages, evidenced that none of units would be accessible to wheelchair users. The Town argued that it had properly applied provincial building code, which exempted "rental cottages" from any barrier free design requirements. However, the appellants argued that the Town had failed to apply its own bylaw that stated "[a]ll commercial buildings must be accessible to wheel chairs and physically challenged persons." The Commission found that the more stringent accessibility requirements found in the Town's bylaw would apply. The issue of accessibility, however, was only one of many grounds of appeal, which were overall much more related to their concerns about the potential for noise and the aesthetics of the project. There is no comment in the decision about whether the appellants were disabled themselves. Since one of them, Keir Clark, was a prominent politician in PEI for decades, the fact that accessibility was raised in this case seems more likely due to the sophistication of appellants rather than their own personal experience with disability. Ultimately, the Commission quashed the building permit on the grounds that the Town had misapplied its Official Plan and its bylaws in issuing the permit. The Commission stressed that the motel could be built on the proposed site eventually but that the developer would have to update its building plans to comply with the municipal regulations that the Town had failed to apply.

The appellants in the PEI case were neighbours to the proposed motel and so their standing to bring this appeal was not at issue. They were able to use the inaccessibility of the proposed project as grounds for their appeal but accessibility was not the end goal of their appeal. My proposal here is to consider whether a third party appeal could be initiated by a individual or a group that oppose a project or aspects of a project because it would not be

accessible to persons with disabilities. There are no reported cases from administrative bodies or courts that involve such an effort but there have been third party appeals brought by environmental groups.

Ontario is the only province to have case law on the issue of standing in building and development permit appeals. In the leading Ontario case, the Superior Court held that to meet the statutory requirement of "a person who considers themself aggrieved", an appellant must have reasonable grounds for this belief:

> an appellant's belief that he or she is 'aggrieved' must be reasonable and not fanciful and should demonstrate some nexus or connection between the decision complained of and some legitimate interest of the appellant.[607]

Reasonable grounds include when an appellant has suffered a legal grievance, in the sense of having been wrongfully deprived of something.[608] However, it is not necessary for the appellant to have suffered legal harm; they may simply "consider themselves wronged by a decision of the chief official within the context of the Building Code Act…[and] an appeal is not to be barred simply because the appellant does not have a personal, proprietary or pecuniary interest."[609] Economic interest is a sufficient basis for a permit appeal. Several owners of grocery store chains or other types of commercial chains have been granted standing to appeal the permits issued to their competitors.[610]

In many of the third party appeal cases the individual or group challenging the permit has already voiced opposition to a particular project during public consultations held prior to the permitting decision. In *Friends of Toronto Parkland v. Toronto*, a third party appealled the

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[607] *Berjawi v Ottawa (City),* 2011 ONSC 236 at para 8 [*Berjawi*].
[608] *Friends of Toronto Parkland v Toronto (City)* (1991), 8 MPLR (2d) 127 [*Friends of Toronto Parkland*].
[609] *Ibid.*
[610] See *Loblaws Inc v Ancaster (Town), Chief Building Officer,* (1992), 12 MPLR (2d) 94; *York Region Condominium Corp No 890 v Toronto (City),* [2005] OJ No 873.

building permit issued for the construction of a community centre in Eglinton Park on the basis that the proposed underground parking would violate a city bylaw. The City of Toronto had already conducted several public consultations regarding the construction of the community centre. Friends of Toronto Parkland was a non-profit corporation opposed to the construction of the community centre because of its membership's interest in preserving green space in Eglinton Park. Representatives of Friends of Toronto Parkland appeared and made submissions at several of the public consultations. The Court found that these appearances were relevant to the issue of standing:

> It is clear that the appellant's have a different approach to the appropriate use of parks and parklands. Their main objective was to prevent or obstruct the construction of the community centre project. This is a battle which they had fought and lost. Questioning the parking component of the building permit as constituting a violation of the by-law was the last effort to realize their goal. Considering the history of their involvement, it is doubtful that they consider themselves aggrieved by the underground facilities for parking permitted by the building permit.[611]

However, courts do not always consider past participation in public consultations as evidence of a bad faith appeal. In *Friends of McNichol Park v. Burlington (City)*, the appellant challenged a building permit that had been issued to a hospital that was planning to build a rehabilitation centre in McNichol Park. The court of first instance applied *Friends of Toronto Parkland* and held that the appellant's "voice ha[d] been heard and its opinions rejected by the persons elected to represent the interests of the community as a whole."[612] The appeal court disagreed, finding that the appellant had an interest not only in preserving the parkland but also in being deprived of its right to challenge a rezoning bylaw, which the City of Burlington ought to have passed before allowing the rehabilitation centre to be built.[613]

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[611] *Friends of Toronto Parkland*, *supra* note 609 at paras 15-16.
[612] *Friends of McNichol Park v Burlington (City),* (1996), 33 MPLR (2d) 198 (Ont Gen Div) at 8.
[613] *Friends of McNichol Park v Burlington (City),* 1996 CanLII 11771 (ON SC).

Since *Friends of McNichol Park*, Ontario courts have been fairly generous with the test for standing and have not treated an appellant's participation in public consultations as evidence that the appellant is attempting to block a project by any means necessary. In *Berjawi*, the appellants were neighbours of a proposed group home for survivors of domestic violence.[614] The Court gave the appellants standing even after finding that these neighbours were not satisfied that their concerns had been addressed in the public hearing process and so were now using the building permit appeal process to block the construction of the group home. Even though the appellants were granted standing, their appeal was ultimately unsuccessful because the court disagreed with their position on whether the group home was permitted by the zoning bylaw.

Since the test for standing is relatively broad, in some cases the municipality responding to a permit appeal requests that the appellants post security for costs prior to the adjudication of the permit appeal. This has been a successful strategy for municipalities in cases where environmental groups use the permit appeal process to challenge land development projects.[615] There are concerns that requiring these groups to post security for costs is an unfair deterrent to those with a legitimate case that a permit should not have been issued.[616] The threat of a costs order could ensure that only wealthy individuals and organizations can launch a third party appeal. However, if the appellants challenging the permit are "public interest litigants" then, according to the law of costs, the Court can excuse the applellant from posting security for the legal costs of the opposing party.

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[614] *Berjawi, supra* note 608 at para 8.
[615] *Durham Citizens Lobby for Environmental Awareness & Responsibility Inc. v. Durham (Regional Municipality),* 2011 ONSC 7143 [*Durham CLEAR*]; *Pointes Protection Association v Sault Ste. Marie Region Conservation Authority*, 2013 ONSC 5323.
[616] Mark McAree, "Security for Costs Orders Against Environmental Groups Bolstered by Pointes Decision" (24 February 2014), online: *Mondaq* <https://www.mondaq.com/canada/Environment/294972/Security-For-Costs-Orders-Against-Environmental-Groups-Bolstered-By-Pointes-Decision>.

The test for public interest litigant status in the context of a permit appeal is set out by the Ontario Superior Court of Justice in *Durham Citizens Lobby for Environmental Awareness & Responsibility Inc. (Durham CLEAR) v. Durham (Regional Municipality)*.[617] The appellant brought a third party challenge to a permit issued by the municipality of Durham for the construction of a waste incinerator plant by Covanta Durham York Renewal Energy Limited Partnership (Covanta). Extensive public consultation took place before the selection of the site, including 99 public information sessions throughout the Durham Region. The appellant, Durham CLEAR, described itself as a "public interest not-for-profit corporation…formed…as an environmental advocacy organization for all of the Regional Municipality of Durham."[618] Its appeal was based on the argument that the construction of the waste incinerator plant would contravene provincial planning legislation and municipal zoning by-laws.

When Covanta, one of the respondents, brought a motion to have the appellant post security for cost, Durhan CLEAR argued that such an order would be inappropriate because it qualified as a public interest litigant. The Court assessed the appellant's status as a public interest litigant by applying the following considerations:

- the proceeding involves issues the importance of which extends beyond the immediate interest of the parties involved;
- the litigant has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically;
- the issues have not been previously determined by a court in a proceeding against the same defendant;
- the defendant has a clearly superior capacity to bear the costs of the proceeding; and,
- the litigation has not engaged in vexatious, frivolous or abusive conduct.[619]

[617] *Durham CLEAR, supra* note 616 at para 4.
[618] *Ibid* at para 9.
[619] *Ibid* at para 51.

The Court found that Durham CLEAR did qualify as a public interest litigant but declined to rule that the group was immune from posting security for costs because it was not a "pure" public interest litigant. When considering what would have made the appellant a "pure" public interest litigant, the Court emphasized the relevance of whether a litigant is "a marginalized, powerless or underprivileged member of society" and whether the interests at stake are "the relief of poverty or the vindication of the constitutional rights of beleaguered minorities."[620] The Court was persuaded that Durham CLEAR was more akin to a resident action group collectively opposed to living near a waste incineration plant rather than a group representing a marginalized population. The Court also noted that Durham CLEAR had demonstrated its capacity for fundraising by collecting over $20,000 on its website. When applying the public interest litigant test in another planning case, *House v. Lincoln (Town),* the Ontario Superior Court of Justice gave public interest litigant status to (and refused to order costs against) an individual seeking to prevent the demolition of an older school building that he considered a heritage property.[621]

Given the jurisprudence on public interest litigants and costs in third party planning appeals, a person with a disability or a disability advocacy group could use this type of proceeding without fear of posting security for costs or paying the government or developers costs if the appeal is unsuccessful. A permit appeal of this type may be the only legal remedy to challenge a proposed construction project that is not accessible either because of a misapplication of provincial building code or a municipal bylaw. As in the PEI case discussed above, the third party appellant does not actually need to be disabled themselves. This is important because human rights complaints about the built environment must not only be brought by a person with a disability but also must pertain to a specific instance of

[620] *Ibid* at paras 55 and 80.
[621] *House v Lincoln (Town)*, 2015 ONSC 6286.

discrimination. As a result, a permit appeal is the only opportunity to challenge inaccessibility during the pre-construction phase.

Planning Law and Opposition to Accessibility

The formal opportunities for public participation in the planning process, including a third party permit appeal, can expand both standing and the legal remedies available for those who seek to challenge inaccessibility. Yet third party appeals and other planning law tools can also be used to reduce or prevent the construction of accessible buildings. Throughout this thesis I have argued that accessible design requirements have always been subordinate to the main text of building codes in Canada. As a result, it can be very difficult for people with disabilities to find places to live, go to school and work. In this section I will explain how planning law remedies are used to threaten accessibility in the built environment. My point is not to criticize the availability of these remedies but to emphasize the exclusive way that they have been exercised to assert privilege for able-bodied people. Some of these cases also reveal how building projects that introduce accessibility into the built environment can trigger special permit requirements since they introduce new design features that were not comtemplated by land use or zoning bylaws.

One of the criticisms of third party appeals in the planning contexts (as I discussed above) is that, instead of empowering marginalized people, they will realistically only by initiated by sophisticated and wealthy litigants. This was a concern raised by some in Willey's study of the use of third party appeals in Australia, which involved interviews with a variety of stakeholders, including government planning departments, developers and resident action groups. In another study from Australia, researchers assessed the impact of third party appeals on the construction of high density and social (or low income) housing developments by reviewing

permit applications and any appeals for all housing developments in the city of Melbourne from 2009-10.[622] The results of this study showed a higher number of third party appeals in neighbourhoods with "higher relative advantage", both in terms of wealth and education.[623] The researchers in Melbourne also conducted interviews with third party appellants to learn more about the reasons for their objections. As in Canadian jurisdictions, the official grounds for an appeal must demonsrate that the municipality erred in issuing the permit by improperly applying planning regulations, which typically concern building height or access to parking. But during interviews, third party appellants from affluent areas revealed to the researchers their "desire to exclude particular social groups from the neighbourhood", such as the beneficiaries of government-subsidized housing, because of their effects on the status of the community and property values.[624]

The Melbourne study on third party appellants was conducted in 2012 and is the only one of its kind. Canadian legal scholarship does not address third party planning appeals in a comparable way to the research from Australia. However, we do have case law and academic discussion of the history of the use of planning law, including third party permit appeals, by residents of a particular neighbourhood to "protect" their community from undesirable social groups, using similar arguments to those litigants interviewed for the Melbourne study. [625] The most controversial goal of organized community action in recent years has been the opposition to

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[622] Nicole Cook, et al, *Resident third party objections and appeals against planning applications: implications for higher density and social housing* (Melbourne: Australian Housing and Urban Research Institute, 2012).
[623] *Ibid* at 85.
[624] *Ibid* at 88.
[625] Ian Skelton, *Keeping them at Bay: Practices of Municipal Exclusion*, (Winnipeg: Canadian Centre for Policy Alternatives, 2012) [Skelton]; Sandeep Agrawal, "Balancing Municipal Planning with Human Rights: A Case Study" (2014) 23:1 Can J Urban Research 1; Lilith Finkler & Jill L Grant, "Minimum Separation Distance Bylaws for Group Homes The Negative Side of Planning Regulation" (2011) 20:1 Can J Urban Research 33; Lilith Finkler, "Re-placing (in)justice: Disability-related facilities at the Ontario Municipal Board (OMB)" in Law Commission of Ontario, ed, *The Place of Justice* (Halifax: Fernwood Publishing, 2011), 95-119.

group homes or supportive housing for persons with disabilities. In the typical case, neighbours initiate a permit appeal to block the proposed construction of a group home, or they lobby for certain zoning bylaws that would exclude or limit the number group homes in their community. Zoning of this nature was successfully challenged at the Ontario Human Rights Tribunal in a series of complaints between 2011 and 2014. Municipalities across Canada have been revising their bylaws accordingly.[626] However, group homes remain the subject of intense scrutiny during the planning approval process and the threat that neighbours will initiate a permit appeal puts group home developers and operators in a defensive position from the beginning of the construction project.

Part of the stigma associated with group homes is that, in many cases, they house persons with psychiatric disabilities who have left institutional settings or those seeking addiction recovery services.[627] In addition to myths about the criminality of these populations, some opposition is based on the perception that these group homes are only a temporary residence for individuals who require support or supervision until they can live independently. However, group homes also house people with disabilities who need permanent supports, such as 24-hour caregivers or design features that are almost impossible to find in affordable housing, like ceiling lifts. This means that the construction of group homes directly addresses the shortage of accessible housing in Canada (which is a consequence of every jurisdiction exempting housing from the accessibility standards required by applicable building code).

It is the very design features that are required to make an existing structure or new building accessible that can trigger the requirement for a variance or development permit, which

[626] Hamilton, Planning and Economic Development Division, *Residential Care Facilities and Group Homes: Human Rights and the Zoning Bylaws within the Urban Area* (City of Hamilton, 2019).
[627] Skelton, supra note 626.

in turn creates a right of appeal for neighbours who do not want to live next to a group home. For example, *Aldighieri v. Niagara Escarpment Commission*, a 1995 case from Ontario, involved a third party appeal of a development permit that had been issued for renovations to an existing structure so that it could become a group home for six persons with developmental disabilities.[628] The appellants, the neighbours on either side of the property, raised several objections to the project that, on the surface, were connected to planning matters such as concerns about the increased wear and tear on roads, increased traffic, stress on the water supply and inadequate parking spaces. However, some objections directly targeted the individuals who would be living in the home because of their disability, alleging that:

- the proposal will depreciate property values in the vicinity. It would be more appropriately located in the inner city, rather than in the countryside. Mr. Furlong, a resident of Hamilton, testified that property values in the vicinity of a group home in his neighbourhood had declined after the group home was established there [and]
  …
- there is an intangible stigma that comes from living close to a group home. Safety hazards posed to the children of surrounding residents must be considered.[629]

The adjudicator expressed confusion about why the developer of the group home had to apply for a development permit in this instance:

> When I asked why a development permit is required, since the structure would be a single dwelling both before and after approval, Mr. Stone [a land use planner] cited as reasons the change from an existing residence to a group home, the structural modifications needed for the wheelchair ramp and the fact that it constitutes a new residential use.
> In response to additional questions, Mr. Stone stated that the principal reason for the requirement of approval is that the wheelchair ramp would not constitute an extension to the dwelling that is exempt under [applicable regulations]…Consequently, a permit is required [emphasis added].[630]

[628] *Aldighieri v Niagara Escarpment Commission*, 1995 CarswellOnt 5411 (Niagara Escarpment Hearing Office) [*Aldighieri*].
[629] *Ibid* at para 10.
[630] *Ibid* at paras 28 and 29.

The adjudicator rejected the neighbours' appeal finding that the primary reason for the development permit was to authorize the construction of the ramp and none of the grounds of appeal were relevant to this narrow issue. Even though courts and administrative bodies tend to dismiss these types of appeals as thinly veiled attempts to prevent people with disabilities from living in a particular neighbourhood, these appeals still impose the cost and delay of litigation on group home projects.[631]

Third party permit appeals related to the construction of group homes are such a common threat that government departments and non profit organizations across Canada have published guides that offer detailed strategic advice about how to avoid this type of litigation.[632] These guides encourage developers to initiate community engagement from the beginning of any project and they also warn about the targeted use of planning law procedures by municipalities to foster community opposition. Sometimes local municipal politicians will encourage or request developers to hold public consultations that are not required by law.[633] Significant turnout from opposition in the community can lead to outcomes where developers elect not to proceed with the project or make significant concessions about the design of the project that affect who will be able to live in the group home once constructed. For example, in 2017 at a public consultation

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[631] See, for example, *Steinbock v Toronto (City),* 2017 CarswellOnt 14611 (OMB); *Nantuck Investments Inc. v Oshawa (City),* 2016 CarswellOnt 22180; *S. Kossatz v Development Authority of the City of Edmonton*, 2020 ABESDAB 10132; *Ronald L. Bruce v Fredericton Planning Advisory Committee and al.,* 2008 NBAPAB 20.
[632] Canadian Housing and Renewal Association, *Minimizing and Managing Neighbourhood Resistance to Affordable and Supportive Housing Projects* (September 2014) online: CHRA < https://chra-achru.ca/wp-content/uploads/2015/08/Minimizing-and-Managing-Neighbourhood-Resistance-to-Affordable-and-Supportive-Housing-Projects.pdf>; Focus Consulting, *Finding Common Ground: Best Practices in Managing Resistance to Affordable Housing* (March 2014) online: Focus Consulting <http://www.focus-consult.com/wp-content/uploads/Finding-Common-Ground_Best-Practices-in-Managing-Resistance-to-Affordable-Housing-.pdf>; New Directions, Beyond NIMBY: A Toolkit for Opening Staffed Community Homes in Manitoba (December 2015) online: New Directions < https://newdirections.mb.ca/wp-content/uploads/2016/01/Nimby-Toolkit-web.pdf>; Canadian Homebuilders' Association – Newfoundland and Labrador, *Building "Yes": A Not-In-My-Backyard (Nimby) Toolkit* (June 2016) online: Canadian Home Builders' Association – Newfoundland & Labrador < https://chbanl.ca/building-yes-a-not-in-my-backyard-toolkit/>.
[633] Skelton, *supra* note 626 at 17.

about a proposal for a group home in Brockville, Ontario, neighbours and city councillors were careful to emphasize that they had "no problem" with the future residents of the group home but that they had concerns about the layout of the building and parking spots.[634] The building was designed in a bungalow style to make it accessible to wheelchair users, but those opposed to the project felt the lot was too small to accommodate a four unit residence along with four parking spots. One of the individuals speaking against the project argued: "'Maybe it's the right application in the wrong location...It looks like it's a great building but it doesn't look like it fits the lot.'"[635] Another suggested that a better use of the space would be to redesign the project so that it would be a two storey building with only two accessible units on the groundfloor and two non-accessible units on the second floor.[636]

The threat of a permit appeal ensures that public consultations have a significant impact on the design of a group home and on whether the project goes ahead at all. In a news story about HomeSpace, a charity in Calgary that develops and manages group homes, the organization's success was defined by the fact that it had completed five projects "without one angry neighbour appealing permits to the city."[637] Instead of waiting for requests from the city to hold a public consultation, HomeSpace goes door-to-door inviting neighbours to "open houses" where the community can hear from the project architect, police and representatives from any support services for the group home residents. Not only do they answer all questions at these meetings, but they also sign what they term "good-neighbour contracts" that itemize any changes to the design of the project that are suggested by the community and agreed upon.

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[634] Ronald Zajac, "Neighbours object to group home parking" *The Recorder and Times* (6 April 2017).
[635] *Ibid.*
[636] Brockville, Economic Development and Planning Committee Public Planning Meeting Minutes (4 April 2017).
[637] Elise Stolte, "Calgary supportive-housing effort harnesses the power of buy-in" *Edmonton Journal* (20 May 2017), B3.

The ways that community groups can exercise influence over the construction of group homes for persons with disabilities evidence the power of planning law procedures for public participation. But the opposition at a public consultation only has influence because of the background threat of a permit appeal. As I explained earlier in this section, because of the costs of delay to a construction project, lawyers who specialize in this area of law advise their clients to mitigate any risks of third party litigation during the development stage. In the case of group homes, developers mitigate this risk by giving significant attention and influence to the neighbours of a proposed group home. Yet this is not the only way that planning law can disproportionately impact the lives of people with disabilities. The adjudicator in the *Aldighieri* case pointed out some the equity issues for people with disabilities that need to make renovations to make their living spaces accessible:

> An examination of [the regulation requiring a development permit for a ramp] in the context of this case suggests that the Regulation reflects an interesting value system. Wheelchair ramps require a development permit, carrying with it the possibility of an appeal and a long waiting period for a person who has become handicapped and requires the structure.
> A frontyard or backyard swimming pool, however, where certain set back or size restrictions are met, can be built without the need of a development permit. I suggest that the Regulation be re-examined, in light of this case.[638]

Just as a group home developers might require special permits to create accessible living spaces, private homeowners may also be vulnerable to legal interventions from neighbours when adding accessibility features to their homes.

People with disabilities and their families may decide to renovate their homes to add features that will make the home accessible, like a ramp, and these types of renovations usually require a building permit and may sometimes require a minor variance application. Since most jurisdictions in Canada allow third parties to appeal these types of decisions, there are examples

[638] *Aldighieri*, *supra* note 629 at paras 54-55.

from caselaw and in the media of litigation between neighbours over these construction projects. In *Porter v. Toronto (City) Committee of Adjustment*, after a wheelchair user obtained a variance from the City to extend the size of her deck and build a ramp to access the deck, her next-door neighbour brought an appeal.[639] The neighbour argued that the proposed deck and ramp would be too close to his backyard and would interfere with his barbequeing activities. While the appeal was unsuccessful, the wheelchair user had to incur the legal costs of the appeal along with the costs of retaining a planner to appear as an expert witness.

In addition to a formal appeal, there are other tools of planning law that give individuals influence over their neighbour's accessibility construction projects. For example, in order to stop a couple from demolishing their home in order to rebuild an accessible one (because of a newly diagnosed health condition), their neighbour initiated a campaign to have the home designated as a heritage property.[640] The neighbour successfully brought a motion at the municipal council to have the heritage preservation staff conduct a report on the property, which ended up delaying her neighbour's construction project until the report could be completed.[641]

In another case, an individual anonymously contacted the municipality to report that their neighbour had completed a deck renovation project without obtaining a variance to allow for a larger structure than permitted by applicable zoning laws.[642] The municipality investigated the complaint and found that the deck had been built for the use of a wheelchair user and so to allow for the individual to safely move around, the deck was twice the size of what the applicable zoning law would allow. The municipality ordered the homeowners to remove half of the deck,

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[639] *Porter v Toronto (City) Committee of Adjustment*, 2007 CarswellOnt 5350, 57 O.M.B.R. 213.
[640] Megan O'Toole, "Family Plight Sparks Furor in the Beach" *National Post* (27 May 2010).
[641] The report ultimately concluded that the house did not meet the requirements to be considered a heritage property and the couple was issued a demolition permit.
[642] Ellwood Shreve, "Scotti's Spot Tarnished" *The Chatham Daily News* (5 May 2017).

which thy had spent $700 to build, or apply for a variance at an expense of $1,400 (which the neighbour could then appeal).

The planning appeal process is also effective for organized groups of neighbours to oppose accessible design features in commercial or other types of public buildings. In 2017 the Richmond/Knob Hill Community Association (the Community Association) brought an appeal to the Calgary Subdivision and Development Appeal Board regarding a development permit that had been issued to a personal injury law firm to construct a new office building in an area that was being redeveloped from residential into a "Main Street".[643] The Community Association brought the appeal because of its members' concern over the proposed law office fitting into the plans for redevelopment, and, in particular the part of the property that would be in the "public realm". In this case the public realm was the space between the curb and the front of the building. Many of the Community Association's objections stemmed from the law firm's plan to build a ramp for wheelchair users that would "protrude into the sidewalk zone" and "diminish the public realm".[644] The reason the ramp was necessary to the law firm's proposed offices was that one of the partners of the firm is a wheelchair user and many of its clients have disabilities.

The Community Association proposed changing the grading of the site to eliminate the need for a ramp but this would necessitate building a ramp at the back of the building with the parking spots. The Community Association also wanted more parking spots than were planned for but they would accept less parking spots to eliminate the ramp at the front of the building and relegate the ramp to the back. Finally, the Community Association proposed more landscaping at the front of the building to help "lessen the ramp's visual impact for passersby".[645] The

[643] Calgary, SDAB2017-0062 (Re), 2017 CGYSDAB 62.
[644] *Ibid* at para 22.
[645] *Ibid* at para 35.

Subdivision and Development Appeal Board ultimately rejected the appeal on the basis that the Development Authority that issued the permit considered all the plans and exercised its discretion to allow the ramp to cross into the public realm.

The final aspect of the building and development and permit process that I will discuss here is the availability of exemptions from or relaxations of accessibility standards for developers and building owners that can demonstrate that their application would be inappropriate. These decisions are not public so the circumstances in which these exemptions are granted is not subject to scrutiny unless there is a dispute that warrants judicial review. In *Voropanov v. Alberta (Municipal Affairs)*, the applicants brought a request to relax barrier-free building code requirements when applying for a permit to conduct renovations.[646] The applicants ran a private club that included a sauna and other spa services. They wanted to conduct their renovations in a building that was subject to new accessibility standards that had been added to provincial building code since the building's construction. They applied for judicial review of decision of the Chief Building Administrator (CBA) to deny their request for a relaxation of the building code requirements that required a barrier-free shower space in their private club. The *Alberta Building Code* gives the CBA the authority to grant a relaxation of accessibility requirements where a building owner can demonstrate that "the specific requirements are unnecessary" or "extraordinary circumstances prevent conformance"[647]. The applicants submitted that it was their club policy to refuse individuals with certain health risks, including all individuals who use wheelchairs, from being members of the club due to the sauna's high temperatures. The policy of denying club membership to those who use wheelchairs was not at

[646] *Voropanov*, *supra* note 237.
[647] Alberta Ministry of Municipal Affairs, *Application for Barrier-free Relaxation,* online: *Alberta Ministry of Municipal Affairs* <http://www.municipalaffairs.alberta.ca/documents/Barrier-Free-Application-Form.pdf>.

issue in the case and so the Court proceeded on the assumption that this was a legal policy. The applicants argued that their club was too small to accommodate showers that would meet the requirements of the accessibility standards and that these types of showers were unnecessary because of their membership restrictions. The Court ultimately held that the CBA's decision to deny the relaxation was unreasonable because the CBA relied on the fact that the club might change its policy on wheelchair users in the future or that people in wheelchairs might still be present in the private club. The Court remitted the case back for reconsideration by the CBA, finding that:

> The relevant provisions of the [Alberta Building] Code help to ensure that new and renovated buildings are constructed barrier-free, thus allowing individuals with physical and sensory disabilities to have access to and use of buildings. The [CBA's] role in deciding whether or not to approve a relaxation application therefore involves balancing the interests of individuals with disabilities and those of business owners. Such balancing of interests weighs in favour of greater deference [emphasis added]."[648]

It is not possible to determine from publicly available documents the ultimate result of the *Voropanov* case. It is possible that a different judge could have found the CBA's determination to be a reasonable balancing of the interests of persons with disabilities and business owners. The CBA, in my view, understood the permanence of buildings and that people who use wheelchairs might one day be present in the space. The owners of the private club could sell at any point and future owners may not have a policy of excluding wheelchair users from their facility.

The judge in the *Voropanov* case described the discretion to issue a relaxation of accessibility standards as a balancing of interests between people with disabilities and business owners. Leaving aside the obvious fact that people with disabilities are sometimes business owners, this description gives the appearance that the interests of persons with disabilities were represented during the relaxation decision or at the judicial review hearing. Yet, the only parties

[648] *Voropanov, supra* note 237 at para 17.

to any of these proceedings were the applicants, the Chief Building Administrator and the Government of Alberta. It will not always be, like in *Aldighieri*, that decisionmakers will rule in favour of improving accessibility without evidence or submissions from the disability community. In *Voropanov* it would have been open to a third party, such as a local organization of disabled activists, to appeal the issued building permit once the matter was remitted to the CBA for reconsideration. If successful, a permit appeal in this case by persons with disabilities would not only require the building at issue to have accessible facilities but would create precedent for future decisions regarding a requests for relaxation or exemption from accessibility standards.

Conclusion

Earlier in this chapter I explained why public consultations that are statutory requirements of planning law could be an effective means for persons with disabilities to influence the built environment. I then described the use of a permit appeals by third parties to challenge planning decisions, including on the basis of a public interest. Both of these strategies have also been exercised against the interests of persons with disabilities, including a long history of permit appeals to prevent the construction of group homes. Planning law gives motivated individuals a variety of tools to influence the built environment whether for large projects, such as a new hospital or library, or for small, like the size of a neighbour's deck. Given the significant impact of the built environment on people with disabilities, utilizing the tools of planning law to intervene in these construction projects could be a preventative strategy against inaccessible design.

Third party permit appeals, even when they are unsuccessful, have had a significant influence on the decisions that developers make in the context of group home projects. People

with disabilities could strategically engage in permit appeals to command the attention of developers, architects, planners and other stakeholders involved in the construction of the built environment. Not only could people with disabilities present their input on proposals at public hearings, but developers may start to seek out their feedback as part of their risk mitigation during the planning stages. And, in contrast to the human rights complaint process, the individuals and organizations initiating these kinds of permit appeals would not have to prove their disability status and they could assess the building plans prior to construction, thereby avoiding the burden of expense of retrofitting. The human rights complaint process is not the only or even the best way for persons with disabilities to demand changes to the built environment.

Throughout this chapter I have presented a variety of planning tools that persons with disabilities and their allies could use participate in the decisions that shape the built environment. These are currently underutilized and understudied, perhaps due to the perceived success of persons with disabilities who complain about inaccessibility using human rights law. For example, Linda Gauthier, one of the activists at the centre of the case study in Chapter Two, has personally been awarded, or has helped others obtain, monetary damages in the tens of thousands by way of human rights complaints about inaccessibility. However, these successes do not influence how we design the built environment in the first place.

Considerations about accessibility are already one of the factors contributing to these decisions, because every province has had some minimum standards of accessibility in its building code since the 1990s. However, the problem is that those who are most affected by the implementation of these standards are not in the room when decisions about their implementation are made. As I have argued here, it is not enough to only consult persons with

disabilities when the federal, provincial or municipal governments decide to host a comprehensive public hearing on everything disability-related. As mentioned earlier in this chapter, representatives of the deaf community took part in a public consultation in 2002 that was specifically designed to obtain input from the disability community on potential amendments to *Ontario Building Code* and they recommended adding rear window captioning to the existing requirements for assisted hearing devices in movie theatres. Their recommendations never made it into provincial building code and, on application from an individual with severe hearing loss, the Ontario Human Rights Tribunal found it did not have jurisdiction to add them. However, human rights complaints against individual film distributors led to a mediated settlement and there are now theatres in Ontario with rear window captioning. The result is nearly the same as if this design feature was required by building code but it treats the matter as the responsibility of private businesses rather than a legal requirement of operating a movie theatre.

The legal requirements of building code are one of the ways that government endorses a particular built form. As I have explained here, human rights law cannot change these legal requirements but can only provide a remedy when people with disabilities encounter barriers in the resulting built form. The opportunities for intervention at the planning stage, whether at a public consultation or by way a permit appeal, demonstrate that there are differing interpretations of how to apply regulations such as provincial building code. This chapter contains examples of how people with disabilities can exercise influence where and when these planning decisions occur. With years of publications from the National Research Council (along with a multitude of other standards organizations) and the knowledge of those with lived experience, we do not suffer from a gap in information about how the built environment excludes persons with

disabilities and the design solutions to remedy these exclusions. We fail to implement these solutions proactively because, most of the time, people with disabilities only exercise power in the form of a human rights complaint, which is an exclusively retroactive remedy. My proposals here, which modestly suggest that people with disabilities take advantage of the planning law processes that are already available to everyone, are just the beginning of reimagining what will be required to start treating persons with disabilities as members of the Canadian public.

Conclusion

We live, work and socialize in buildings that we assume to be safe and useable. Most of us have no expertise in design or construction so we rely on the government to regulate these activities for our benefit. The substance of these regulations and how they are enforced have a lasting impact because buildings last for decades and even centuries. The built environment is relatively static in comparison to the flow of ownership and occupancy. Those involved in the construction process or who operate businesses reasonable believe that they have met all of their legal obligations vis-à-vis the design of their premises once they obtain the relevant permits and licenses from provincial and municipal governments. With the multitude of regulations that apply to the built environment, I think it comes as a genuine surprise to those who are or have been able-bodied that these regulations do not actually require useabilty and safety for everyone. The assumptions that most able-bodied people can make about the the built environment are simply not available to people with disabilities.

In the preceding chapters I have examined the role of law in prioritizing the mobility of able-bodied people in the built environment and thereby making everyday life difficult for disabled Canadians. I argue that in order to use the law to improve the accessibility of the built environment, we must look at why the law has failed at this in the past. There is nothing natural or necessary about building our communities in ways that exclude or endanger people with disabilities. It is the laws regulating the built environment that support or create the conditions that marginalize disabled bodies. But this also means that law can also offer tools for building inclusively.

The types of regulations that I address in this thesis, such as provincial building code and municipal bylaws, have a significant impact on the lives of persons with disabilities but these

areas of law do not usually get much attention in disability scholarship or policy. Instead, there is a significant focus on the developments in human rights protections for people with disabilities. While *Charter* litigation and human rights complaints are important as remedial measures, they do not offer much in the way of an explanation. It is settled law that the physical exclusion of people with disabilities from public space is discrimination on the basis of disability. As I discussed earlier in this thesis, human rights scholarship uses the example of a stairs-only entrance at a restaurant to illustrate the very concept of discrimination.[649] However, the reason those stairs are the exclusive means to enter a building is not relevant to a human rights complaint. All that matters is that the stairs are a barrier to some people with disabilities and therefore the restaurant owner has discriminated against those who cannot use stairs on the basis of disability.

As a wheelchair user, I know that every time I leave my home I encounter circumstances that could form the grounds for a successful human rights complaint. Linda Gauthier, one of the subjects of the case study I presented in Chapter Two, is tireless in bringing complaints like this on her own behalf or to support other people with disabilities. The issue is not that there is any uncertainty about whether people with disabilities will be successful when they bring human rights complaints about inaccessibility in the built environment. Linda Gauthier and RAPLIQ have obtained many settlements in the human right complaint process that have led to renovations and damages awards to complainants. But even if these types of complaints are ultimately "winnable", people with disabilities who work in this area, such as David Lepofsky,

[649] Eliadis, *supra* note 15 at 34.

argue that it is an impossible burden for people with disabilities to police the built environment themselves, one barrier at a time.[650]

In this thesis I have tried to understand the dissonance between the lived experience of disabled people in Canada and the almost universal agreement, politically and legally, that the built environment ought to be accessible for persons with disabilities. We do not tend to ask why the built environment is not already accessible. The dominance of the social model of disability in policy and scholarship helps explain why there is little attention to the causes of inaccessibility. The impact of the social model of disability was to emphasize societal responsibility for disabling environments rather than treating disability as private misfortune. Yet the very definition of disability under this model is inextricably linked to exclusion or disadvantage. The focus on the environmental factors that create disability, which are termed "barriers", has led to laws and policys that are meant to improve the lives of people with disabilities by identifying and removing these barriers.[651] The goal of a barrier-free society is now relatively uncontroversial in Canadian politics and one of the least complicated applications of the concept of barriers is how people with disabilities experience the physical environment. Looking towards a barrier-free future is premised on the idea that the exclusion that people with disabilities experience today is the starting point.

The social model and human rights remedies do not require an understanding of why barriers exist in the first place. But without an investigation into how law regulates aspects of the built environment, such as buildings and sidewalks, we cannot meaningfully address the problem of inaccessibility. There is a distinction between being disabled or having an atypical body and

[650] The *AODA* in Ontario, which Lepofsky was instrumental in bringing about, was meant shift some of this burden onto government instead.
[651] This is the entire purpose of the *Accessible Canada Act, supra* note 30 at s 5.

being excluded or disadvantaged in society. For the purposes of a legal analysis, once we separate these concepts we can interrogate the ways that law treats disabled bodies differently or the ways that law benefits able bodies. The historical approach I use in this thesis helps explain why the built environment works for some bodies and not for others.

I have not spent much time in this thesis discussing the perspectives and interests of able-bodied people but I did touch on this issue in Chapter Two when I described the frustrations of the business community during the summer patio dispute. The consequence of RAPLIQ's victory for these restaurant and bar owners was that they had to redesign their patios to include a ramp for wheelchair users or, in other words, remove a barrier that prevented wheelchair users from getting onto their patios. The reason the redesign was required was that the municipality had previously issued patio permits with no accessibility requirements. The perceived unfairness for the business owners is that the municipality did not require accessibility in year one of the summer patio program when the first design and construction took place. There would have been no cost to making the patios accessible during the first year of the program, but retrofitting one year later put a price tag on accessibility.

In the same way, but on a much larger scale than the summer patio example, the history of building regulations in Canada has led to inaccessibility in the built environment that is now costly to fix and hard to blame on any single property owner. The physical problem may be that there is a step to get in a building or onto a patio, but the legal reason that the step is there at all is that the government issued a permit allowing the construction of the step as the only means of entering the premises. The price tag of accessibility exists because we chose to build only for the needs of able-bodied people.

The legal causes of inaccessibility, such as building code or municipal permit requirements, make it confusing for a business owner to understand that they have discriminated against a person with a disability just by operating their business in an inaccessible building that has otherwise met all legal requirements to obtain relevant permits and licenses. It is also difficult for many people who have not experienced disability themselves (or spent time trying to navigate in public space with a disabled person) to understand how the design features in the built environment exclude people with disabilities and how frequently this takes place in communities across Canada. Unfortunately, this means that able-bodied people can be oblivious to the regulations that allow them to easily use public spaces. This aspect of the problem of inaccessibility – the privilege accorded to able-bodiedness by law – is what the social model of disability ignores. Even if Canadian human rights jurisprudence clearly holds that inaccessibility is discrimination against persons with disabilities, there are a myriad of regulations found in building codes or municipal bylaws that continue to ignore or subordinate the use of public space by people with disabilities.

I introduced critical disability theory at the outset of this thesis and I argue that it offers the analytical tools to address the legal causes of inaccessibility. The social model's solution to the disadvantage that disabled people experience is to remove the barriers that cause disability and ultimately create a barrier-free society.[652] But this approach runs the risk of reinforcing stigma towards disability by treating it as something to eliminate. Critical disability theory rejects the premise that disability is an undesirable deviation from able-bodiedness. By applying the critical disability approach to the issue of the built environment in this thesis, we can uncover

[652] The use of deadlines in federal and provincial accessibility legislation are examples of this approach, e.g. the *Accessible Canada Act*'s goal to make Canada barrier-free by January 1, 2040: *Accessible Canada Act*, supra note 30 at s 5.

the insidious ways that law can perpetuate a hierarchy of embodiments. The step in an entranceway is not just a barrier for someone who cannot walk, it is a design feature that guarantees that only people who can walk are expected to enter the building. This is a subtle but important distinction because it draws our attention away from the step (and the costs of replacing it or supplementing it with a ramp) and towards the conditions, legal or otherwise, that created a situation where the needs of able-bodied people have been the only consideration.

The ways that able-bodiedness is treated as the norm or afforded privilege by law are not adequately understood. My approach in this thesis has been to start by looking at this issue historically to understand why buildings, especially older ones, are not designed for everyone. In Chapter One I explained the legal history of the regulation of the built environment. Canada's first *National Building Code* was drafted as part of the federal government's housing policy in the 1930s and 40s. The National Research Council, the body assigned to the task of drafting this model code, explicitly saw its work as supporting the construction industry and the *National Building Code* as its most significant contribution to that industry. Decades later, in 1965, when the federal government decided to add barrier-free design standards to the *National Building Code*, these new standards did not fit with the market and industry orientation of the overall document. The "Building Standards for the Handicapped" was a supplementary appendix and an explicitly optional guide for anyone interested, rather than model regulations like the main body of the *National Building Code*. This subordinate status delayed the adoption of these standards into law, and so issues of cost became an excuse to only apply barrier-free standards to new construction or when major renovations take place.

At around the same time that provinces were adding barrier-free design to provincial building codes, the debates on human rights codes and the *Charter* channelled the energies of

disability rights activists into lobbying for the addition of disability as a prohibited ground of discrimination. Human rights law essentially monopolizes our understanding of why people with disabilities experience disadvantage in Canada today – that people with disabilities experience discrimination. Inaccessibility in the built environment is one type of discrimination and human rights complaints can provide a remedy by requiring renovations on an individual basis. However, these remedies often do not address the underlying regulations that create inaccessibility in the first place.

In Chapter Two I used a case study to illustrate the complexity of the regulations that govern the built environment and the limitations of a human rights complaint in that context. RAPLIQ, a group of disability activists, brought a human rights complaint about the inaccessibility of temporary summer patios in the Plateau neighbourhood of Montréal, Québec. While RAPLIQ's negotiations with local government officials and businesses ultimately led to bylaw changes requiring ramps on these patios, this apparent success also exposed some of the limitations of human rights complaints for changes to the built environment.

At the procedural level, the use of a non-disclosure agreement (commonly used in human rights mediations) limited the value of this case as precedent and concealed the terms of the settlement. Substantively, this human rights complaint may have improved accessibility to summer patios in Montréal but it had no effect on access to the interior of the restaurants and bars with these patios and, most importantly, it did not provide access to washrooms. This is because provincial building codes creates exemptions to the application of barrier-free standards, particularly for older buildings. These exemptions signal that the built environment, by default, is designed for use by able-bodied people and that it is appropriate to treat access for disabled people as contingent on factors such as the age or size of a building.

I contrast RAPLIQ's summer patio complaint with *Reed*, a case from Nova Scotia where disability activists used a different strategy with a human rights complaint directed at the provincial government's definition of "the public" rather than the actions of private businesses. The complainants successfully argued that the province discriminated against persons with disabilities by issuing licenses to restaurants without accessible washrooms even though one of the requirements of such a license is public access to handwashing facilities. As a result, the Province funded renovations in buildings that, pursuant to exceptions in provincial building code for older buildings, were not required to have any accessibility design features. Nova Scotia also changed its building code to require anyone opening a new restaurant to abide by barrier-free standards, including an accessible washroom. The *Reed* case shows that disability advocates do not have to give up on human rights complaints. And it may prove to be a blueprint for future human rights complaints that can directly challenge laws, like the regulations that apply to restaurant licenses, that operate to privilege able-bodiedness.

In Chapter Three I looked at strategies by which persons with disabilities have or might intervene in the planning of the built environment, which are not available by way of the human rights complaints process. The first was the story of how people with disabilities lobbied their municipalities for changes to sidewalks in the 1970s, leading to curb cuts at every intersection across Canada today. The second example is the potential for participation by persons with disabilities at public consultations that are legally required in the context of land use planning and development. I critique how governments across Canada arrange separate consultations for persons with disabilities that are not connected to any particular context but are intended as a catch-all for disability-related concern. I question the implicit assumption that people with disabilities should only be given the conditions to provide input to government when the

government decides it wants to hear from them. Rather, the statutory requirement for public consultation that brings members of the public together with government and developers to assess concrete planning proposals should support a legal basis for implementing procedural accessibility at these consultations.

Finally I explore the possibility of persons with disabilities intervening at the building and development permit stage. Human rights jurisprudence explicitly prevents people with disabilities from challenging proposed building projects or the application of building codes at the permitting stage. The permit appeal process may be used to address concerns about accessibility, like a misapplication of accessibility standards, before a building is constructed, and thereby avoid expensive retrofitting altogether. I provide examples of how accessibility is already being litigated when third parties intervene in the permit process, including when builders apply for an exemption from barrier-free standards. Since the building and development permit process involves the direct interpretation of law onto the final form that a building will take, persons with disabilities ought to take part in this interpretation.

Throughout my argument, critical disability theory informs my analysis of how law can perpetuate or challenge inaccessibility in the built environment. This approach requires the analysis to go beyond the fact that people with disability experience exclusion from the built environment and to look at the reasons for this exclusion. Applying critical disability theory in a legal context is particularly appropriate because it requires precision about the actual meaning of words or concepts, like “the public”. The *Reed* case is one example of the profound effects of simply interpreting the meaning of the word “public” differently, from an interpretation that requires hand washing facilities for able-bodied people to one that requires hand washing facilities for disabled people too.

Applying critical disability theory in this thesis has also meant that I have avoided or left out some arguments that are common in any discussion of disability, academic or otherwise. For instance, I do not justify the importance of my thesis topic by providing statistics on the number of persons in Canada living with disabilities. This is for several reasons. First, it is not clear that that questioning law's role in privileging able-bodiednes should depend on the size of the population that does not experience this privilege. Further, it is actually quite difficult to demarcate the population of people with disabilities. Relying on a defined number of persons experiencing disability, as portrayed in a census, fails to appreciate the spectrum of embodied experience in each person's lifetime.[653] This is particularly true when it comes to the built environment because, for example, anyone who reaches old age will start to share the experiences of younger wheelchair users or members of the deaf community in a world that is designed for able-bodiedness. Another reason I do not discuss the percentage of the population living with disabilities today is that my argument is based on the historical wrong of segregating persons with disabilities. Narrowing the population to those alive today can erase the cumulative experiences of the disability community who lived through times when no one questioned their isolation or exclusion.

Another consequence of using a critical disability approach is that even though I have addressed the issue of cost as a practical matter, I remain sceptical of arguments that attempt to prove that accessibility will improve the participation of people with disabilities in the economy. As I have touched on throughout this thesis, there is a theme in current disability policy and advocacy emphasizing the value to businesses and employers of improving physical

[653] Pamela Moss & Michael J Prince, "Nomadic positionings: a call for critical approaches to disability policy in Canada" in Sarah Marie Hall & Ralitsa Hiteva, eds, *Engaging with Policy, Practice and Publics: Intersectionality and Impact* (Bristol: Policy Press, 2020), 121-134.

accessibility. The so-called "business case for accessibility" posits that employers and business owners should choose to make their establishments accessible (rather than being required to do so by law) because of the untapped potential of disabled people as employees and consumers.[654] This parallels the introduction to the "Building Standards for the Handicapped" in 1965, which emphasized that accessibility is not threatening and can be beneficial to the non-disabled population. These arguments trivialize the history how people with disabilities were treated in the past and inserts a precondition that people with disabilities must justify their admittance into society in terms of their economic value. The business case for accessibility concedes that the law regulating the built environment is for the benefit of able-bodied people and that accessibility must be an earned privilege.

It is more consistent with a critical disability approach to explain the economic benefits of planning for accessibility because of a societal interest in saving money on retrofitting. If we start from the premise that it is no longer state policy to segregate or excludes people with disabilities in Canada then it follows that retrofitting the built environment is a collective responsibility. The market value of disabled people as consumers or employees is not relevant. Instead, my point is that continuing to build inaccessibly is just adding more to the eventual cost of retrofitting. Of course, if we plan the built environment for a public that includes people with disabilities then, as a society, we will save money long term.

The ways that an environment built for able-bodied people will impact persons with disabilities are often completely invisible to those who have not experienced disability (yet). If people with disabilities participate in planning law processes, like public consultations or the permitting stage, they can potentially prevent the mistakes that will likely be made if only able-

[654] Conference Board, *supra* note 7.

bodied people are in the room. It is not reasonable, or cost effective for anyone, if persons with disabilities have to wait and file a human rights complaint post-construction when they could intervene directly in how the laws that regulate the built environment are applied and interpreted.

My research will have several insights for the various stakeholders that create and want to influence the built environment in Canada. The historical understanding of how we regulate the built environment exposes that inaccessibility has been and continues to be sanctioned by government at all levels. The ways we design the built environment have never been neutral or natural; they are the creation of law and they privilege the mobility of certain types of bodies. This is important for people with disabilities and for organized advocacy groups that want to assert their rights guaranteed in the *Charter* and human rights codes in Canada. The legal history of the built environment in Canada is also very relevant to legislators that are grappling with the apparent collective will to create a society that is inclusive for people with disabilities.

One of my criticisms of the *Accessible Canada Act* is that it purports to offer federal leadership on the creation of acccessibilty standards as if this is a new endeavour or evidence of real action to combat inaccessibility. As I discovered in my research, through the work of the National Research Council, the federal government has been researching and drafting accessibility standards since the 1960s. Sixty years later, the *Accessible Canada Act* creates an entirely new standards drafting body, Accessibility Standards Canada, and separates this body as distinctly disability-related. We were never told that the National Research Council was no longer competent at this task. My concern is that separating the development of accessibility standards away from the National Research Council's work on model building code reinforces the idea that accessibility standards are different from the "normal" standards that continue to be under the purview of the National Research Council. Even more perplexing, the *Accessible*

Canada Act does not have any mechanism by which accessibility standards would become legally enforceable either as part of provincial building code or through a complaint process.

A redundant accessibility standards research and drafting organization that has no plan or authority to change the law actually looks very similar to the approach that the federal government took in the 1960s. The "Building Standards for the Handicapped" were only an appendix to the 1965 edition of the *National Building Code*. The introduction to these standards was explicit about the fact that they were not intended to become law. I fear that the standards created by Accessibility Standards Canada will have a similar fate.

I have been quite open about the impact that my personal experiences have informed my research and my arguments in this thesis. I want to briefly explain why I think that this experience has been asset to my work rather than a reason to suspect that I am not able to be objective. First, I chose to focus on regulations like building codes because during the first months after I became disabled, these laws went from being invisible to determining many aspects of my everyday life. I do not mean this in an abstract way. For example, I could not legally build a ramp to get in and out of my house because my municipality determined that there was no room for a ramp that would meet the required slope ratio in the provincial building code. My friends built a ramp at my front door anyways and during the years I lived in that home the municipality never issued any ticket or gave me notice requiring me to remove the ramp. There were still negative consequences for me as a result of the municipality's application of the building code. I had to pay out of pocket for the materials to build the ramp (my friends donated their labour costs) because my provincial insurance would only pay for a ramp that was approved by the municipality. Accepting those costs was particularly galling when I could look across the street at all of the businesses that had steps at their entrances. Why would the municipality deny

my request to buid a ramp so that I could get in and out of my own home while also failing to require accessible entrances at any of the businesses in my neighbourhood? The building code failed me at every turn.

Instead of starting with international and domestic human rights norms, I have focused on the regulations that determine the everyday mobility of disabled people. My personal experience as a wheelchair user has informed my research and writing process. Having lived almost 30 years of my life as an able-bodied person, I know how much privilege I had to move freely in society. After my car accident, I experienced an immediate and immense loss of mobility. The loss was of course a physical one, in that I could no longer walk. However, I truly did not expect that I would be excluded from so many places that I had once frequented. I never even got to go back to my home that I was living in at the time of my car accident because it was a second story walk up. Nor have I gone back to my bedroom on the top floor in my parents' home and I probably never will. These personal losses are not that serious but the restrictions on my ability to move around in public space are more than just unfortunate, they are demeaning and discriminatory. Inaccessibility in public spaces restricts my ability to do things like work, go to school, buy necessities, socialize and participate in our democracy. I know that I am not alone in these because the majority of complaints at the federal and provincial human rights commission and tribunals are disability related. There are many different types of disabilities and I have almost zero knowledge of what it is like to have a different body or disabling condition. However, I hope to begin the conversation about how law treats disability with a recognition of how hard it is to experience the world that is not designed for you. By including pieces of my own experience in this academic contribution I do not mean to overly focus or prioritize the experience of wheelchair users. Rather, I seek to illustrate the impact of relatively technical

bylaws or regulations on the daily lives of people with disabilities. Those who know more about another marginalized embodied experience than I do can apply the approach I have used in this thesis. Aspects of the way we build are communities that facilitate able-bodied people and ignore/exclude anyone who is different will always have a legal explanation. There is a lot of research yet to be done on why the built environment looks the way it does.

There are other avenues of research or legal strategies that can build on the work I have started in this thesis. Even in the *Reed* case, which I have described in positive terms, the province refused to apply accessibility standards retroactively. I think that there is significant potential for a *Charter* challenge to those provisions in provincial and territorial building codes that exempt older buildings from the application of accessibility standards. Given that barrier-free standards are not like other provisions in building codes that change over time because of new research and technologies, it does not seem consistent with the *Charter* to justify excluding people with disabilities from certain buildings because of the building's age. The only reason that an older building was built inaccessibly is because of the marginalized position of people with disabilities at the time rather than due to the progress of building science. It also may be fruitful to pursue the approach, which was used by Nova Scotia after the *Reed* case, of changing the requirements of accessibility standards to apply to particular building uses. In Nova Scotia this only applies to restaurants for now, but as I mentioned in Chapter Two, Quebec legislators considered, and then rejected, a change to provincial building code that would connect accessibility requirements to how a particular building is used.

Another potential outcome of my research is a new approach to disability activism. In addition to human rights litigation, I consider organized participation during local planning procedures to have the potential for profound impact on the lives of persons with disabilities.

This may include identifying ways that current public hearings could better facilitate participation by persons with disabilities or lobbying to include accessibility as a legislative requirement for such hearings. It could also mean engaging with planning professionals to improve the competency of disability activists on the intracies of planning processes. This could create the capacity for disability organizations to audit the plans for major developments, like a new hospital or music venue, to assess their accessibility. These organizations could also focus on empowering people with disabilities to engage in smaller planning projects, individually or collectively.

Post Script

I wrote a significant portion of this thesis during the Covid-19 pandemic. It was strange to be writing about how disabled people are excluded from the built environment at a time when it was unlawful or too risky for any of us to be in public space. Yet the reprieve in the summer of 2020 when we could enjoy socializing again outside brought a new importance, both economically and psychologically, to patio season. Cities across Canada experimented with Montreal's culture of temporary summer patios, allowing restaurants and bars to spill over into the sidewalk so that they could accommodate more patrons outside and ensure social distancing. Given Montreal's experience with this type of patio and the history of human rights complaints regarding accessibility, I was disappointed to find out that once again RAPLIQ was trying to raise awareness about the issues of sidewalk and patio access for people with disabilities.[655] Some boroughs in Montreal waived the requirement for restaurants and bars to obtain permits for the summer of 2020 and, in other cases, there was no enforcement of accessibility either for

[655] Zoe Magalhaes, "Les oubliés du déconfinement" *Métro Montréal* (15 July 2020) 5 [Magalhaes]; Emmanuel Delacour, "Rosemont: le tiers des terrassess «inaccessibles», plaide le RAPLIQ" Métro Montréal (30 Aug 2019) 3.

sidewalk space requirements or for accessible patios. RAPLIQ issued a press release pointing out that in the summer of 2020, the haphazard approach to the layout of patios, in combination with barriers set up by the City to create "health corridors" (passages that altered pedestrian routes), created new problems for people with disabilities.[656] Blind pedestrians could no longer rely on the familiar landmarks and wheelchair users could not fit in the spaces allocated for pedestrians between the road and the patio spaces or the passageways to get to the entrance of certain stores. By contrast, other Canadian cities that were experimenting for the first time with temporary summer patios instituted permit requirements with accessibility requirements. For example, Vancouver required permit applicant to maintain a 2.4 metre passage for pedestrians, keep entrances/exits clear of furniture, and meet the following conditions regarding patio design:

> For accessibility, table and seating options that accommodate people of all abilities must be available, and access ramps must be available wherever there may be changes in grade (e.g. a step down from the curb). Ramps must be provided and maintained by the business.[657]

In Calgary, when I saw the changes to the sidewalk from my window that overlooks a busy commercial street, I was worried about whether I would be able to navigate my wheelchair through the patio furniture and barriers that had been erected just like the "health corridors" in Montreal. On my first outing after these installations in my neighbourhood, I was pleasantly surprised to discover a ramp every single time that the pedestrian pathway was diverted off or on the sidewalk. I soon learned that the City of Calgary's Transportation Department had rushed to build over 100 ramps so that they could be installed at the same time as the rest of new sidewalk

[656] RAPLIQ, Press Release, "Montreal reimagined… 'No cars, no disabled people'" (21 May 2020), online: <: Newswire <https://www.newswire.ca/news-releases/montreal-reimagined-no-cars-no-disabled-people--838520444.html>.
[657] City of Vancouver, "Temporary Expedited Patio Program (TEPP)", online: City of Vancouver <https://vancouver.ca/doing-business/expedited-patio-program.aspx>.

infrastructure.[658] These ramps were the only thing that allowed me go anywhere independently in the summer of 2020. Without them, every time I left the house I would have had to bring someone strong to move patio furniture or fencing out of my way.

One of the spokespersons for RAPLIQ described the inaccessibility of Montreal's sidewalks and patios in the summer of 2020 as just one of the ways that people with disabilities had been forgotten during the Covid-19 pandemic.[659] It is frustrating to conclude this thesis with this story because for all of the criticisms I raised in the summer patio case study, it was still an important victory for people with disabilities in Montreal. The circumstances of the pandemic and its impact on the hospitality sector made planning for accessibility seem like a luxury only for normal times. It will be important for us to understand why Canadian cities responded differently to the public space design challenges during the pandemic. We could look for policies or regulations at the municipal level to understand why accessibility was part of the planning considerations for Calgary's Transportation Department when rearranging sidewalk routes in response to the pandemic. These micro-level decisions have such a large impact on who gets to be part of the public. Rebuilding to include people with disabilities will take time and, especially in places that have stubbornly refused to change, it will be expensive. My hope is that people with disabilities will no longer have to pay this price.

[658] Helen Pike, "Not everyone liking expanded patios and sidewalk lanes on 17th Avenue SW" *CBC News* (28 May 2020), online: *CBC News* <https://www.cbc.ca/news/canada/calgary/calgary-patios-beltline-resident-pedestrian-safety-1.5589430>.
[659] Magalhaes, *supra* note 644.

Appendix 1

Transcript of my appearance at City of Calgary Combined Meeting of Council Public Hearing on Policy Amendment and Land Use Amendment in Inglewood (Ward 9) at 1230 and 1234 - 9 Avenue SE
July 27, 2020

Stephanie Chipeur: Hi. So my name is Stephanie Chipeur. And for the benefit of those who may not be able to see me, I have a disability and I use a wheelchair. And that's the main reason I'm here today to talk in support of this new project.

I think one of the things that we've been kind of avoiding or ignoring in this discussion is the way in which Inglewood hasn't actually been great space or friendly space for people with disabilities.

As I go down 9th Avenue, there's so many businesses I can't go in. I actually grew up in Calgary and moved back here from going to school in Montreal. A year and a half ago, when I was considering places to live, I would have loved Inglewood because it is a great place to be. I wasn't always in a wheelchair, I used to be able to walk there. But this was not an option for me coming back here, because there's not accessible housing, and there's not a lot of accessible establishments. I prefer to live in a place where I can easily push myself in a wheelchair or use my power chair to use my neighborhood and be in, you know, any restaurant, any store, visit friends nearby. So I think that's one of the things that has not been addressed, in terms of the benefits of this new building for people like myself who want to live downtown, use transit and use the neighborhood, as anyone else does.

I also think that we're missing the piece on aging in place and I think these kinds of condo buildings, like Rndsqr's building, are a great place for people like myself who cannot walk and who use wheelchairs, but also seniors who are looking for a place to live when they can no longer live in their home. I think that's become even more critical now that we realize that institutions aren't a great place for a lot of us.

And so, I actually didn't know much about this debate because, as I said, I don't live in Inglewood. But when I saw the news coverage of it I was quite concerned that everyone is focusing on aesthetics as opposed to the functionality of the neighborhood for people like myself. So basically I cold-called Rndsqr and asked "what are you going to be doing for me?" And they came back with a really detailed response in terms of the accessibility features that they were including in this project. They've actually spoken to people with lived experience who have more expertise than I do about the need for accessible housing and accessible public spaces in Calgary.

I do want to commend our city - I think we're one of the best cities for people with disabilities, I just think, unfortunately, with Inglewood, that's not the case. And so I think Rndsqr['s project] is

a great opportunity. People like me wait for his these new buildings to come and improve the sidewalks (like I cannot manage the sidewalks very well in the manual chair and I can't fit very well) and improve access to housing. There are going to be units in the building that are accessible. I think that matters not just for me but people who can't walk far distances who need single floor housing. And then there's the public space that's open for everyone and that's completely barrier-free.

[The developer] spoke earlier about some of the commercial space that would be in that building. That's also going to be barrier-free, which means I would be able to be someone who goes into those establishments but also work there and I think that's key too. Accessible working spaces are important as well in the neighborhood. And I know, yes, I could work downtown but I think people underestimate how important it is [for people like me] to live, work, and play, I guess you could say, all in the same neighborhood. Inglewood, right now, is just not doing that for me.

So I would hope that we would consider the future in terms of, you know, building for the future. We want to build to include people like myself in Inglewood, and seniors as well, who would like to live there but wouldn't be able to manage the steps.

I know [during this hearing] we're talking a lot about height but those smaller buildings are not accessible to me. Like Without Papers, a local pizza place I used to go to, I can't get into that and it's one of those [shorter] buildings. So I think we're letting aesthetics and concerns about height overcome this conversation instead of talking about accessibility and the future in terms of including people like myself. And protecting heritage buildings but doing so in a way that allows people like myself to use those heritage buildings and be inside them, which isn't the case in lots of cities in Canada.

So I'd like you to support [this project]and consider it as a part of the city's agenda to be inclusive and accessible for people with disabilities and seniors who want to age in place. And that's it. Thank you.

Mayor Naheed Nenshi: Thank you so much. At risk of sounding overly positive, I really appreciate that you came because we always talk about universal design and then we never talk about it when we're in the midst of our public hearings. So that is a really helpful perspective and I really appreciate you being here. Thank you.

Bibliography

Legislation

Canada:

Accessible Canada Act, SC 2019, c 10.
Accessibility Act, SNS 2017, c 2.
Accessibility for Manitobans Act, SM 2013, c 40.
Accessibility for Ontarians with Disabilities Act, 2005, SO 2005, c 11.
An Act mainly to regulate building inspections and divided co-ownership, to replace the name and improve the rules of operation of the Régie du logement and to amend the Act respecting the Société d'habitation du Québec and various legislative provisions concerning municipal affairs, SQ 2019, c 28.
Act respecting elections and referendums in municipalities, CQLR c E-22.
Act respecting land use planning and development, CQLR, c A-19.1.
Act to secure handicapped persons in the exercise of their rights, RSQ 1978 c E-20.1.
Act to secure handicapped persons in the exercise of their rights with a view to achieving social, school and workplace integration, SQ 2004, c 31.
Barrier-Free Design Regulations, PEI Reg EC139/95.
Bill C-81. *Accessible Canada Act*, 1st Sess, 42nd Parl, 2018 (1st reading).
Bill C-81. *An act to ensure a barrier-free Canada*, 1st Sess, 42nd Parl, 2018 (2nd reading).
Building Access Act, RSNS 1989, c 45.
Building Act, SBC 2015, c 2.
Building Code Act. RSNS 1989, c 46.
Building Code Act. SO 1992, c 23.
Building Code Act. SNu 2012, c 15.
Building Code Regulations, Nu Reg 009-2018.
Buildings Accessibility Act, 1981 c 90 s 1.
Buildings Accessibility Act, 1990 c55 s4.
Buildings Accessibility Act, RNSL 1990, c B–10.
Buildings Accessibility Regulations, 1982 (Rep by 176/92), s 5(d).
Buildings and Mobile Homes Act, CCSM 1987, c B93.
Calgary, SDAB2017-0062 (Re), 2017 CGYSDAB 62.
Canadian Charter of Rights and Freedoms, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
Charter of Ville de Montréal, Metropolis of Québec, CQLR c C-11.4.
Community Planning Act, SNB 2017, c 19.
Community Planning and Development Act, SNWT 2011, c 22.
Environment Management Act, SBC 2003, c 53.
Equality Rights Statute Law Amendment Act, 1986, S.O. 1986, c. 64, s.16.
Food Safety Regulations, NS Reg 206/2005.
Human Rights Code, 1981, SO 1981, c 53.
Land Use Planning and Development Act, RSQ 2003, c A-19.1.
Local Government Act, RSBC 2015, c1.
Municipal Act, RSY 2002, c 154.

Municipal Government Act, RSA 2000, c M-26.
Municipal Government Act, SNS 1998, c 18.
Niagara Escarpment Planning and Development Act, RSO 1990, c N2.
Nova Scotia Building Code Regulations, NS Reg 179/2019.
Nunavut Planning and Project Assessment Act, SC 2013, c 14, s 2.
Ontarians with Disabilities Act, 2001, SO 2001, c 32.
Planning Act, CCSM, c P80.
Planning Act, RSO 1990, c P13.
Planning Act, RSPEI 1988, c P-8.
Planning Act, SO 1983, c 1.
Planning and Development Act, 2007, SS 2007, c P-13.2.
Règlement établissant le programme d'aide à l'accessibilité des commerces (PAAC), RCG 17-011
Règlement sur l'occupation du domaine public, RRVM 2017, c O-0.1 (Le Plateau-Mont-Royal).
Safety Codes Act, RSA 2000, c S-1.
The Montréal Charter of Rights and Responsibilities, Montréal 2006, c 7.
The Planning and Development Act, SS 2007, c P-13.2.
The Uniform Building and Accessibility Standards Act, SS 1983-84, c U-1.2.
Urban and Rural Planning Act, SNL 2000, c U-8.
Vancouver Charter, SBC 1953, c 55.

United States of America:

Americans with Disabilities Act of 1990, 42 U.S.C. § 12101.
Architectural Barriers Act, 42 USC § 4151 (1968).
Rehabilitation Act, 1429 U.S.C. §§ 701-796 (2012).

International:

Convention on the Rights of Persons with Disabilities, 13 December 2006, 47 UNTS 2515, Art 9 – Accessibility.

Jurisprudence

Aldighieri v Niagara Escarpment Commission, 1995 CarswellOnt 5411 (Niagara Escarpment Hearing Office).
Atlantic Shopping Centres v Newfoundland (Minister of Labour) et al, 1987 CanLII 5152 (NL SC).
Atlantic Shopping Centres Ltd v Newfoundland (Minister of Labour), 1988 CanLII 4416 (NL CA).
Barcis v Sault Ste. Marie (City), 2019 CanLII 2233 (ON LPAT).
Bell c Mount-Royal (Town of), 2011 QCCS 6011.
Berjawi v Ottawa (City), 2011 ONSC 236.
Beutel Goodman Real Estate Group Inc. v Halifax (City), 1998 CanLII 2244 (NS SC).
Boyd v British Columbia, 2001 BCSC 667.
Calgary, SDAB2017-0062 (Re), 2017 CGYSDAB 62.

Canadian Odeon Theatres Ltd. v Human Rights Commission (Sask) and Huck, 1985 CanLII 183 (SK CA).
Carasco v University of Windsor, 2012 HRTO 195.
Clegg v HMQ Ontario, 2016 ONSC 2662.
Coopérative d'habitation L'Escale de Montréal c Commission des droits de la personne et des droits de la jeunesse, 2010 QCCA 1791.
Council of Canadians with Disabilities v VIA Rail Canada Inc, 2007 SCC 15.
Dolmage v. HMQ, 2013 ONSC 6686.
Durham Citizens Lobby for Environmental Awareness & Responsibility Inc. v Durham (Regional Municipality), 2011 ONSC 7143,
Eaton v Brant County Board of Education, 1997 CanLII 366 (SCC), [1997] 1 SCR 241.
Eldridge v British Columbia (Attorney General), 1997 CanLII 327 (SCC), [1997] 3 SCR 624.
Fontaine c Lapointe-Chartrand, 1996 CanLII 6264 (QC CA).
Freitag v Penetanguishene (Municipality), 2010 HRTO 1704 (CanLII).
Freitag v Penetanguishene (Town), 2013 HRTO 554 (CanLII).
Freitag v Penetanguishene (Town) et al, 2015 HRTO 1275 (CanLII).
Friends of McNichol Park v Burlington (City), (1996), 33 MPLR (2d) 198 (Ont Gen Div).
———. 1996 CanLII 11771 (ON SC).
Friends of Toronto Parkland v Toronto (City) (1991), 8 MPLR (2d) 127.
Granovsky v Canada (Minister of Employment and Immigration), 2000 SCC 28.
HJ v British Columbia, [1998] BCJ No 2926 (SC).
House v Lincoln (Town), 2015 ONSC 6286.
Keir & Marion Clark v Town of Montague, (1997) Order LA97-08 - LA97003 (PEI Regulatory and Appeals Commission).
Kinney v Yerusalim, 9 F 3d 1067 (3d Cir 1993).
Loblaws Inc v Ancaster (Town), Chief Building Officer, (1992), 12 MPLR (2d) 94.
MacLean v Nova Scotia (Attorney General), 2019 CanLII 115231 (NS HRC).
Malkowski v Ontario Human Rights Commission, 2006 CanLII 43415 (ON SCDC).
McKillop and Bechard v HMQ, 2014 ONSC 1282.
Miele v Pat Quinn's Restaurant and Another, 2017 BCHRT 244 (CanLII).
Muir v Alberta, 1996 CanLII 7287 (AB QB).
Multani v Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6 (CanLII), [2006] 1 SCR 256.
Nantuck Investments Inc. v Oshawa (City), 2016 CarswellOnt 22180.
Peel Board of Education v Ontario Human Rights Commission (Div Ct), 1991 CanLII 7356 (ON SC).
Pointes Protection Association v Sault Ste. Marie Region Conservation Authority, 2013 ONSC 5323.
Porter v Toronto (City) Committee of Adjustment, 2007 CarswellOnt 5350, 57 O.M.B.R. 213.
Portman v Northwest Territories, 2014 CanLII 21552 (NT HRAP).
Quesnel v London Educational Health Centre (1995), 28 CHRR D/474 (Ont Bd Inq).
Reed v Province of Nova Scotia (Department of Environment), 2018 CanLII 89418 (NS HRC).
Ripplinger v Saskatchewan Human Rights Commission, 2002 SKCA 56 (CanLII).
Ronald L. Bruce v Fredericton Planning Advisory Committee and al., 2008 NBAPAB 20.
S. Kossatz v Development Authority of the City of Edmonton, 2020 ABESDAB 10132.
Saskatchewan (Human Rights Commission) v Ripplinger, 1996 CanLII 4913 (SK CA).

Seed v Ontario, 2017 ONSC 3534.
Shuparski v Toronto (City), 2010 HRTO 726 (CanLII).
Steinbock v Toronto (City), 2017 CarswellOnt 14611 (OMB).
The Architectural Institute of British Columbia v Langford (City), 2020 BCSC 801.
Voropanov v Alberta (Municipal Affairs), 2012 ABQB 551.
Welsh v Ontario, 2018 ONSC 3217.
York Region Condominium Corp No 890 v Toronto (City), [2005] OJ No 873.

Government Documents

National:

Report of the work of the Invalided Soldiers' Commission (Ottawa: Government of Canada, 1918).
Archer, J W. *A Brief History of the National Buildings Code of Canada* (National Research Council of Canada, 2003).
———. *Building codes - why are they developed?* (National Research Council of Canada, 2003).
———. *Canada Introduces "Objective Based" Codes* (National Research Council of Canada, 2005).
———. *Public Review of Three Proposed Code Changes* (National Research Council of Canada, 2006).
Canadian Commission on Building and Fire Codes, Final Report - Alterations to Existing Buildings (Ottawa: National Research Council, 2020).
Canadian Human Rights Commission. *The Rights of Persons with Disabilities to Equality and Non-Discrimination: Monitoring the Implementation of the UN Convention of the Rights of Persons with Disabilities in Canada* (2015).
Employment and Social Development Canada. *Accessible Canada: Creating new national accessibility legislation* (Government of Canada, 2017).
Ferguson, R S. *The Development of a Knowledge-Based Building Code* (Ottawa: National Research Council of Canada, 1974).
Gill, A F. *A National Building Code* (Ottawa: National Research Council of Canada, 1937).
Gold, L W & J K Richardson. *The code development and writing process* (National Research Council of Canada, 1984).
Hansen, A T. *Accessibility Requirements in the National Building Code of Canada 1985* (National Research Council of Canada, 1985).
———. Canadian Building Digest, *The regulation of building construction* (Ottawa: National Research Council, 1985).
House of Commons Debates. 12-7, No 4 (30 July 1917) at 3905 (Sir George Foster).
———. 17-6, No 4 (23 June 1935) at 3910 (Right Hon Sir George Perley).
———. 27-1, No 10 (17 November 1966) at 10,0021 (Thomas Speakman Barnett).
———. 28-2, No 7 (1 June 1970) at 7587 (Randolph Harding).
———. 30-3, No 2 (12 December 1977) at 1785 (Ralph Wesley Stewart).
Leggett, Robert F. *The National Building Code of Canada, A General Review* (Ottawa: National Research Council, 1966).
National Research Council of Canada. *Building Standards for the Handicapped (Supplement No. 7 to the National Building Code of Canada)* (National Research Council of Canada, 1965).

———. *National Building Code of Canada*, (Ottawa: National Research Council of Canada, 1941).
———. Division of Building Research, *The First 25 Years: 1947 to 1972* (Ottawa: National Research Council, 1973).
———. *National Building Code of Canada*, (Ottawa: National Research Council of Canada, 1975).
———. *National Building Code of Canada*, (Ottawa: National Research Council of Canada, 1980).
———. *National Building Code of Canada*, (Ottawa: National Research Council of Canada, 1985).
———. *National Building Code of Canada*, (Ottawa: National Research Council of Canada, 1995).
———. *National Building Code of Canada*, (Ottawa: National Research Council of Canada, 2005).
———. *National Building Code of Canada*, (Ottawa: National Research Council of Canada, 2015).
———. *Canada's National Model Construction Codes Development System* (Ottawa: National Research Council, 2013).
———. *Policies and Procedures: Canadian Commission on Building and Fire Codes,* 3rd ed (Ottawa: National Research Council Canada, 2016).
———. *National Building Code – 2019 Alberta Edition* (Ottawa: National Research Council Canada, 2019).
———. News Release, "Free electronic access to Codes!" (26 April 2019), online: National Research Council <https://nrc.canada.ca/en/certifications-evaluations-standards/codes-canada/construction-innovation/free-electronic-access-codes>.
Office for Disability Issues, Human Resources Development Canada, Defining Disability: A Complex Issue (Gatineau, QC: Human Resources Development Canada, 2003).
Parks Canada, *National Planning Permit Process: Discussion Paper* (2018) online: *Parks Canada* https://www.pc.gc.ca/en/agence-agency/lr-ar/consultations/discussion.
Public Services and Procurement Canada, "Accessible federal government built environment" (briefing material to the Standing Committee on Procedure and House Affairs), (27 February 2020) online: *Public Services and Procurement Canada* <https://www.tpsgc-pwgsc.gc.ca/trans/documentinfo-briefingmaterial/proc/2020_02_27/p13-eng.html>.
Public Works and Government Services Canada. *Ensuring Access: A Duty to Accommodate* (Ottawa: Government of Canada, 1999).
Special Committee on the Disabled and the Handicapped. *Obstacles: Report of the Special Committee on the Disabled and the Handicapped* (Ottawa: Minister of Supply and Services Canada, 1981).
Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, *Accessibility for All* (Ottawa: Government of Canada, 2005).
———. *Government Response To The Eighth Report Of The Standing Committee On Human Resources, Skills Development, Social Development And The Status Of Persons With Disabilities: Accessibility for All* (Ottawa: Government of Canada, 2005) online: House of Commons Canada <https://www.ourcommons.ca/DocumentViewer/en/38-1/HUMA/report-8/response-8512-381-169>.

Statistics Canada. *Canadian Survey on Disability Reports*, online: *Statistics Canada* <https://www150.statcan.gc.ca/n1/en/catalogue/89-654-X>.

Provincial:

Building Standards and Licensing Branch, *Building Standards Guide: Barrier-Free Design* (Regina: Government of Saskatchewan, 2019)

Government of Alberta, Alberta Municipal Affairs, Public Safety Division, *The Evolution of Alberta's Public Safety System* (Edmonton: Government of Alberta, 2005).

———. Building Standards Branch, *Alberta Building Code 1974* (Edmonton: Government of Alberta, 1974.

Government of British Columbia. Ministry of Social Development and Social Innovation, *Disability Consultation Report: Moving Together Toward an Accessible B.C.* (Victoria: Government of British Columbia, 2014)

———. Office of Housing and Construction Standards, *Building Access Handbook 2014: Illustrated Commentary on Access Requirements in the 2012 British Columbia Building Code* (Victoria: Government of British Columbia, 2014).

———. Office of Housing and Construction Standards, *History of British Columbia Building Regulations* (Victoria: Government of British Columbia, 2015).

Government of Newfoundland and Labrador, *What We Heard: Accessibility Legislation* (Government of Newfoundland and Labrador, 2019).

———.*What We Heard: Inclusion for All: Consultations to Develop a Plan to Remove Barriers for People with Disabilities in Newfoundland and Labrador* (Government of Newfoundland and Labrador, 2011).

Government of Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31-3 (22 November 1979) at 2:15PM (Hon Mr Elgie).

———. Legislative Assembly, *Official Report of Debates (Hansard)*, 32-1 (1 December 1981) at 5:40PM (Ms Copps).

———. *Official Report of Debates (Hansard)*, 32-1 (25 May 1981) at 5:30PM (Hon Mr Elgie).

———. Legislative Assembly, *Official Report of Debates (Hansard)*, 32-1 (29 May 1981) at 10:40AM (Hon Mr Elgie).

———. Legislative Assembly, *Official Report of Debates (Hansard)*, 33-1 (11 June 1985) at 2:30PM (Hon Mr Pope).

———. Mayo Moran, *Second Legislative Review of the Accessibility for Ontarians with Disabilities Act, 2005* (Toronto: Government of Ontario, 2014).

———. Ministry of the Attorney General, *Sources for the interpretation of equality rights under the Charter: a background paper* (Toronto: Government of Ontario, 1985).

———. Ministry of Municipal Affairs, *Building Code Consultation Paper: Accessible Built Environment* (Toronto: Government of Ontario, 2012).

Government of Québec. Ministre du Travail, *Pour une meilleure accessibilité: rapport du ministre du travail sur l'accessibilité aux personnes handicapées de bâtiments à caractère public construits avant décembre 1976,* (Québec: La régie du bâtiment du Québec, 2006).

———. Office des personnes handicapées du Québec. *Évaluation de l'efficacité de la politique gouvernementale À part entière : pour un véritable exercice du droit à l'égalité : les*

déplacements des personnes handicapées : l'accès aux transports et l'accessibilité des bâtiments et des lieux publics (Drummondville, QC: Publications du Québec, 2017).
———. *On Equal Terms. The Social Integration of Handicapped Persons; A Challenge for Everyone*, (Drummondville, QC: Publications du Québec, 1984).
———. *Portrait sur l'accessibilité des commerces: Rapport d'étape de l'Office des personnes handicapées du Québec présenté à la Commission de l'économie et du travail*, (Drummondville, QC: Publications du Québec, 2018).
———. Régie du bâtiment du québec, *Normes des conceptions sans obstacles* (Quebec: Government of Quebec, 2010).
———. Régie du bâtiment du Québec, *Quebec Construction Code, Chapter I - Building*, (Quebec: Government of Quebec, 2010).
Ontario Human Rights Commission. *Dining Out Accessibly: An Accessibility Audit of Select Restaurant Chains in Ontario* (Ontario Human Rights Commission 2004).
———. *Policy on Ableism and Discrimination Based on Disability* (Ontario Human Rights Commission 2016).
———. *Submission of the Ontario Human Rights Commission concerning barrier-free access requirements in the Ontario Building Code* (Ontario Human Rights Commission 2002).
Province of Manitoba, *Municipal Planning Guide To Zoning Bylaws In Manitoba: Component A* (Winnipeg: Province of Manitoba, 2015).
Saskatchewan Human Rights Commission, "Accessibility Rights of Persons with Disabilities Building Standards" (2010) online: *Saskatchewan Human Rights Commission* <https://saskatchewanhumanrights.ca/education-resources/information-sheets/building-standards-the-code/>.

Municipal:

Brockville, Economic Development and Planning Committee Public Planning Meeting Minutes (4 April 2017).
Hamilton, Planning and Economic Development Division, *Residential Care Facilities and Group Homes: Human Rights and the Zoning Bylaws within the Urban Area* (City of Hamilton, 2019).
Kamloops, *Accessibilty and Inclusion: Moving Together Towards a More Accessible Kamloops* (City of Kamloops, 2018).
Montréal, *Bilan de l'an 1 du Programme d'aide à l'accessibilité des commerces (PAAC) Période d'avril 2017 à avril 2018* (Montréal: Ville de Montréal, 2018). online: <https://www.realisonsmtl.ca/6768/documents/12158/download>.
———.*Bilan 2004-2005: Mise en œuvre de plan d'urbanisme de Montréal* (Montréal, May 2005).
———.Le Plateau-Mont-Royal*, Guide d'aménagement d'un café-terrasse sur le domaine public*, (Montréal: Ville de Montréal, 2019).
———. Office de consultation publique de Montréal, *Le Nouveau Plan d'Urbanisme de la Ville de Montréal: Rapport du consultation publique* (Montréal: Office de consultation publique de Montréal, 2004).
———. *Participation Sans Exclusion: Rétrospective des 15 Ans de l'OCPM* (Montréal: Office de consultation publique de Montréal, 2017).

———. *Plan d'action en développement social 2019-2020: Rassembler Montréal* (Montréal: Ville de Montréal, 2020).
———. *Plan de Protection et de Mise en Valeur du Vieux-Montréal: Rapport du consultation publique* (Montréal: Office de consultation publique de Montréal, 2013).
———. *PPU du Quartier des spectacles – pôle du Quartier Latin: Rapport du consultation publique* (Montréal: Office de consultation publique de Montréal, 2015).
———. *Projet de développement immobilier du site Norampac: Rapport du consultation publique* (Montréal: Office de consultation publique de Montréal, 2010).
———. *Projet de développement résidentiel du site du Centre Raymond-Préfontaine: Rapport du consultation publique* (Montréal: Office de consultation publique de Montréal, 2011).
———. *Projet de Mise en Valeur du Site Des Ateliers Municipaux Rosemont: Rapport du consultation publique* (Montréal: Office de consultation publique de Montréal, 2006).
———.Proposition de Charte Montréalaise des Droits et Responsabilités: Rapport du consultation publique (Montréal: Office de consultation publique de Montréal, 2004).
———. *Public Consultation Procedures* (Montréal: Office de consultation publique de Montréal, 2011).
———. *Révision de la Charte montréalaise des droits et responsabilités: Rapport du consultation publique* (Montréal: Office de consultation publique de Montréal, 2011).
———. *Secteur d'Emplois Plateau Est: Rapport du consultation publique* (Montréal: Office de consultation publique de Montréal, 2015).
———. *The Effects of Public Debate: 2006-2009 Review* (Montréal: Office de consultation publique de Montréal, 2010).
Ottawa, *Public Engagement Feedback Report, Accessibility Consultations* (City of Ottawa, 2019).
Toronto. Ontario Municipal Social Services Association, *Guide to Accessible Public Engagement* (Toronto: Ontario Municipal Social Services Association, 2013).
Vancouver, City Council Minutes, (1 September 1970) 13.
———. City Council Minutes, (18 January 1977) 56.

United States of America:

Lauder, Ruth. *The Goal Is: Mobility! Environmental and Transportation Barriers Encountered by the Disabled*, by Ruth Lauder (Washington, D.C.: U.S. Department of Health, Education, and Welfare: Social and Rehabilitation Service, 1969).
National Commission on Architectural Barriers to the Rehabilitation of the Handicapped. *Design for All Americans: A Report of the National Commission on Architectural Barriers to the Rehabilitation of the Handicapped* (Washington, DC: Department of Health, Education and Welfare, 1967).

International:

UK, Department for Communities and Local Government, *Improving Public Access to Toilets Guidance on Community Toilet Schemes and SatLav* (London: Communities and Local Government, 2008).

UN Committee on the Rights of Persons with Disabilities (CRPD), *Consideration of reports submitted by States parties under article 35 of the Convention, Initial reports of States parties due in 2012 : Canada*, 2015, CRPD/C/CAN/1.

Non-government Reports

Abelson, Julia & François-Pierre Gauvin. *Assessing the Impacts of Public Participation: Concepts, Evidence and Policy Implications* (Ottawa: Canadian Policy Research Networks 2008)

CAN/CSA-B651-95 Barrier-Free Design: A National Standard of Canada (Ottawa, Canadian Standards Association, 1995).

Canadian Homebuilders' Association – Newfoundland and Labrador, *Building "Yes": A Not-In-My-Backyard (Nimby) Toolkit* (June 2016) online: Canadian Home Builders' Association – Newfoundland & Labrador < https://chbanl.ca/building-yes-a-not-in-my-backyard-toolkit/>

Canadian Housing and Renewal Association, *Minimizing and Managing Neighbourhood Resistance to Affordable and Supportive Housing Projects* (September 2014) online: CHRA < https://chra-achru.ca/wp-content/uploads/2015/08/Minimizing-and-Managing-Neighbourhood-Resistance-to-Affordable-and-Supportive-Housing-Projects.pdf>.

Clogg, Jessica. *Land Use Planning: Law Reform* (Vancouver: West Coast Environmental Law Project, 2007).

Council of Canadians with Disabilities, In Unison: A Canadian Approach to Disability Issues (1998), online: *Council of Canadians with Disabilities* < http://www.ccdonline.ca/en/socialpolicy/poverty-citizenship/income-security-reform/in-unison>.

Canham, Rachel. *Talking Toilets: Assessing the accessibility of public toilet provision in Ottawa, Ontario* (Ottawa: GottaGo! Campaign, 2014).

Centre St-Pierre. *Consultation en Accessibilité universelle intégrée dans la version préliminaire du plan d'action 2019-2020 en accessibilité universelle: Commentaires des participant-e-s et synthèse* (Montreal: Centre St-Pierre, 2019).

Enns, Henry. "The Role of Organizations of Disabled People: A Disabled Peoples' International Discussion Paper", Independent Living Institute, online: *Independent Living Institute* https://www.independentliving.org/docs5/RoleofOrgDisPeople.html.

Environmental Law Centre. Standing in Environmental Matters (Edmonton: Environmental Law Centre, 2014).

Focus Consulting, *Finding Common Ground: Best Practices in Managing Resistance to Affordable Housing* (March 2014) online: *Focus Consulting* http://www.focus-consult.com/wp-content/uploads/Finding-Common-Ground_Best-Practices-in-Managing-Resistance-to-Affordable-Housing-.pdf.

Jürgens, Ralf. "'Nothing About Us Without Us' Greater, Meaningful Involvement of People Who Use Illegal Drugs: A Public Health, Ethical, and Human Rights Imperative" (2005) Canadian HIV/AIDS Legal Network.

Kéroul. *Revue des norms et règlements en matière d'accessibilité des établissements touristiques*, (Montréal: Kéroul, 2014).

Mallet, James S. *Municipal Powers, Land Use Planning, and the Environment: Understanding the Public's Role* (Edmonton: Environmental Law Centre, 2005).

Neptis Foundation. *The state of greenlands protection in south-central Ontario : Neptis studies of the Toronto Metropolitan region* (Toronto: Neptis Foundation, 2004).
New Directions, *Beyond NIMBY: A Toolkit for Opening Staffed Community Homes in Manitoba* (December 2015) online: *New Directions* < https://newdirections.mb.ca/wp-content/uploads/2016/01/Nimby-Toolkit-web.pdf>.
Sheedy, Amanda. *Handbook on Citizen Engagement: Beyond Consultation* (Ottawa: Canadian Policy Research Networks, 2008).
Skelton, Ian. *Keeping them at Bay: Practices of Municipal Exclusion* (Winnipeg: Canadian Centre for Policy Alternatives, 2012).
Solomon, Rhonda Cheryl. *A comparative policy analysis of public toilet provision initiatives in North American cities: recommendations for the creation of a public toilet strategy in Toronto* (Toronto: Cities Centre, University of Toronto, 2013).
The Canadian Hearing Society. *Response To The Ontario Ministry Of Municipal Affairs And Housing: A Consultation On Barrier-Free Access Requirements In The Ontario Building Code* (Toronto: The Canadian Hearing Society, 2002).
The Conference Board of Canada. *The Business Case to Build Physically Accessible Environments* (Ottawa: The Conference Board of Canada, 2018).

Secondary Materials: Monographs

Bacher, John C. *Keeping to the Marketplace: The Evolution of Canadian Housing Policy* (Montreal: McGill-Queen's University Press, 1993).
Bickenbach, Jerome E. *Physical Disability and Social Policy* (Toronto: University of Toronto Press, 1993).
Boyce, William. *A Seat at the Table: Persons with Disabilities and Policy Making* (Montreal: McGill-Queen's University Press, 2001).
Campbell, Fiona Kumari. *Contours of Ableism: The Production of Disability and Abledness* (Hampshire, Great Britain: Palgrave Macmillan, 2009).
Charlton, James I. *Nothing About Us Without Us: Disability Oppression and Empowerment* (Berkeley: University of California Press, 1998).
Nicole Cook, et al, *Resident third party objections and appeals against planning applications: implications for higher density and social housing* (Melbourne: Australian Housing and Urban Research Institute, 2012).
Dupuis, Jean "Federal Housing Policy: An Historical Perspective" (Ottawa: Parliamentary Research Branch, 2003).
Eggleston, Wilfred. *National Research in Canada: The NRC 1916-1966* (Toronto: Clarke, Irwin & Company, 1978).
Eliadis, Pearl. *Speaking Out on Human Rights* (Montréal: McGill-Queens University Press, 2014).
Epstein, Howard. *Land Use Planning* (Toronto: Irwin Law, 2017).
Goldsmith, Selwyn. *Designing for the Disabled: The New Paradigm* (New York: Routledge, 1997).
Johnson, Lyndon B. *Lyndon B. Johnson: 1968-1969 (in two books): containing the public messages, speeches, and statements of the president [Book 2]* (Ann Arbor: University of Michigan Press, 2005).

Kirkland, Sue-Anne. *Architectural Barriers to the Physically Disabled* (Toronto: Canadian Rehabilitation Council for the Disabled, 1973).
Lau, S-T et al. *A Canadian Roadmap for Accessibility Standards* (Toronto: Canadian Standards Association, 2020).
Lord, John. *Impact: Changing the Way We View Disability* (Ottawa: Creative Bound International, 2010).
Malhotra, Ravi & Benjamin Isitt. *Disabling Barriers: Social Movements, Disability History, and the Law* (Vancouver: UBC Press, 2017).
Malloy, Robin Paul. *Land Use Law and Disability: Planning and Zoning for Accessible Communities* (New York: Cambridge University Press, 2015).
McRuer, Robert. *Crip Theory: Cultural Signs of Queerness and Disability* (New York: New York University Press, 2006).
Moore, Steven A & Barbara B Wilson. *Questioning Architectural Judgment: The Problem of Codes in the United States* (Abingdon, Oxon: Routledge, 2013).
Prince, Michael J. *Absent Citizens: Disability Politics and Policy in Canada* (Toronto: University of Toronto Press, 2009).
Prince, Michael J. *Struggling for Social Citizenship: Disabled Canadians, Income Security, and Prime Ministerial Eras* (Kingston: McGill-Queen's University Press, 2016).
Reaume, Geoffrey. *Remembrance of Patients Past: Life at the Toronto Hospital for the Insane, 1870-1940* (Toronto: University of Toronto Press, 2009).
Rioux , Marcia H & Michael Bach, eds. *Disability Is Not Measles: New Research Paradigms in Disability* (North York, ON: Roeher Institute, 1994).
Spade, Dean. *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Brooklyn, NY: South End Press, 2011).
Tyhurst, J S. *More for the Mind* (Toronto: Canadian Mental Health Association, 1963).
Welke, Barbara Young. *Law and the Borders of Belonging in the Long Nineteenth Century United States* (Cambridge UK: Cambridge University Press, 2010).
Williamson, Bess. *Accessible America: A History of Disability and Design* (New York: NYU Press, 2019).
Young, Iris Marion. *Justice and the Politics of Difference* (Princeton: Princeton University Press, 2012).
———. *Inclusion and Democracy (*Oxford, Oxford University Press, 2002).

Secondary Materials: Book Chapters & Edited Collections

Abbas, Jihan & Jijian Voronka. "Remembering Institutional Erasures: The Meaning of Histories of Disability Incarceration in Ontario" in L Ben-Moshe, C Chapman & A Carey, eds, *Disability Incarcerated: Imprisonment and Disability in the United States and Canada* (New York: Palgrave Macmillan, 2014) 121-138.
Ball, Jessica. "Restorative research partnerships in Indigenous communities" in Ann Farrell, ed, *Ethical research with children* (Maidenhead, UK: Open University Press, 2005).
Barnes, Colin. "Understanding the Social Model of Disability: Past, Present and Future" in Nick Watson & Simo Vehmas, eds, *Routledge Handbook of Disability, 2nd Ed* (London: Routledge, 2019) 14-31.
Beall, Jo. "Valuing Difference and Working with Diversity" in Jo Beall, ed, *A City for All: Valuing Difference and Working with Diversity* (London: Zed Books, 1997) 2-37.

Bickenbach, Jerome E. “Disability Human Rights, Law, and Policy” in Gary L. Albrecht, Katherine Seelman & Michael Bury, eds, *Handbook of Disability Studies* (Thousand Oaks: Sage Publications, 2001) 565-584.

Chivers, Sally. “Barrier by Barrier: The Canadian Disability Movement and the Fight for Equal Rights” in Miriam Smith, ed, *Group Politics and Social Movements in Canada* (Toronto: University of Toronto Press Higher Education, 2000) 307-328.

D’Aubin, April. “‘Nothing About Us Without Us’: CCD's Struggle for the Recognition of a Human Rights Approach to Disability Issues” in Henry Enns & Aldred H. Neufeldt, eds, *In Pursuit of Equal Participation: Canada and Disability at Home and Abroad* (Concord, ON: Captus Press, 2003) 111.

Dreidger, Diane. “The Council of Canadians with Disabilities: a voice of our own, 1976-2012” in Nancy Hansen, Roy Hanes & Diane Driedger, eds, *Untold Stories: A Canadian Disability History Reader* (Toronto: Canadian Scholars, 2018) 221.

Edwards, Nancy C. “Knowledge Translation for Intersectoral Action: The Case of Canada’s Building Codes” in Ivy Lynn Bourgeault, et al, eds, *Population Health in Canada: Issues, Research, Action* (Toronto: Canadian Scholars, 2017), 156-160.

Enns, Henry. “Foreword” in Mary Ann McColl & Jerome E Bickenbach, eds, *Introduction to Disability* (Philedelphia: WB Saunders Co, 1998) xi-xii.

Finkler, Lilith. “Re-placing (in)justice: Disability-related facilities at the Ontario Municipal Board (OMB)” in Law Commission of Ontario, ed, *The Place of Justice* (Halifax: Fernwood Publishing, 2011), 95-119.

Imrie, Rob. “Space, place and policy regimes: the changing contours of disability and citizenship” in Karen Soldatic, Hannah Morgan & Alan Roulstone, eds, *Disability, spaces and places of policy exclusion* (New York: Routledge, 2014) 13-30.

———. “The body, disability and Le Corbusier’s conception of the radiant environment” in Butler, Ruth & Parr, Hester, eds, *Mind and Body Spaces: Geographies of illness, impairment and disability* (London: Routledge, 2005) 25-44.

Jones, Charlotte et al. “Pissed Off! Disability Activists Fighting for Toilet Access in the UK” in Maria Berghs et al, eds, *The Routledge Handbook of Disability Activism* (New York: Routledge, 2020) 219-231.

Kuert, Willy. “The Founding of ISO: ‘Things are Going the Right Way’” in ISO Secretariat, *Friendship Among Equals: Recollections from ISO’s first fifty years* (Geneva: ISO, 1997) 13-21.

Moss, Pamela & Michael J Prince. “Nomadic positionings: a call for critical approaches to disability policy in Canada” in Sarah Marie Hall & Ralitsa Hiteva, eds, *Engaging with Policy, Practice and Publics: Intersectionality and Impact* (Bristol: Policy Press, 2020), 121-134.

O’Hara, Susan. “William Stothers: Journalist and Managing Editor for Mainstream Magazine” in Cynthia Jones and William Stothers, eds*, Mainstream Magazine: Chronicling National Disability Politics* (Berkeley: University of California, 2000) 122 at 177-184.

Paré, Jean. “Le rôle de l’Office de consultation publique de Montréal” in Mario Gauthier, Michel Gariépy & Marie-Odile Trépanier, eds, *Renouveler l’aménagement et l’urbanisme : Planification territoriale, débat public et développement durable* (Montréal: Presses de l’Université de Montréal, 2008) 201-219.

Patterson, Lindsey. "The Disability Rights Movement in the United States" in Michael Rembis, Catherine Kudlick & Kim E Nielsen, eds, *The Oxford Handbook of Disability History* (Oxford: Oxford University Press, 2018).
Pothier, Dianne & Richard Devlin. "Introduction: Toward a Critical Theory of Dis-Citizenship" in Dianne Pothier & Richard Devlin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (Vancouver, BC: UBC Press, 2006) 1-22.
Shakespeare, T & N Watson. "The social model of disability: an outdated ideology?" in SN Barnartt & BM Altman, eds, *Exploring Theories and Expanding Methodologies: Where we are and where we need to go (Research in Social Science and Disability, Vol 2)* (Bingley UK: Emerald Group Publishing Limited, 2001) 9-28.
Shildrick, Margrit. "Critical Disability Studies: Rethinking the Conventions for the Age of Postmodernity" in Nick Watson & Simo Vehmas, eds, *Routledge Handbook of Disability, 2nd Ed* (London: Routledge, 2019) 32-44.
Tremblay, Mary. "Going Back to Main Street: The Development and Impact of Casualty Rehabilitation for Veterans with Disabilities, 1945–1948" in Peter Neary & JL Granatstein, eds, *Veterans Charter and Post-World War II Canada* (Montreal: McGill-Queen's University Press, 1998) 160-178.
Tremblay, Mary. "Locomotion" in Mary Ann McColl & Jerome E Bickenbach, eds, *Introduction to Disability* (Philedelphia: WB Saunders Co, 1998) 108-120.
Valiante, Marcia. "In Search of the 'Public Interest' in Ontario Planning Decisions" in Anneke Smit & Marcia Valiante, eds. *Public Interest, Private Property: Law and Planning Policy in Canada* (Vancouver: UBC Press, 2016) 104-134.
Young, Iris Marion. "Difference as a Resource for Democratic Communication" in James Bohman and William Rehg, eds, *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, MA: MIT Press, 1997) 383-406.
———. "Situated Knowledge and Democratic Discussions" in John Andersen & Birte Siim, eds, The Politics of Inclusion and Empowerment: Gender, Class and Citizenship (New York: Palgrave Macmillan, 2004) 19.

Secondary Materials: Journal Articles

"Architectural Barriers to the Handicapped" (1964) 60 Can Nurse 282-3.
"Report from Civilian Rehabilitation Branch" (1956) 56 Labour Gazette 172.
Abelson, Julia, et al. "Examining the role of context in the implementation of a deliberative public participation experiment: Results from a Canadian comparative study" (2007) 64:10 Social Science & Medicine 2115.
Afsahi, Afsoun. "Disabled Lives in Deliberative Systems" (2020) 48:6 Political Theory 751.
Agrawal, Sandeep. "Balancing Municipal Planning with Human Rights: A Case Study" (2014) 23:1 Can J Urban Research 1.
Andersen, Roger W. "Private Housing for the Disabled: A Suggested Agenda" (1980) 56 Notre Dame Law Review 247.
Atkins, C G K. "A Cripple at a Rich Man's Gate: A Comparison of Disability, Employment and Anti-discrimination Law in the United States and Canada" (2006) 21:2 Can J L Soc 87.

Aubin, Raphaëlle & Lisa Bornstein. “Montreal's Municipal Guidelines for Participation and Public Hearings: Assessing Context, Process and Outcomes” (2012) 21:1 Can Plan & Pol’y 106.
Bacher, John C. “Canadian Housing ‘Policy’ in Perspective” (1986) 15 Urban History Review 3.
———. “W. C. Clark and the Politics of Canadian Housing Policy, 1935-1952” (1988) 17 Urban History Review 4.
Bangert, Elvira & Ronald M Laxer. “The Dunlop-Dottridge Lectureship: A Heritage of Excellence” (2018) 28:4 J Can Rheumatology 22.
Barnes, Marian. “Bringing difference into deliberation? Disabled people, survivors and local governance” (2002) 30:3 Pol’y & Pol 319.
———, et al. “Constituting ‘The Public’ in Public Participation” (2003) 81:2 Public Administration 379.
Beaudry, Jonas-Sébastien. “The Vanishing Body of Disability Law: Power and the Making of the Impaired Subject” (2018) 31 Can J Fam L 7.
Beckmann, Lisa. “Undoing Ableism: Disability as a Category of Historical and Legal Analaysis” (2017) 3 On_Culture: The Open Journal for the Study of Culture, online: *on_culture* https://www.on-culture.org/journal/issue-3/beckmann-undoing-ableism/.
Belec, John. “Origins of State Housing Policy in Canada: The Case of the Central Mortgage Bank” (1984) 28:4 Can *Geographer* 377.
Bénard, Mélanie. “Promouvoir l’accessibilité à l’aide de la loi: un appel à une réforme législative au Québec” (2017) 6:2 Can J Disability Stud 78.
Bennett, Sean. “Wheelchair accessibility: Descriptive survey of curb ramps in an urban area” (2009) 4:1 Disability and Rehabilitation: Assistive Technology 17
Bickenbach, Jerome, Sara Rubinelli & Gerold Stucki. “Being a person with disabilities or experiencing disability: Two perspectives on the social response to disability” (2017) 49:7 J Rehab Medicine 543.
Brown, R Blake. “A Taxonomy of Methodological Approaches in Recent Canadian Legal History” (2004) 34:1 Acadiensis 145.
Boardman, Felicity. “Human genome editing and the identity politics of genetic disability” (2019) 11 J Community Genetics 125.
Bremer, Emily S. “On the Cost of Private Standards in Public Law” (2015) 63 Kansas L Rev 279.
Bridgman, Rae. “Criteria for Best Practices in Building Child-Friendly Cities: Involving Young People in Urban Planning and Design” (2004) 13:2 Can J Urban Research, 337.
Bridgman, Rae & Wins Bridgman. “Public toilets, accessibility, and human rights: A Winnipeg pop-up campaign” (2018) 58:3 Plan Canada 40.
Brown, Steven E. “The Curb Ramps of Kalamazoo: Discovering Our Unrecorded History” (1999) 19:3 Disability Stud Q 203.
Bryden, Philip & William Black. “Mediation as a Tool for Resolving Human Rights Disputes: An Evaluation of the B.C. Human Rights Commission’s Early Mediation Project” (2004) 37:1 UBC L Rev 73.
Cameron, M C Peter. “Letters to the Journal” (1965) 93 Can Med A J 27.
Campbell, Ian. “Progress of Rehabilitation in Canada” (1957) 48:2 Can J Pub Health 58.
Champagne, Jean-Rémi. “Canadian action on handicapping environments” (1988) 2:3 Health Promotion 305.

Church, Kathryn. 'Beyond "Bad Manners": The Power Relations of "Consumer Participation" in Ontario's Community Mental Health System' (1996) 15:12 Can J Community Mental Health 27.
Clifford, Stacy. "Making disability public in deliberative democracy" (2012) 11:2 Contemp Political Theory 211.
Clutterbuck, Alyssa. "Rethinking *Baker*: A Critical Race Feminist Theory of Disability" (2015) 20 Appeal 51.
D'Aubin, April. "Personal Services: A Challenge for the Nineties" (1990) 9:2 Can J Community Mental Health 9.
Dunn, Linda K & Shiki Xie. "Standards Collection Development and Management in an Academic Library: A Case Study at The University of Western Ontario Libraries" (2017) 87 Issues in Science & Technology Librarianship, online: Issues in Science & Technology Librarianship <http://istl.org/17-summer/refereed5.html>.
Edwards, Nancy, et al. "Advocating for improvements to building codes for the population's health" (2019) 110 Can J Pub Health 516.
Epstein, Howard M. "Subsidiarity at Work - The Legal Context for Sustainability Initiatives at the Local Government Level: How an environmental agenda could be advanced by Canadian municipalities" (2009) 63 MPLR 56.
Finkler, Lilith & Jill L Grant. "Minimum Separation Distance Bylaws for Group Homes The Negative Side of Planning Regulation" (2011) 20:1 Can J Urban Research 33.
Fondo, Grant P. "Access Reigns Supreme: Title III of the Americans with Disabilities Act and Historic Preservation" (1994) 9 BYU Journal Public Law 99.
Fougeyrollas, Patrick & Yan Grenier, "Monitoring Disability Policies and Legislation towards Effective Exercise of Rights to Equality and Inclusive Access for Persons with Disabilities: The Case of the Quebec Model" (2018) 8:2 Societies 41.
Funnell, Sarah et al. "'Nothing About Us, without Us.' How Community-Based Participatory Research Methods Were Adapted in an Indigenous End-of-Life Study Using Previously Collected Data" (2020) 39:2 Can J Aging 145.
Galer, Dustin. "'A Place to Work Like Any Other?' Sheltered Workshops in Canada, 1970-1985" (2014) 3:2 Can J Disability Stud 1.
Gauthier, M & L Simard. "Le Bureau d'audiences publiques sur l'environnement du Québec : genèse et développement d'un instrument voué à la participation publique" (2011) 17:1 Télescope 39.
Gharebaghi. Amin et al. "The Role of Social Factors in the Accessibility of Urban Areas for People with Motor Disabilities" (2018) 7:4 Int'l J Geo-Info.
Gray, David B, Mary Gould & Jerome E Bickenbach. "Environmental Barriers and Disability" (2003) 20 Journal of Architectural and Planning Research 29.
Green, Ralph James. "An Introductory Theoretical and Methodological Framework for a Universal Mobility Index (UMI) to Quantify, Compare, and Longitudinally Track Equity of Access Across the Built Environment" (2011) 21:4 Journal of Disability Policy Studies 219.
Hamraie, Aimi. "Enlivened City: Inclusive Design, Biopolitics, and the Philosophy of Liveability" (2018) 44:1 Built Env't 32.
Heijden. Jeroen Van Den. "One task, a few approaches, many impacts: Private-sector involvement in Canadian building code enforcement" (2010) 53:3 Can Pub Admin 351.

D N Henning, “Consideration of the physically disabled” (1971) CBD-135:3 Canadian Building Digest 1.
Hoehn, Felix & Michael Stevens. “Local Governments and the Crown's Duty to Consult” (2018) 55:4 Alberta L Rev 971.
Hulchanski, J. “The 1935 Dominion Housing Act: Setting the Stage for a Permanent Federal Presence in Canada’s Housing Sector” (1986) 15:1 Urb Hist Rev 19.
Imrie, Rob. “The interrelationships between building regulations and architects’ practices” (2006) 34 Environment and Planning B: Planning and Design 925.
Inckle, Kay. “Debilitating Times: Compulsory Ablebodiedness and White Privilege in theory and Practice” (2015) 111:1 Fem Rev 41.
Jacobs, Laverne. “An Introduction to Exploring Law, Disability, and the Challenge of Equality in Canada and the United States: Papers from the Berkeley Symposium” (2015) 32:1 Windsor Y B Access Just 1.
———. “‘Humanizing’ Disability Law: Citizen Participation in the Development of Accessibility Regulations in Canada” (2016) International Journal of Open Governments 93.
Jacobs, Laverne, Victoria Cino & Britney DeCosta. “The Accessibility for Manitobans Act: Ambitions and Achievements in Antidiscrimination and Citizen Participation” (2016) 5:4 Can J Disability Stud 1.
Keene, Judith. "Toward a Definition of Discrimination - Exemptions under the New Ontario Human Rights Code" (1982) 3:3 Advoc Q 265.
Kitchin, Rob. “‘Out of Place’, ‘Knowing One’s Place’: Space, power and the exclusion of disabled people” (1998) 13:3 Disability & Society 343.
Kitchin, Rob & Robin Law. “The Socio-spatial Construction of (In)accessible Public Toilets” (2001) 38:2 Urban Studies 287.
Larrouy, Muriel. “Invention of Accessibility: French Urban Public Transportation Accessibility from 1975 to 2006” (2014) 2:2 Rev Dis Stud Int’l J.
Leon, Roberto & Jim Rossberg. “Evolution and Future of Building Codes in the USA” (2002) 22:2 Structural Engineering Int 265.
Lepofsky, M David. “The Charter's Guarantee of Equality to People With Disabilities - How Well is it Working?” (1998) 16 Windsor Y B Access Just 155.
———. “The Long, Arduous Road To A Barrier-Free Ontario For People With Disabilities: The History Of The Ontarians with Disabilities Act - The First Chapter” (2004) 15 National J Constitutional L 125.
Leung, Colette. “The Living Archives Project: Canadian Disability and Eugenics” (2012) 1 Can J Disability Stud 143.
Levesque, Anne & Ravi Malhotra. “The Dawning of The Social Model? Applying a Disability Lens To Recent Developments in the Law of Negligence” (2019) 13:1 McGill JL & Health 1.
Listokin, David & David B Hattis. “Building Codes and Housing” (2005) 8 Cityscape: A Journal of Policy Development and Research 21.
Liston, Mary. “Expanding the Parameters of Participatory Public Law: A Democratic Right to Public Participation and the State’s Duty of Public Consultation” (2017) 63:2 McGill LJ 375.

Malhotra, Ravi & Robin Hansen. “The United Nations Convention on the Rights of Persons with Disabilities and Its Implications for the Equality Rights of Canadians with Disabilities: The Case of Education” (2011) 29:1 Windsor YB Acess Just 73.
McColl, Mary Ann et al. “People with Disabilities and the Charter: Disability rights at the Supreme Court of Canada under the Charter of Rights and Freedoms” (2016) 5:1 Can J Disability Stud 183.
McKenna, Ian B. “Legal Rights for Persons with Disabilities in Canada: Can the Impasse Be Resolved?” (1997) 29:1 Ottawa L Rev 153.
McLaren, Duncan. “Third-party Rights of Appeal in Scotland: Something Rotten?” (2006) 7:3 Planning Theory & Practice 346.
Meekosha, Helen & Russell P Shuttleworth. “What’s so ‘critical’ about critical disability studies? Helen Meekosha and Russell Shuttleworth” (2009) 15:1 Austl J HR 50.
Mendelson, Nina A. "Private Control over Access to Public Law: The Perplexing Federal Regulatory Use of Private Standards" (2014) 112:5 Mich L Rev 737-807.
Minich, Julie Avril. “Enabling Whom? Critical Disability Studies Now” (2016) 5.1 Emergent Crit Analytics for Alternative Human.
Mosoff, Judith. “Is the Human Rights Paradigm ‘Able’ to Include Disability: Who’s In? Who Wins? What? Why?” (2000) 26 Queen’s Law Journal 225.
Nasca, Tessa F et al. “Participatory planning in a low-income neighbourhood in Ontario, Canada: building capacity and collaborative interactions for influence” (2019) 54:4 Community Dev J, 622.
Nelson, Alex. “Nothing about us without us: Centering lived experience and revolutionary care in efforts to end and prevent homelessness in Canada” (2020) 2:2 Radical Housing J 83.
Nejad, Sarem et al. “‘This is an Indigenous city; why don’t we see it?’ Indigenous urbanism and spatial production in Winnipeg” (2019) 63:3 Can Geographer 413.
Poste, Zachary. “Annexing the Subterranean: Montreal’s Metro and the Reconfiguration of Urban Space” (2016) 30:2 Historical Discourses 3
Pothier, Dianne. “Tackling Disability Discrimination at Work: Toward a Systemic Approach” (2010) 4:1 McGill JL & Health 17.
Prince, Michael J. “Inclusive City Life: Persons with Disabilities and the Politics of Difference” (2008) 28:1 Disability Studies Quarterly digital.
———. “Reconsidering Knowledge and Power: Reflections on Disability Communities and Disability Studies in Canada” (2016) 5 Canadian Journal of Disability Studies 1.
Rossiter, Kate & Annalise Clarkson. “Opening Ontario’s ‘Saddest Chapter’: A Social History of Huronia Regional” (2013) 2:3 Can J Disability Stud 1.
Schalk, Sami. “Critical Disability Studies as Methodology” (2017) 6.1 Emergent Crit Analytics for Alternative Human.
Sépulchre, Marie. “Ensuring equal citizenship for disabled people: A matter of rights or a matter of costs?” (2020) 14:2 Alter 114.
Shipley, Robert & Stephen Utz. “Making it Count: A Review of the Value and Techniques for Public Consultation” (2012) 27:1 J Plan Lit 22.
Silverman, Robert Mark. “Central city socio-economic characteristics and public participation strategies” (2006) 26:3/4 Int’l J Sociology & Social Pol’y 138.
Strong-Boag, Veronica. “‘Children of Adversity’: Disabilities and Child Welfare in Canada from the Nineteenth to the Twenty-First Century” (2007) 32:4 J Fam Hist 413.

tenBroek, Jacobus “The Right to Live in the World: The Disabled in the Law of Torts” (1966) 54:2 Cal L Rev 841.
Wakeling, Thomas W. “Frederick A. Laux, Q.C., Memorial Lecture” (2018) 55:3 Alberta L Rev 839.
Willey, Stephen. “Are planning appeal rights necessary? A comparative study of Australia, England and Vancouver BC” (2005) 63:3 Progress in Planning 265.
———. “Planning Appeals: Are Third Party Rights Legitimate? The Case Study of Victoria, Australia” (2006) 24:3 Urb Pol’y & Research 369.
Williamson, Bess. “The People’s Sidewalks: Designing Berkeley’s Wheelchair Route, 1970-1974” (2012) 2 Boom: A Journal of California 49.
Wilson, A D. “Canadian Housing Legislation” (1959) 2:4 Can Pub Admin 214.
Wolf, Tyler RT. “Existing in a Legal Limbo: The Precarious Legal Position of Standards-Development Organizations” (2008) 65 Wash & Lee L Rev 807.
Woods, Brian & Nick Watson, “The social and technological history of wheelchairs” (2004) 11:9 Int’l J Ther & Rehabilitation 407.
Wu, Allan. “Regulating Project Risk: Project Development in the Regulatory State” (2018) 2018 J Can C Construction Law 213 at 244-5.

Secondary Materials: Newspaper Articles

"Aménagement d'un placottoir”, *Le Plateau-Mont-Royal* online: <http://ville.montreal.qc.ca/portal/page?_pageid=7297,129877587&_dad=portal&_schema=PORTAL>.
“City of Montreal asks for citizens’ help in developing universal accessibility plan” *CBC News* (5 October 2018), online: <https://www.cbc.ca/news/canada/montreal/public-consultations-accessibility-1.4851688>.
“La terrasse de L'ITHQ accessible à tous” *Institut de tourisme et d’hôtellerie* (18 February 2019) online: <https://www.ithq.qc.ca/institut/actualites/article/la-terrasse-de-lithq-accessible-a-tous/>.
“Manitoba to make renos to accomodate disabled politicians” *Medicine Hat News* (11 January 2016).
“Montréal aidera les commerçants à accueillir les clients à mobilité réduite”, *Radio-Canada* (26 January 2017) online: <https://ici.radio-canada.ca/nouvelle/1013333/aide-pour-aider-commercants-accueillir-clients-mobilite-reduite>.
“Montreal to launch public consultations on accessibility for all” *Montreal Gazette* (4 October 2018), online: <https://www.montrealgazette.com/news/local-news/montreal-to-launch-public-consultations-on-accessibility-for-all/>.
“Nation-wide Support Urged for Disabled” *Winnipeg Free Press* (28 August 1952).
“New Building Code, A Guide for Toronto” *The Globe* (29 April 1912) 8.
“Prefer Jobs to Pension for Disabled” *The Windsor Star* (6 May 1954).
“Seek rights, handicapped urged” *The Globe and Mail* (5 November 1973).
“STM Metro accessibility plan will mean more elevators, ramps”, *CBC* (7 March 2017), online: <https://www.cbc.ca/news/canada/montreal/stm-metro-accessibility-plan-will-mean-more-elevators-ramps-1.4013361>
“Subways Need Not Be Sewers”, *The Architectural Forum* 128:1 (January 1968) 68.

"UdeM ordered to pay $10,000 over accessible bathroom complaint", *CTV News* (4 February 2017) online: <https://montreal.ctvnews.ca/udem-ordered-to-pay-10-000-over-accessible-washroom-complaint-1.3271204>.
"Une Autre Terrasse Bientôt Accessible À Tous", *Journal de Montreal* (5 July 2017) 20.
"175 commerces inaccessibles sur la rue Mont- Royal", *Le Journal de Montreal* (11 September 2010) online: <https://www.journaldemontreal.com/2010/09/11/175-commerces-inaccessibles-sur-la-rue-mont-royal-1>.
Anderssen, Erin. "Wheeling and dealing at the UN The 13 activists weren't all that keen on attending the ceremony in New York until they were promised an audience with the Prime Minister", *The Globe and Mail* (7 March 1998) D1.
Angiolini, Daphné. "Victoire pour le RAPLIQ*", Le Plateau* (8 March 2012) 3.
Bélisle, Sarah. "Toujours pas d'accès aux terrasses de l'avenue Mont-Royal pour les personnes à mobilité réduite", *24 heures* (15 May 2011).
———. "Personnes à mobilité réduite: <<Enfin>>, les terrasses du Plateau accessible", *24 heures* (5 March 2012).
Bernard, Florian. "La CUM se propose d'intégrer les handicapés à la vie urbaine" *La Presse* (12 November 1975) D17.
Bernier, Yves. "Monsieur Québec", *Le Soleil* (26 May 1977) A7.
Blake, Peter. "Downtown in 3-D", *The Architectural Forum* 125:2 (September 1966) 31 at 31.
Boisvert, Philippe. "L'accessibilité universelle jugée insatisfaisante", *Le Plateau* (6 July 2011).
Canadian National Institute for the Blind. Press Release, "CNIB welcomes new federal accessibility legislation" *Globe Newswire* (June 25, 2018), online: <www.globenewswire.com/news-release/2018/06/25/1528787/0/en/CNIB-welcomes-new-federal-accessibility-legislation.html>.
City of Montreal, "Chantier en accessibilité universelle 2020-2024", *City of Montreal* online:, <https://www.realisonsmtl.ca/accessiblite>.
Cooke, Alex. "Inquiry to examine washroom access" *Cape Breton Post* (4 July 2018).
Delacour, Emmanuel. "Rosemont: le tiers des terrassess «inaccessibles», plaide le RAPLIQ" *Métro Montréal* (30 Aug 2019) 3.
Derfel, Aaron. "MUHC upgrading public washrooms to better accommodate disabled users", *The Gazette* (20 September 2018) A1.
Devet, Robert. "Fight for what's right, disability activist tells Nova Scotia Human Rights Commission", *The Nova Scotia Advocate* (20 April 2018) online: <https://nsadvocate.org/2018/04/20/fight-for-whats-right-disability-activist-tells-nova-scotia-human-rights-commission/>.
Descôteaux, Bernard. "Les handicapés devront attendre un an leur service de transport en commun", *Le Devoir* (27 May 1976) 2.
Duff, Morris. "The Physically Disabled are Trapped in a Prison of Our Indifference", *Toronto Star* (9 May 1970) C5.
Dunphy, Catherine. "A Crusader for Street-Level Change: Bill Owen Fought to Make Toronto More Accessible", *Toronto Star* (12 December 2005) B5
———. "The Disabled Still Face a World of Barriers", *Toronto Star* (16 September 2000) NE28.
Editorial, "Other disabled people need help, too" *The Toronto Star* (10 June 1977) B4.
Frazee, Catherine. "Assisted dying legislation puts equality for people with disabilities at risk", *Globe and Mail* (17 November 2020) online: *Globe and Mail*

<https://www.theglobeandmail.com/opinion/article-assisted-dying-legislation-puts-equality-for-people-with-disabilities/>.
Freed, Josh. “A nice gesture for a woman in a wheelchair: A $ 250 fine: Small businesses face city’s wrath for letting people sit outside on sidewalk” *Montreal Gazette* (29 August 2015).
———. “A nice gesture for a woman in a wheelchair: A $ 250 fine: Small businesses face city’s wrath for letting people sit outside on sidewalk” *Montreal Gazette* (29 August 2015).
Gorman, Michael. “Lack of progress on human rights order frustrates accessibility activist”, *CBC News* (9 August 2019) online: <https://www.cbc.ca/news/canada/nova-scotia/human-rights-accessibility-government-1.5240482>.
Guthrie, Jennifer. “L’accessibilité universelle à Québec”, *Journal Metro* (20 June 2011).
Hawkins, H. “Ramped Curbs Help Wheelchair Users”, *Toronto Star* (21 January 1972) 7.
Hirez. Carole le. “Empêche de voter”, *Le Plateau* (19 November 2009).
Hudes, Sammy. “Inglewood residents push back against proposed 12-storey development”, *Calgary Herald* (12 July 2020) online: Calgary Herald <https://calgaryherald.com/news/local-news/inglewood-residents-push-back-against-proposed-12-storey-development/>.
Klingbeil, Annalise. “People who encounter barriers weigh in on city building standards” *Calgary Herald* (23 July 2016).
Kula, Tyler. “Sarnia facing human rights complaint” *The London Free Press* (11 October 2018).
Labby, Bryan. “Disabled Calgarians ask why Calgary Transit Access doesn't 'treat us with respect'” *CBC News* (11 March 2019) online: <https://www.cbc.ca/news/canada/calgary/calgary-transit-access-complaints-foip-disabled-transportation-1.5049319>.
Lampert, Allison. “Card readers draw complaint”, *The Gazette* (19 February 2010) B1.
Lampert, Allison. “Victory for the Disabled”, *The Gazette* (15 July 2010).
Lee, Jeff. “A Parallel Dream: Paralympics are about Sports, but also Human Rights”, *Vancouver Sun* (12 March 2009) E4.
MacLeod, Rex. “A Champion in a Wheelchair Goes to Bat for Handicapped”, *Toronto Star* (8 March 1975) B5.
Magalhaes, Zoe. “Les oubliés du déconfinement” *Métro Montréal* (15 July 2020) 5
Magder, Jason. “Group to take fight for more accessible women's shelters to human rights commission” *Montreal Gazette* (9 March 2021).
Marquez, Reynaldo. “Terrasses enfin accessibles”, *le Journal de Montréal* (1 August 2011) online: <https://www.journaldemontreal.com/2011/08/01/enfin-accessibles>.
McAree, Mark. “Security for Costs Orders Against Environmental Groups Bolstered by Pointes Decision”, *Mondaq* (24 February 2014), online: <https://www.mondaq.com/canada/Environment/294972/Security-For-Costs-Orders-Against-Environmental-Groups-Bolstered-By-Pointes-Decision>.
McDonald, Robert. “The handicapped help Canada grow”, *Toronto Daily Star* (12 July 1965) 20.
McQuigge, Michelle. “Canadians with Disabilities Act to focus on employment: minister”, *Global News* (5 February 2017) online: *Global News* <globalnews.ca/news/3228515/canadians-with-disabilities-act-to-focus-on-employment-minister/>.
Meagher, John. “Human rights commission takes disabled voter's case to court”, *Montreal Gazette* (13 January 2016).

Miller, Jacquie. “Poppy primer: Everything you should know about Remembrance Day poppies” *Ottawa Citizen* (4 November 2014) online*: Ottawa Citizen* < https://ottawacitizen.com/news/local-news/all-about-remembrance-day-poppies-how-they-began-how-to-wear-them-and-the-ottawa-connection>.

Monsebraaten, Laurie. “Disability rights advocates welcome national legislation”, *The Star* (June 21, 2018) online: <www.thestar.com/news/canada/2018/06/21/disability-rights-advocates-welcome-national-legislation.html>.

Montgomery, Sue. “Wheelchair access to terrasses needs to be addressed: activists’ group” *Montreal Gazette* (16 May 2011).

Rosie Mullaley, “‘These establishments need all the help they can get’ St. John’s council approves outdoor patios for Churchill Square, more for downtown” *The Telegram St. John’s* (24 March 2021).

Obituary of Ian Campbell, *Ottawa Citizen* (23 May 2002) online: <www.legacy.com/obituaries/ottawacitizen/obituary.aspx?n=ian-campbell&pid=138256431>.

O’Toole, Megan O’Toole. “Family Plight Sparks Furor in the Beach” *National Post* (27 May 2010).

Pike, Helen. “Not everyone liking expanded patios and sidewalk lanes on 17th Avenue SW” *CBC News* (28 May 2020), online: *CBC News* <https://www.cbc.ca/news/canada/calgary/calgary-patios-beltline-resident-pedestrian-safety-1.5589430>.

Pinard, Guy. “Efforts louables de la Ville pour les handicapés”, *La Presse* (27 May 1981) A3.

RAPLIQ. Press Release, “Montreal reimagined… ‘No cars, no disabled people’” *Newswire* (21 May 2020), online: *Newswire* <https://www.newswire.ca/news-releases/montreal-reimagined-no-cars-no-disabled-people--838520444.html>.

Rex, Kathleen. “West moving ahead of Ontario aiding disabled, Toronto man says” *The Globe and Mail* (13 November 1973).

Rieger, Sarah. " Barriers to accessibility at Calgary's new Central Library”, *CBC News Calgary* (November 13, 2018) online: <https://www.cbc.ca/news/canada/calgary/accessibility-barries-calgary-central-library-1.4904287>.

Rocha, Roberto. “Montreal is 375 years old, but how old are its buildings?”, *CBC* online: <https://www.cbc.ca/news2/interactives/montreal-375-buildings/>.

Ruckleshaus, Jay. “The Non-Politics of Disability” *The New York Times* (18 January 2017) online: The New York Times <https://www.nytimes.com/2017/01/18/opinion/denouncing-trump-wont-help-disability-rights.html>.

Saucier, Stéphanie. “Assez larges, les trottoirs?”, *24 heures* (8 June 2010) 5.

Schaffter, Cathy. “What They Want: Freedom Through Mobility”, *Winnipeg Tribune* (3 September 1977) 10.

Schué, Romain. “La Ville octroie 1,6M$ sur 6 ans pour l’accessibilité universelle des commerces”, *Métro* (26 January 2017) online: https://journalmetro.com/actualites/montreal/1081684/les-commerces-seront-plus-accessibles-aux-personnes-a-mobilite-reduite/.

Shreve, Ellwood. “Scotti’s Spot Tarnished” *The Chatham Daily News* (5 May 2017).

Sioui, Marie-Michèle. ”Accès pour handicapés: poursuite de RAPLIQ”, *Journal Métro* (13 August 2012) online: < https://journalmetro.com/actualites/montreal/138614/acces-pour-handicapes-poursuite-du-rapliq/>.

Smith, Kenneth B. "Man in the News: Housing Role Stressed to Architects by First President from Public Service" *The Globe and Mail* (20 February 1970) B5.
Spector, Dan. "Bar owner defies Montreal's terrace rules on purpose", *Global News* (29 June 2017) online: < https://globalnews.ca/news/3566705/bar-owner-defies-montreals-terrasse-rules-on-purpose/>.
Stolte, Elise. "Calgary supportive-housing effort harnesses the power of buy-in" *Edmonton Journal* (20 May 2017), B3.
Tank, Phil. "Advocate seeks true accessibility in city sites, jobs - Speaker with disability had to address committee from back of meeting room" *Saskatoon StarPhoenix* (5 September 2018).
Tardif, Germain. "Les p'tites nouvelles", *La Presse: Rive Sud* (5 September 1978) 4.
Weil, Bernard Rick Madonik & Boris Spremo. "City Limits: Barriers to the Disabled", *Toronto Star* (17 September 2000) NE6.
Zajac, Ronald. "Accessiblity cash sought: Advocacy group seeks extra $10k in municipal budget for accessible meetings" *The Recorder & Times* (3 December 2013).
———. "Neighbours object to group home parking" *The Recorder and Times* (6 April 2017).

Secondary Materials: Other

"Fact Sheet – Barrier-Free Requirements for Renovations", online: *Government of Ontario* <https://v0.oboa.on.ca/news/files/Final%20Renovations%20Fact%20Sheet.pdf>.
"Homes and buildings: Saving money and making our buildings more energy efficient" (11 January 2018), online: *Government of Canada* <https://www.canada.ca/en/services/environment/weather/climatechange/climate-action/federal-actions-clean-growth-economy/homes-buildings.html>.
"Protecting Canada's Fresh Water" (11 March 2021), online: *Government of Canada.* <https://www.canada.ca/en/environment-climate-change/corporate/transparency/consultations/protecting-canada-fresh-water.html>.
Alberta Ministry of Municipal Affairs, *Application for Barrier-free Relaxation,* online: *Alberta Ministry of Municipal Affairs* <http://www.municipalaffairs.alberta.ca/documents/Barrier-Free-Application-Form.pdf>.
American Standards Association. *Specifications for Making Buildings and Facilities Accessible to and Usable by the Handicapped* (New York: American Standards Association, 1961).
Arbour, Myriam. *Le point de vue des parties prenantes sur les processus de consultation dans une demarche d'acceptabilité sociale de projets urbains: exemples de deux cas Montréalais* (MA Thesis: Université du Québec à Montréal 2016).
ARCH Disability Law Centre, Press Release, "ARCH Disability Law Centre welcomes the passage of the Accessible Canada Act" (May 30, 2019), online: *ARCH Disability Law Centre* <archdisabilitylaw.ca/press-release-arch-disability-law-centre-welcomes-the-passage-of-the-accessible-canada-act/>.
Beaverbrook Art Gallery, online: *Historic Places* <https://www.historicplaces.ca/en/rep-reg/place-lieu.aspx?id=16982&pid=0>.
Boyne, Melanie. *The Montreal Metro: Reflections of a City* (Carleton University, 2002) [unpublished].
British Columbia Institute of Technology, *Student information brochure 1964-1965* (Burnaby: British Columbia Institute of Technology, 1964).

City of Calgary, "Accomodations and Services for Accessibility", online: *City of Calgary* <https://www.calgary.ca/csps/cns/research-and-strategy/advisory-committee-on-accessibility/accomodations-and-services.html>.

———. Council and Committee Agendas, Minutes and Video, online: *City of Calgary* <https://www.calgary.ca/ca/city-clerks/legislative-services/agenda-minutes.html?redirect=/agendaminutes>.

———. "Council Chamber Renovation" online: *City of Calgary* <https://www.calgary.ca/cs/cpb/projects-and-initiatives/council-chamber-renovation.html>.

City of Montreal. "PAAC – Retail business accessibility program", online: City of Montreal <https://ville.montreal.qc.ca/portal/page?_pageid=9537,143244075&_dad=portal&_schema=PORTAL>.

City of Vancouver. "Temporary Expedited Patio Program (TEPP)", online: City of Vancouver <https://vancouver.ca/doing-business/expedited-patio-program.aspx>.

Clément, Dominique, Will Silver & Daniel Trottier. *The Evolution of Human Rights in Canada* (Ottawa: Minister of Public Works and Government Services, 2012).

Clemmensen, Bruce. "Building Codes – A Good Tool In The Right Context" (Global Policy Summit on the Role of Performance-Based Building Regulations in Addressing Societal Expectations, International Policy, and Local Needs delivered at The National Academy of Science, Washington, DC, 3 November 2003) online: *Inter-Jurisdictional Regulatory Collaboration Committee* <https://ircc.info/new%20page/Workshops/Documents/USA2003_1-02_BruceClemmensen_workshops.pdf>

Commission des droits de la personne et des droits de la jeunesse Québec. *Mémoire à la commission de l'aménagement du territoire de l'assemblée nationale: Projet de loi n°16, Loi visant principalement l'encadrement des inspections en batiment et de la copropriete divise, le remplacement de la denomination de la regie du logement et l'amelioration de ses regles de fonctionnement et modifiant la loi sur la societe d'habitation du quebec et diverses dispositions legislatives concernant le domaine municipal* (Québec: Commission des droits de la personne et des droits de la jeunesse Québec, 2019)

———.News Release, "Bill 16 is an opportunity to expand access to justice and improve the accessibility of buildings for public use" (4 June 2019), online: Commission des droits de la personne et des droits de la jeunesse <https://www.cdpdj.qc.ca/en/news/bill-16-is-an-opportunity-to-e-2>.

———. News Release, "Universal access to supermarkets and pharmacies: six major chains pledge to
improve their practices" (11 September 2013), online: Commission des droits de la personne et des droits de la jeuness <https://www.cdpdj.qc.ca/en/news/universal-access-to-supermarke-3>.

Driedger, Diane. *The Origins and History of Disabled Peoples International (DPI), 1945-1985* (MA Thesis: The University of Manitoba 1987).

Ex Aequo, "À propos" online: Ex Aequo, <https://exaequo.net/a-propos/>.

Gabias, Mary Ellen. "Organize: Working Together to Live the Lives We Want" (CFB 'Organize' Convention delivered at the Sandman Inn, Victoria, BC, 5 May 2018) online: *The Canadian Federation of the Blind* <https://www.cfb.ca/organize-working-together-to-live-the-lives-we-want>.

Goldsborough, Gordon. “Memorable Manitobans: Anthony Theodore “Tony” Mann (c1921-1996)” (29 December 2018) online: *Manitoba Historical Society* <http://www.mhs.mb.ca/docs/people/mann_at.shtml>.
Grewal, Taranjeet Kaur. “Inclusive City Building: Public Engagement Processes in the GTA” (Working paper No. 2020/03) (Toronto: Ryerson University 2020).
Hagg, Matthew. *Making Montréal’s Indoor City Accessible for People with Disabilities* (Master of Urban Planning, Mcgill University, 2009).
Hagg, Matthew & Ahmed M El-Geneidy. *Making Montreal’s Indoor City Accessible for People With Disabilities* (2010).
Interview with Laurence Parent (31 July 2018), audio of interview and transcript on file with author.
Interview with Linda Gauthier (14 August 2018), audio of interview and transcript of interview on file with author.
Katz, Jonathan Paul. “Facilitating Movement: Assessing the Adequacy, Accessibility, and Usability of Public Toilet Infrastructure” online: *Greater Greater Washington* <https://ggwash.org/files/FacilitatingMovementPublicVersion.pdf>.
Laurence 416. “Nous n’aurons pas d’été cette année [We will have no summer this year]” (13 August 2010), online: YouTube <https://www.youtube.com/watch?v=pZvDeF_n0eU>.
Law Commission of Ontario. *A Framework for the Law as it Affects Persons with Disabilities* (Toronto: Law Commission of Ontario, 2012).
National Research Council Canada, “Historical Editions of Codes Canada publications” (17 September 2020), online: <https://nrc.canada.ca/en/certifications-evaluations-standards/codes-canada/codes-canada-publications/historical-editions-codes-canada-publications-1941-1998>.
———. “How the national codes are developed” (26 March 2019), online: *National Research Council*, < https://nrc.canada.ca/en/certifications-evaluations-standards/codes-canada/codes-development-process/how-national-codes-are-developed>.
Northwest Territories Human Rights Commission, “Gap Between National Building Code and Accessibility Standards Risks Human Rights Complaint” (16 November 2020), online: Northwest Territories Human Rights Commission < https://nwthumanrights.ca/newspost/gap-between-national-building-code-and-accessibility-standards-risks-human-rights-complaint/>.
Office de consultation publique de Montréal, “English Resources”, online: OCPM, <https://ocpm.qc.ca/fr/english>.
Ontario Human Rights Commission. “Backgrounder: Settlement with respect to the exhibition of movies with closed captioning”, *Ontario Human Rights Commission*, online: <http://www.ohrc.on.ca/en/backgrounder-settlement-respect-exhibition-movies-closed-captioning>.
Parker, Tara. “Human Rights Dispute Resolution: Protecting the ‘Public Interest’” (1999), online: Canadian Forum on Civil Justice <http://cfcj-fcjc.org/sites/default/files/docs/hosted/17464-rights_dr.pdf>.
RBC, Press Release, “A place to call home - Canada's retiring boomers hope to stay put, despite potential health issues” (30 May 2019), online: *RBC* <http://www.rbc.com/newsroom/news/2013/20131024-myths-realities.html>.

Restaurants Canada, “Upcoming changes to Nova Scotia’s building code” (6 August 2020), online: Restaurants Canada < https://www.restaurantscanada.org/industry-news/upcoming-changes-to-nova-scotias-building-code/>.

The Eugenics Archive, Social Sciences and Humanities Research Council of Canada, online: *Eugenics Archive* https://eugenicsarchive.ca/.

Wilson, Barbara B. *Social Movement Towards Spatial Justice: Crafting a Theory of Civic Urban Form* (University of Texas at Austin, 2010) [unpublished].

Wong, Alice. "Resisting Abelism: Disabled People and Human Gene Editing" (2017) online: *Fabric of Digital Life* <https://fabricofdigitallife.com/index.php/Detail/objects/3288>.