Access to Information and the *AODA*: A Discrete Concern for Persons with Disabilities in Light of Communication Technology

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Introduction

Internet and digital media play an increasingly integral role in the professional, commercial and social lives of Canadians today. Excluding any group from these avenues would be a violation of the human and civil rights that are central to the social fabric of Canadian society. Almost ten years ago in their study, Kerry Dobransky and Eszter Hargittai sought to analyze the spread of information and technology communications and its potential to help persons with disabilities by improving their equality rights in the United States.[1] Their research suggested that persons with disabilities were not being involved in the development of information technology and were facing significant barriers in accessing it. Dobransky and Hargittai suggested many different approaches to addressing this issue, among them emphasizing the need for public policy supporting the development of technology that is universally accessible from inception to avoid lags between when new technology is developed and when assistive technology becomes available to enhance accessibility.[2] Unfortunately, this accessibility issue still remains an issue for many persons with disabilities globally and in Canada today. When persons with

[1] Kerry Dobransky, Eszter Hargittai. "The Disability Divide in Internet Access and Use. Information", Communication & Society (2006) 9:3 at 313-334.
[2] *Ibid* at 330.

disabilities use media such as the Internet or television to gain access to information and communication their experience is still significantly hindered by many barriers.

For example, individuals with visual impairments still face problems accessing information incompatible with screen readers. Individuals with hearing impairments often encounter issues accessing information through video due to either the absence of closed captioning or poor quality captions. Furthermore, individuals with cognitive or physical challenges face a range of difficulties when content is not designed and programmed in a manner that is compatible with their assistive technologies.

A critical analysis of the discrete concern of accessibility of information and communication technologies for persons with disabilities sheds light on the barriers that exist despite legislative attempts to improve accessibility standards in Ontario. The solution to a truly digitally accessible Canada must consist of a threefold multi-faceted approach. First the government must effectively enforce proactive legislation such as the *Accessibility for Ontarians with Disabilities Act* ("*AODA*") and the *Ontario Human Rights Code*. Second, drawing from international jurisprudence, the courts must provide appropriate remedies for breaches of legislation, as current non-compliance is not adequately being deterred by the government enforcement mechanisms. Third, the dialogue about accessibility needs to expand from a legal rights-based conversation to include the market demand for accessible technology-based services.

The Concept of Disability

There are many ways of analyzing disability and the various types of decisions made by society affecting persons with disabilities. Critical disability theories seek to develop ways of understanding the concept of "disability". As Anita Silvers notes, a model is a standard, example, image, simplified representation, style, design or pattern often executed in miniature so that its components all are easy to discern.[3] Models can help explain why disability exists in society and how people come to be disabled. Theoretical models of disability can also be especially useful in analyzing past government actions and decisions. These models can be used as a "lens" through which to look at and categorize the justifications used by government actors in implementing programs, legislative schemes and formulating judicial decisions. Understanding why certain approaches are taken and how they are justified by government actors, the legislature and in the judiciary can be the first steps in addressing the unacceptable barriers to accessibility that persons with disabilities still face today. The following theoretical models expounded below will be used in analyzing relevant accessibility legislation as well as its corresponding jurisprudence.

The Social Model

The theoretical "Social Model" posits that "disability" is socially created and is distinct from the concept of impairment, which describes the physical feature of an individual. This theory argues that a limitation in a person's physical or mental ability

[3] Anita Silvers, "An Essay on Modeling; The Social Model of Disability" in *Philosophical Reflections on Disability* (2010), Springer Netherlands, 19 at para 22.

becomes disability because of prevailing "ableist" social structures. This shift in emphasis situates disability in a cultural and political position. As Tania Burchardt explains, the Social Model is often described in contrast to the medical model, in which "limitations in functioning or participation in society are seen as the direct result of a medical condition".[4] In contrast, by drawing attention to the economic, social and physical barriers, the Social Model leads to demands for greater accessibility of buildings, transport and information, and for measures to counter discrimination in employment and other spheres of activity.[5] Ultimately the emphasis of society as the cause of disability leads to a rejection of the idea of disability as personal tragedy. As such disability becomes more of a matter of social justice to have these barriers dismantled.

Disability Culture

An understanding of disability as a "cultural identity" using a minority group model opens up the possibility that technologies can be redesigned to eliminate rather than perpetuate ableism. This particular lens attempts to take discourse around the Social Model theory to prompt action and transformation through the use of this cultural identity, allowing persons with disabilities to reclaim themselves.[6] As Susan Peters proposes, a "syncretized view" of disability culture allows for an ethical framework in decision-making regarding the notion of disability culture. With the notion of a culture of

[4] Tania Burchardt, "Capabilities and disability: the capabilities framework and the social model of disability" (2004) 19:7 Disability & Society at 734.
[5] *Ibid* at 736-737.
[6] Susan Peters, "Is There a Disability Culture? A Syncretisation of Three Possible World Views" (2000) 15:4 Disability & Society 583 at 585.

disability, one can ask, "How inclusive of disability culture is this decision that I have chosen?" – both in terms of diverse sources and numbers of persons with disability who have access to it.[7] Keeping in mind this cultural group when making decisions in the context of policy, legislation and institutional design can help to minimize or eradicate social barriers affecting this group.

Nussbaum's 10 Capabilities

Also complementing and drawing from the Social Model of disability is the Capabilities Framework provided by Martha Nussbaum.[8] This framework – based on ten "capabilities" that are central to human life participation – provides a more general theoretical framework developed by economics and political philosophers in reaction to the utilitarian basis of modern welfare and liberal political thought.[9] It provides a way of conceptualizing the disadvantage experienced by individuals in society, emphasizing the social, economic and environmental barriers to equality. Nussbaum's capabilities are essentially activities performed by humans that seem definitive to a life that is truly human. Crucially, these capabilities can be analogized to the idea of human rights and that at the very least, these rights should not fall below a certain standard. It is also important to note that these capabilities are all internal but depend exclusively upon

[7] *Ibid* at 599.
[8] Martha Nussbaum, *Creating Capabilities: The Human Development Approach*. (2011) Cambridge, Mass: Belknap Press of Harvard University Press, at 30–31 [*Nussbaum*]; See also Kuklys Wiebke, *Amartya Sen's Capability Approach Theoretical Insights and Empirical Applications* (Berlin ; New York : Springer, 2005) at 9.: Sen's Capabilities Framework was developed and narrowed by Nussbaum.to include an exhaustive list of 10 capabilities that are central to a person's ability to generate valuable outcomes in society [*Wiebke*].
[9] Tania Burchardt. Capabilities and Disability: The Capabilities Framework and the Social Model of Disability (2004) at 738.

external conditions, which is where government action and society must step in to ensure that individuals' capabilities are not diluted.[10]

Additional Theoretical Models: Antidiscrimination and Vulnerability

The Antidiscrimination model approaches disability discrimination and bases its claims on protected class membership. It generally arises in "discrete environments" such as the workplace and particular places of public accommodation such as transportation or with services offered to the general public. But as Ani Satz points out, the current approach to disability discrimination based on protected class membership ignores the possible "shared benefits" of facilitating a variety of means of functioning.[11] Satz cautions that viewing vulnerabilities as situational results in patchwork-like protections that do not result in meaningful social participation and ultimately fails to appreciate the vulnerability of disabled individuals to certain environmental changes.

The model of Vulnerability, coined by Martha Fineman, takes a different approach by supporting the argument that it does not make sense to view vulnerabilities associated with disability as arising in discrete environments because vulnerability does not end when one leaves a movie theater, a workplace, or a commuter train.[12] The Vulnerability model sees impairment to functioning as universal and constant. This model can be particularly useful when advocating for meaningful access and participation

[10] *Ibid.*
[11] Ani Satz "Disability, Vulnerability, and the Limits of Antidiscrimination" (2008) 83:1 Wash L Rev 513 at 531.
[12] *Ibid* at 532.

of persons with disabilities because this perspective helps them step out of the notion of "charity" and helps put more pressure on the State to address the inequalities stemming from these vulnerabilities. This model blends both the Social Welfare model as well as a Civil Rights model, which promotes the idea of pushing through litigation to achieve certain issues that are everyone's issue in society, not just issues affecting persons with disabilities.

Discrete Concern Overview

Brief Summary of Discrete Concern

The accessibility of information and communication technologies remains a discrete concern for persons with disabilities, especially in an age of rapid technological change, where innovative digital forums continue to evolve based on market demand, often at the expense of ensuring accessibility for all. As Silvers acknowledges, the ability of blind and visually impaired individuals to access inscribed information is a striking illustration of how environment affects functional limitation.[13] While various forms of information and communications technology have been credited with opening up the world to people with disability, many persons with disabilities are still incapable of accessing information through various forums. Specifically, individuals with "print impairments" are still facing many barriers today despite the significant advances in technology and the legal landscapes aimed at increasing their access to information.

[13] *Supra* note 3 *Silvers* at 25.

Similarly, individuals in the deaf community continue to face challenges in accessing reliable and accurate descriptive video and audio forums.[14]

Information and communication technologies have the great potential to eliminate or at least reduce disabling barriers preventing individuals with disabilities from participating in many activities and in theory could allow for better inclusion for persons with disabilities. Technological advancements are often likened to a source of "liberation" for society in helping advance mankind. Digital technologies are even held up as a way to eradicate socially constructed disability. Yet, as society shifts and becomes more and more dependent on the Internet, people with disabilities are being left behind[15] As Gerrard Goggin explained over a decade ago, the Internet may genuinely offer an opportunity for many people with disabilities to communicate with others, yet lack of accessible websites or further use of email means that people with disabilities are also systematically positioned as "other", excluded or marginalized in the friction-free supposed "utopia of cyberspace".[16]

Universal design, a process that seeks to include the broadest base of potential users, can paradoxically exclude other groups. For instance with the Internet, most websites are not compatible with assistive technology being used by visually impaired computer users. Also, the lack of labeling of images on web sites results in screen readers

[14] Joshua Robare, "Television for All: Increasing Television Accessibility for the Visually Impaired through the FCC's Ability to Regulate Video Description Technology" (2010) 63:1 Fed Com LJ 553 at 554.
[15] Kate Ellis, Mike Kent, "Disability and New Media" (2011) Routledge Studies in New Media and Cyberculture, at 2.
[16] Gerrard Goggin, *Digital Disability: The Social Construction of Disability in New Media* (Maryland, Rowman & Littlefield Publishers 2003) at 11.

not being able to locate or read them.[17] Further, the security feature called "Captcha", which consists of websites producing a series of distorted letters or numbers in an image that require the user to re-type the figures pictured before them in order to distinguish themselves as a human user rather than a computer remains an obvious barrier for visually impaired computer users navigating the web.[18] An adapted solution to the accessibility issues of Captcha images includes providing an "audio Captcha" function, the audio must still contain background noises to mask the voice of the audio to remain resistant to automated analysis technologies. This solution presupposes however that users have no hearing impairments.[19]

In the context of broadcasting and television, the decrease in prevalence of "linear TV" because of the increase in "user-generated TV" (for example, TiVO, Google TV, Apple TV) and internet content possibilities for users to schedule and play programmes at a time that suits them invites new challenges for the delivery of accessible Television.[20] As older technologies such as radio and television became digital, we have seen a convergence of digital information being stored on the Internet.[21] As newer technological platforms continue to emerge in society, it becomes difficult for disability advocates and organizations to ensure these platforms are accessible.

Access to Information as a Human Right

[17] Katie Ellis, Mike Kent, "Able iTunes is Pretty (Useless) When You're Blind Digital Design is Triggering Disability When it Could Be a Solution" (2008) 11: 3 MC J at 7.
[18] World Blind Union, *World Blind Union Toolkit on Providing, Delivering and Campaigning for Audio Description on Television and Film* (Toronto, Ontario 2011) at 52.
[19] Matej Saric, "*The Accessibility Demand for Audio Captcha*" (2013). < https://captcha.com/articles/audio-captcha.html>.
[20] *Ibid*.
[21] *Supra* note 16 *Goggin* at 5.

Access to basic elements required for human survival have been known to include things such as food, drinkable water, shelter, and medical care. As society, it is understood that humans – although arguably not always available to everyone everywhere in the world – should be accorded these basic elements. However, given Canada's increasingly technology-based society, meaningful participation for individuals requires accessibility to information technology. Today, access to these basic telecommunication services can be arguably categorized as a basic human right required for social participation. In fact, access to information and communication has been recognized at an international level to be a fundamental human right. Over 140 countries – of which includes Canada – ratified the United Nations Convention on the Rights of People with Disabilities ("CRPD").[22]

Article 9 of the CRPD, which is titled "Accessibility", recognizes the right of people with disabilities to full participation including access to information and communications (including information and communications technologies and systems).[23] The United Nations Convention also addressed in Article 30 the right of persons with disabilities to participate in cultural life, recreation, leisure and sports.[24] This right is also applicable to this discrete concern. Over the past few decades, information and communication technology has become integral to daily life, affecting the way individuals learn, work, create and communicate with each other. For instance, television programming is a primary source of news, entertainment and sports, reflecting

[22] UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex I.
[23] *Ibid* art 9.
[24] *Ibid* art 30.

a wide range of ideas and perspectives that characterize Canadian society. As access to information has become more essential to these areas, greater focus has been placed on the idea that information can be seen as a necessary human right and a core part of social justice. Because of this new and emerging technological landscape, human rights and social justice are becoming more and more dependent on information and the ability to use information. In fact, the right to access information has been labeled as the "linchpin right" that holds the others together, particularly in online contexts.[25]

The AODA and the Code

Ontario became an early forerunner for disability legislation in 2005 as the province was the first in Canada to adopt, develop and implement mandatory accessibility standards to be met by specific private and public entities.[26] This legislation was titled the *Accessibility for Ontarians with Disabilities Act* ("*AODA*"), and it puts a legal obligation on "large organization" to ensure greater accessibility province-wide with an ultimate goal of making Ontario accessible by 2025.[27]

The *Ontario Human Rights Code* ("the *Code*"), unlike the *AODA* had been around in Canada since 1962.[28] The *Code* is a "rights-based" legislative regime. Its application is limited, especially in respect to providing proactive solutions for accessibility. As Michelle Flaherty and Alain Roussy note, the *Code* does not apply to prospective

[25] Kay Mathiesen, "Human Rights for the Digital Age," (2014) 29:1 J of Mass Media Ethics at 2–18.
[26] Michelle Flaherty and Alain Roussy, "A Failed Game Changer: Post Secondary Education and the AODA" (2014) 24:1 Education Law Journal, Forthcoming Ottawa Faculty of Law Working Paper No. 2014-27 at 1.
[27] *Accessibility for Ontarians with Disabilities Act,* SO 2005, c 11 [*AODA*]. See the definition of "Large Organization" under s 1: "means an obligated organization with 50 or more employees in Ontario, other than the Government of Ontario, the Legislative Assembly or a designated public sector organization."
[28] *The Ontario Human Rights Act*, SO 1961-2, c 93 [*Code*].

breaches, which means that this piece of legislation is mostly reactive in nature.[29] It's objective is to compensate applicants for past acts of discrimination, although orders by the Ontario Human Rights Tribunal can be crafted to prevent further discrimination. Flaherty and Roussy also note that the *Code* imposes no "positive obligation" on government and large organizations to actively ensure general accessibility.[30] This is where the *AODA* attempts to help bridge that gap. Both the *Code* and the *AODA* define "disability" quite broadly.[31] Disability has been found to include not just a physical or mental limitation, but also the social construct that accompanies it, including the assumption that a person with a disability is less capable or less worthy of dignity.[32]

The *Integrated Accessibility Standards*

Under the *AODA,* the *Integrated Accessibility Standards* Regulation ("*IASR*") was instituted.[33] Relevant to our discrete concern is Part II Information Communications Standards. This part of the *IASR* imposes standards with which government entities as well as large private sector companies must comply. Part II of the *IASR* is concerned with ensuring that every obligated organization under the Act that creates, provides or receives information and communications does so in accessible formats for persons with disability.[34] The definition of "information" in Part II includes: data, facts and knowledge

[29] *Supra* note 26 at 3.
[30] *Ibid*.
[31] *Ibid*.
[32] *Ibid* at 4. See *Québec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City)*, 2000 SCC 27 at para 38, 185 DLR (4th) 385 and *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54. See also *Ontario Human Rights Commission, Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: Ontario Human Rights Commission, 2009) at 7.
[33] O Reg 191/11.
[34] O Reg 191/11, s 11, 12.

that exists in any format, including text, audio, digital or images, and that conveys meaning.[35] Meanwhile "communication" is defined as the interaction between two or more persons or entities, or any combination of them, where information is provided, sent or received.[36] Communication can occur in many different ways such as over the television, online, through print or media advertisements. Internet and web content are specifically addressed under s 14, requiring obligated organizations to make their new web content compliant with the Web Content Accessibility Guidelines ("WCAG") by 2014 and 2021 for all other/pre-existing content.[37]

Jurisprudence Analysis

Canadian Jurisprudence

Traditionally, the Canadian legal system has been largely reactive when dealing with issues of accessibility. For the most part, it has been left up to the individual to file a complaint or launch a legal action when their rights have been infringed on due to lack of accessibility. Jurisprudence demonstrates how the courts have taken a social and civil rights model approach when dealing with lack of accessibility and digital communication. The case law also demonstrates that the legislative system has not been able to completely address the issues facing individuals with disability. Arguably, the reactive nature of litigation is not suitable to keep up with the rapidly changing technological environment of today.

[35] O Reg 191/11, s 9 (1); "Information" includes data, facts and knowledge that exists in any format, including text, audio, digital or images, and that conveys meaning.
[36] O Reg 191/11, s 9 (1); "Communications" means the interaction between two or more persons or entities, or any combination of them, where information is provided, sent or received.
[37] O Reg 191/11, s 14(1); "Web Content Accessibility Guidelines" means the World Wide Web Consortium Recommendation, dated December 2008, entitled "Web Content Accessibility Guidelines ("WCAG") 2.0

In the 2012 *Jodhan v Canada* case, Donna Jodhan, a business consultant with extensive technological training, raised a constitutional challenge aiming to provide individuals with visual impairments equal access to the services and information on several federal government websites.[38] Ms. Jodhan, who is blind, filed the complaint after encountering difficulties while applying for various government positions on an online government job bank. In addition to the job bank, she had difficulties responding to an online census as well as accessing data on various government websites including Statistics Canada, the Canada Pension Plan and Service Canada. The Government's position was that because those same services were available in other formats such as in person, by phone or by mail, it did not constitute discrimination. The court rejected this argument.

Many blind or visually impaired individuals access internet content by assistive technology which include screen readers and self voicing browser software.[39] For these to work, the web content must be designed in an accessible and compatible manner. Without compatibility, web content is essentially inaccessible for people with visual impairments. Ms. Jodhan argued that the issue "is more than just a matter of efficiency and reliability; it represents independence and privacy."[40] The Court examined the past and current regulatory framework, which at the time was The Common Look and Feel Standard ("CLF"), adopted by the government in 2001. The CLF required government department websites to be designed and programmed in a way that ensured they can be accessed by users with visual impairments. A 2007 spot audit of 47 of the 146 federal

[38] *Jodhan v Canada(Attorney General)*, 2012 FCA 161 [*Jodhan*].
[39] Constantine Stephanidis, *The Universal Access Handbook* (Web of Science: CRC Press 2009) at 28.3.
[40] *Supra* note 38 *Jodhan* at para 37.

department websites found that none were fully compliant with the CLF standard. In response to these facts, the federal government's chief information officer, Ken Cochrane, explained that each department was responsible for implementing the standard within their own department[41]. The Federal Court of Appeal also found the applicant was denied equal access to the benefit of government information and services[42]. Furthermore, alternative formats and channels did not meet the goal of substantive equal treatment. The Court gave the government 15 months to update its websites and noted that the progress will be monitored to ensure compliance.

While *Jodhan* was successful in implementing change in accessibility it brought to the forefront the need for accountability when imposing accessibility standards.

Justice Nadon, for the Federal Court of Appeal, reiterated the trial Judge's reasoning "…For the blind and visually impaired, access to information and services online gives them independence, self-reliance, control, ease of access, dignity and self-esteem. *A person is not handicapped if she does not need help*. Making the government online information services accessible provides the visually impaired "substantive equality." [43] This ideology is reflective of the Social Model of disability which argues that a limitation in a person's physical or mental functioning is a disability because of the impact of the prevailing social structures and not due to the physical state of their body.

Another theoretical perspective evidenced in the *Jodhan* case is Amartya Sen's Capabilities Framework in which he proposes a human capabilities approach to pursuing social justice. He places value on agency, primarily referring to a person's role as a

[41] *Ibid* at para 57.
[42] *Ibid* at para 164.
[43] *Ibid* para 158.

member of society, with the ability to participate in economic, social, and political actions.[44] He defines the term "capability" as denoting a person's opportunity and ability to generate valuable outcomes in society[45]. Adding to Sen's framework, Nussbaum argues 10 core capabilities should be supported in all democracies. Specifically applicable in the *Jodhan* case is the tenth capability: "Control Over One's Environment". [46] Nussbaum breaks the 10th capability down into two sub-categories, *Material* and *Political*. Of relevance here is *Material,* which emphasizes having the right to seek employment on an equal basis with others.

Ms. Jodhan's inability to access the online government job bank without the help of a sighted individual was a concrete example of how the government undermined her autonomy and right to meaningfully participate in the job market. Providing alternative means of accessing the services was not adequately provided by the government, as Justice Nadon's found: "…they fail to provide the visually impaired with independent access or the same dignity and convenience as the services online."[47] In a broader sense, the general lack of access to government information through the internet, undermined her independence and ability to participate in the functions of society as a free agent of her own will.

Reinforced in the case at the hand, the civil rights model takes the position that people who reside at all points on the disability spectrum have a *right* to participate in society. It is not merely an optional benefit that may be conferred when convenient, but a

[44] *Supra* note 8 *Wiebke* at 9.
[45] *Ibid* at 11.
[46] *Supra* note 8.
[47] *Supra* note 35 *Jodhan* at para 158.

legal right that can be enforced through litigation.[48] Justice Nadon echoes this sentiment in by stating about Ms. Jodhan's rights, "…subsection 15(1) of the *Charter* provides that she has the right to equal benefit of the law. Thus, she is entitled to access the government information and services as effectively as those who have no visual impairment."[49]

Television plays an important role in Canadian society and is a reflection of the perspectives and values of its citizens Closed captioning technology, which was invented in 1981, has been an important step towards providing the deaf community accessibility to this medium. However, in 1997 a deaf BC lawyer named Henry Vlug filed a complaint with the Canadian Human Rights Commission arguing that the lack of captioning on some of the CBC programing infringed on his rights as a person with a disability.[50] Mr. Vlug argued that while *some* programming was captioned, not all was and additionally, the quality of the captioning was inconsistent. For example, sometimes the captioning would block integral portions of the program such as weather report details or the score in a sports broadcast. Of greater concern was the lack of captioning for unscheduled newsflashes, which by their unexpected nature, informed the public of an immediate threat to their safety. Furthermore, commercials were not captioned at all. Mr Vlug made the novel argument that advertising plays an integral role in social culture, thus by not providing advertisements in an accessible format, CBC was further excluding an already disadvantaged group from meaningful participation in social culture.

[48] Laura L. Rovner, "Disability, Equality, and Identity"(2003-2004) 55 Ala L Rev 1043.
[49] *Supra* note 35 *Jodhan* at para 154.
[50] *Vlug v. Canadian Broadcasting Corp*., 2000 CanLII 5591 [*Vlug*].

CBC's position was that the additional benefit derived by Mr.Vlug from having all broadcasts closed captioned would be minimal and did not outweigh the financial burden that would result to CBC. The Tribunal disagreed stating, "the inability to access late breaking news stories - or weather warnings - can hardly be characterized as insignificant." [51] The Tribunal further emphasized the role advertisements, sports broadcasts, and news broadcasts play in shaping popular culture and indicated that excluding Mr. Vlug from participating in this aspect of society amounted to discrimination based on disability. [52]

Being able to enjoy a television program is a benefit that many take for granted. Documentaries, dramas, and comedies satisfy Nussbaum's capability for "*Senses, Imagination and Thought*", which she described as the ability to use imagination and thought in connection with experiencing and producing works and events of one's own choice. [53] Mr Vlug argued that television captioning not only gave him access to entertainment, but let him be included as part of his community. He discussed his frustration when he was unable to watch his favourite baseball team win the world series as the game had not been captioned. The capabilities of "*Play"* and "*Affiliation"* require meaningful participation, something Mr.Vlug was unable to do as he was not able to access the play-by-play and descriptive dialogue of the game. [54]

CBC completely ignored disability culture in their decisions relating to closed captioning. Arguably, organizations such as CBC made broadcast decisions without the

[51] *Ibid* at para 140.
[52] *Ibid*.
[53] *Supra* note 8.
[54] *Supra* note 50 *Vlug* at para 8.

consideration of the deaf community. CBC had the unilateral power to decide what would be accessible, systematically deeming that the deaf community had less of a right to information and entertainment than their non deaf viewers. This imbalance of power and control further alienated an already excluded group from meaningful participation in social functions and the right to information and entertainment. *Vlug* stressed the isolating effect that lack of access to information regarding current events can have on the deaf, and on their ability to participate in daily social discourse. [55]

Ani Satz's interpretation of the vulnerability model treats vulnerability as extending across environments and enables a broader provision of material supports for persons with disabilities. [56] She argues that there are "shared benefits" of facilitating a variety of means of functioning. That was certainly the case in Vlug as it could be argued that closed captioning would not only provide accessibility to the deaf but also to those learning to read English. The Tribunal ordered that The CBC's English language network and Newsworld shall caption all of their television programming, including television shows, commercials, promos and unscheduled news flashes.

In 2007 the CRTC established captioning quality standards that would become conditions of license for broadcasters and would ensure consistent and reliable closed captioning quality.[57] In 2015 the CRTC expressed the expectation that closed captioning

[55] *Ibid* at para 22.
[56] *Supra* note 11 *Satz* at para 530.
[57] "TV Access for People who are Deaf or Hard of Hearing: Closed Captioning" (11 October 2015), online: <www.crtc.gc.ca/eng/info_sht/b321.html>.

will be extended beyond traditional broadcasting platforms to include online broadcasting. It has not yet been implemented. [58]

The internet has become an increasingly popular vehicle for the facilitation of a variety of communication and information sharing tasks.[59] The rising demand for this new medium of communication has caused changes in use of traditional media.[60] With an increase dependence on the internet for our professional, commercial and private lives it is relevant to explore how this new environment will be treated by the Canadian legal market in regard to accessibility and the disabled. While the jurisprudence in Canada is lacking, looking to international jurisdiction may provide some relevant indications.

Australian Jurisprudence

In Australia, accessibility requirements for websites are mandated under government policy, legislation, and through government commitments. [61] The Federal *Disability Discrimination Act* ("DDA") provides protection for everyone in Australia against discrimination based on disability.[62] It enforces the mandate that all government websites should comply with WCAG 2.0 AA. Accessibility of all Australian websites is governed by the Australian Human Rights Commission. [63]

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[58] *Ibid*.
[59] John Dimmick, Yan Chen & Zhan Li, "Competition Between the Internet and Traditional News Media: The Gratification-Opportunities Niche Dimension" (2004)17:1 J of Media Economics 19 at 20.
[60] *Ibid*.
[61] Australian Government, "Accessibility" (1 April 2011) <http://webguide.gov.au/accessibility-usability/accessibility/>.
[62] *Disability Discrimination Act 1992* Cth.
[63] Vivienne L. Conway, "Website Accessibility in Australia and the Australian Government's *National Transition Strategy"* article delivered at the International Cross-Disciplinary Conference on Web Accessibility, January 2011.

The *Maguire v Sydney Organizing Committee for the Olympic Games (SOCOG)*, decision involves an individual, Bruce Maguire, who brought a complaint against the Sydney Organizing Committee for the Olympic Games ("SOCOG").[64] The case is one of many that demonstrates the universal the struggle for accessibility and how the legal process can be an avenue for change. Mr. Maguire's complaint alleged that SOCOG's website, Olympics.com was inaccessible. He cited issues with the fact that a large percentage of the website contained only graphics with no text equivalent to allow him to adequately navigate the website. As a result, the government-run website was inaccessible to him when using either a conventional screen reader or a Braille displayer. Many of the links on the home page of the website were not identifiable as text due to being graphics as well. With no alternate text to allow him to read about sport and event descriptions, the website was not accessible for persons with visual impairments.

The Commission considering Maguire's complaint ruled that the SOCOG website constituted a service within the ambit of the DDA; SOCOG was ordered by the Commission to add text to its images and to add important informational sections linking back directly from the main page. SOCOG failed to do so by the appointed time under the Commission's order, and was also ordered to pay $20,000 in compensation to Mr. Maguire.[65]

American Jurisprudence

[64] *Maguire v SOCOG*, (1999) HREOC H 99/115.
[65] *Ibid.*

Enacted in 1990, The *Americans with Disabilities Act (ADA)*, is a broad civil rights law with the intention to protect persons with disabilities against discrimination. It ensures that covered employers must provide reasonable accommodation as well as regulates accessibility to public spaces. [66] Major federal laws promoting accessibility also include the *Rehabilitation Act*, *Americans with Disabilities Act*, *Individuals with Disabilities Education Act*, *Telecommunications Act*, and *Twenty-first Century Communications and Video Accessibility Act* of 2010, among others. [67]

A 2012 *Cullen v Netflix* decision concluded that the *ADA* did not apply to Netflix, a movie and TV online streaming service. The issue was whether the internet should be considered a place of public accommodation. The court determined it was not, reasoning that the internet is "not connected to any actual, physical place" and therefore not subject to the ADA.[68] The decision was directly contradicted by a recent district court decision where the Court refused to dismiss an action against Scribd, an e-book and PDF hosting site, which argued the opposite, that the internet *is* a place of accommodation. [69]

While providing an interesting discussion, the jurisprudence in the United States is far from conclusive in the realm of accessibility and the internet. In 2013, the National Association of the Deaf brought a lawsuit against Netflix claiming the internet was a place of public accommodation and closed captioning was necessary to insure deaf individuals could access their services.[70] The result was a $750,000 settlement and a promise from Netflix to make closed captioning available for all their content. This is one

[66] *Americans with Disabilities Act*, 42 USCA (1990).
[67] Paul Jaeger,"Disability, Human Rights, and Social Justice: The Ongoing struggle for accessibility and equality" (2015) 20:9 at 1.
[68] *Cullen v Netflix*, 880 F Supp (2d) 1017 (ND Cal 2012).
[69] *National Federation of the Blind v Scribd Inc.*, 97 F Supp (3d) 565 (D Vt 2015).
[70] *National Association of the Deaf, et al., v. Netflix Inc.*, 869 F Supp (2d) 196 (D Mass 2012)

of a large number of settlements in the area of accessibility that by the nature of the settlement, do not set a precedent for others to follow. [71]

Does the lack of conclusive jurisprudence preclude individuals seeking accessibility to such services from making a change? It appears not. Disability advocate groups, like the Accessible Netflix Project have been using unique methods to gain accessibility to online streaming services. A popular Netflix series called Daredevil, features a protagonist who is a blind lawyer turned super hero. Despite a large fan base in the blind community, the show was not being provided with descriptive video. The irony was not lost on disability advocates who launched an online petition on Change.org requesting descriptive video be provided.[72] Netflix listened and has since taken steps to become fully accessible, most recently adding audio descriptions on select titles including Daredevil. [73]

In Canada, the lack of precedent in this area presents a challenge for persons with disabilities who wish to have equal access to online forums. Differentiating it from the United States, Canadian law has not theorized whether the Internet should be categorized as a public space, rather the Ontario Legislation categorizes web content as Information and Communication which falls within the scope of Part II of the Integrated Accessibility Standards.

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[71] Karl Groves "List of Web Accessibility-Related Litigation and Settlements" (15 November 2011) <http://www.karlgroves.com/2011/11/15/list-of-web-accessibility-related-litigation-and-settlements/>
[72] Ryan Dyck "Netflix: Make your new show about a blind superhero accessible to blind viewers" (April 2015) <https://www.change.org/p/netflix-make-daredevil-available-to-blind-people>
[73] NPR Staff "After Fan Pressure, Netflix Makes 'Daredevil' Accessible To The Blind" (27 April 2015) <http://www.npr.org/2015/04/18/400590705/after-fan-pressure-netflix-makes-daredevil-accessible-to-the-blind>.

Critique of the Regulatory Standards

The *AODA* seems to offer, in theory, something that the *Code* does not: proactive legislative standards that should improve Ontario's overall accessibility for persons with disabilities. The *Code* itself does not give the Human Rights Tribunal the authority to award costs to parties in the proceedings, which amounts to a significant barrier for individuals looking to launch a human rights claim in that forum.[74] While a party can represent itself, this requires the applicant to take on a significant workload and stress as well as out of pocket expenses. Meanwhile, the other option of hiring legal representation for themselves comes with significant legal costs.[75]

Given the insufficiency of the Ontario Human Rights *Code* and Tribunal with advancing the fundamental rights to persons with disabilities, the idea of the *AODA* proactively enhancing and eradicating barriers seems to fill the gap left by the *Code* to protect the disabled community. Unfortunately, Mayo Moran's Independent Report for the Government of Ontario suggests that Ontario's momentum of accessibility has slowed considerably and doubts whether it will be possible for the province to be accessible by 2025.[76] The *AODA*'s *IASR* does not do enough for persons with disabilities. Specifically, in the context of information and communication, the *IASR* has some weaknesses that need to be addressed if Ontario wants to meet its 2025 objective.

Inadequate Standards and Scope of the AODA

[74] Mayo Moran, "Legislative Review of the Accessibility for Ontarians with Disabilities Act" Independent Report (November 2014) online: <http://www.ontario.ca/document/legislative-review-accessibility-ontarians-disabilities-act>.
[75] *Supra* note 26.
[76] *Supra* note 74.

The first weakness identified in the *AODA* is the standard mandated by the Act's *IASR* under section 14. The World Wide Web Consortium's ("W3C") *Web Content Accessibility Guidelines* ("WCAG") give criteria that webpages must meet in order to address the vast range of needs of web-users with disabilities. The standards are not enough to make websites and the Internet accessible for persons with disabilities. Barriers continue to persist, even with "compliant websites". In fact, just this summer at the 2015 Para Pan Am Games, the website and iPhone app were found to be inaccessible, according to users with disabilities, including disability rights advocate David Lepofsky[77]. Further, the internal government websites continue to create barriers for government employees with visual impairments .[78] Public servants have come forward to acknowledge that the government, which should be leading by example by offering the most accessible web content, is failing them.[79]. They allege that the government is inadequately accommodating them to ensure they have the proper tools to do their jobs.[80]

Section 14 of the *IASR* prescribes that the Government of Ontario, the Legislative Assembly, designated public sector organizations and large organizations are required to conform to WCAG 2.0 standards.[81] However, the definition of "large organization" under the Act includes only an obligated organization with 50 or more employees in Ontario [82]. The narrow scope of the legislation offers little support for

[77] David Lepofsky "Toronto must do better for people with disabilities" Opinion Editorial *The Toronto Star* (19 August 2015), online: <http://www.aodaalliance.org/strong-effective-aoda/08202015.asp>.
[78] Julie Ireton, "Public servants with visual impairments say government failing them" (2 July 2015) online: < http://www.cbc.ca/news/canada/ottawa/public-servants-with-visual-impairments-say-government-failing-them-1.3126588 >.
[79] *Ibid.*
[80] *Ibid.*
[81] O Reg 191/11, s 14.
[82] O Reg 191/11, s 2.

individuals in Canada who wish to create accountability for global web-based companies such as Netflix. Many of the large tech corporations that provide goods and services in Canada (Netflix, Facebook, Amazon) are not caught by the definitions of the Act. By their web-based nature, their physical location could be anywhere in the world. In this regard, the *AODA* regulations have "no teeth" as the fines and punishments cannot be enforced against these corporations.

Furthermore, even if a web-based organization is located in Ontario it may still not fall within the scope of s.14 due to the "large organization" definition. This is problematic as the internet has changed the traditional corporate model of business. Many web-based organizations start out with very few employees. In 2009, the social media giant Twitter reported[83] millions of users with only 29 employees.[84] It would be naïve to assume that because an organization has a small employee base it does not have a large influence on the global society.

Lack of Public Awareness of the AODA

A second weakness of the *AODA*'s *IASR* standards is the complete lack of public awareness about them. Charles Beer, in a 2013 independent Report for the Ontario government, noted the significance of public awareness and the need to re-establish the leadership and commitment by the Government of Ontario to accessibility by making it a

[83] Jeremiah Owyang, "A Collection of Social Networking Stats for 2009" (11 January 2009) online:< http://www.web-strategist.com/blog/2009/01/11/a-collection-of-soical-network-stats-for-2009/>.
[84] Statista "Number of Twitter employees from 2008 to 2014" <http://www.statista.com/statistics/272140/employees-of-twitter/>

government-wide priority.[85] He also noted how significant of a hurdle the awareness gap is in securing compliance as the standards become phased in. Awareness is particularly important to helping change the attitudes of the public in relation to disability.

As evidenced in the Beer report, members of the disability community believes that attitudinal change must go hand in hand with the implementation of standards or the *AODA* will not succeed and a backlash could even result.[86] Lack of public awareness surrounding the *AODA* can also stem from the fact that many stakeholders and obligated entities under the Act find it extremely difficult to visualize what an accessible society would really look like. The stated purpose of the *AODA* reads under section 1 as:

> 1. Recognizing the history of discrimination against persons with disabilities in Ontario, the purpose of this Act is to benefit all Ontarians by,
>
> (a) developing, implementing and enforcing accessibility standards in order to achieve accessibility for Ontarians with disabilities with respect to goods, services, facilities, accommodation, employment, buildings, structures and premises on or before January 1, 2025; and
>
> (b) providing for the involvement of persons with disabilities, of the Government of Ontario and of representatives of industries and of various sectors of the economy in the development of the accessibility standards.[87]

The purpose of the Act, while understandably broad, raises ambiguities about what achieving accessibility for Ontario means. From the perspectives of different groups and

[85] Charles Beer "Charting A Path Forward: Report of the Independent Review Of the Accessibility for Ontarians with Disability Act" (2013) Independent Report online: <https://www.ontario.ca/page/charting-path-forward-report-independent-review-accessibility-ontarians-disabilities-act#section-3 >.
[86] *Supra* note 78.
[87] *Supra* note 27 *AODA* s 1.

stakeholders, this answer can vary. Unclear conceptualizations of an "accessible Ontario" makes the implementation of the Act difficult, especially in the face of services providers in the province that have failed to take into account their inaccessible services.

Lack of Enforcement of the AODA

A third weakness with the *AODA* is not actually a weakness in the legislation itself, but in its implementation by the Ontario government. The Act actually provides for a significant enforcement and reporting scheme. Government agencies and large corporations face an extensive enforcement scheme that includes inspections, orders, administrative penalties, appeals to a Tribunal and significant fines up to $100,000 for non-compliance with accessibility standards or other regulations under the *AODA*.[88] This was expressed in Moran's Independent Report, as well as the concerns expressed by many stakeholders that the lack of visible enforcement is an impediment holding the province back from achieving its 2025 goal as an accessible province.

Many feel that the *AODA* is "toothless" without adequate enforcement.[89] In fact, as of February 24th, 2015, it was reported that 65% of businesses had still not filed their 2012 accessibility reports and 60% of businesses had failed to meet the 2014 deadline.[90] Adding further to this dilemma is the Government visibly pulling back on its promise by announcing that it would be performing only 1,200 audits of businesses in 2015, a

[88] *Supra* note 27 *AODA*: see sections 14 and 21 that deal with enforcement the required accessibility-reporting scheme under the Act. See also section 37 that outlines the fines to be paid per every subsequent day of failing to comply with an order to comply with the Act by the Ontario Human Rights Tribunal.
[89] Laurie Monsebraaten, "*Ontario to reduce enforcement of accessibility law"* The Toronto Star (24 February 2015) online: <http://www.thestar.com/news/canada/2015/02/24/ontario-to-reduce-enforcement-of-accessibility-law.html >.
[90] *Ibid.*

significant decline from the 2,000 audits in 2014.[91]The inaction and regression on the part of the government sends a mixed message about the importance of the *AODA.*

Market Demand: A Universal Approach

While examining the discrete concern of accessibility of information and communication technologies from a legal perspective by considering the relevant legislation and jurisprudence, it could be helpful to consider a market-driven approach to accessibility of information. An occasional paper produced by Travability, an organization focused on inclusive tourism, makes a compelling argument that the driver for accessibility should be a market demand driver rather than the traditional compliance or rights based driver. [92] While the paper acknowledges the importance of theoretical models of disability such as the social and civil-rights models, it further strengthens the argument for creating an inclusive and accessible environment, specifically focusing on tourism accessibility. The paper argues for a demand driven model, providing that inclusive tourism will give organizations a competitive advantage, especially due to the large inclusive tourism market.[93]

The idea is hardly novel, and can be applied to information communication technology. A report written by Jutta Treviranus explores how taking a universal approach to digital inclusion presents Canada with an unprecedented opportunity to

[91] *Ibid.*
[92] Deborah Davis, Bill Forrester, "Occasional Paper No. 4. An Economic Model of Disability" (2011) at 6.
[93] *Ibid* at para 10.

establish and lead a global platform for innovation. [94] The report identifies a number of factors which are fueling the global demand for inclusively designed services and products. One being the increased consolidation of disability advocacy groups, which ironically is made possible by digital networks. Moreover, the aging population of "Baby Boomers" is a significant factor to consider.[95] The report profiles them as individuals "uncompromising in their demands, intolerant of marginalization, and strong advocates with impressive spending powers and cumulative wealth despite market crisis". [96] In the same vein, Ani Satz views of universal design could be applied to accessibility of digital communication as well as physical environments. She states "the design of products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design," may ultimately be the most economical way to address the vulnerabilities of disabled individuals arising from physical spaces.[97]

Conclusion

The *AODA* is currently not adequately fulfilling its mandate to create an "accessible Ontario". At this rate, it is a real concern to many stakeholders that the 2025 deadline to reach this goal will not be achieved. The discrete concern of accessibility of information to persons with disabilities in the realm of information and communication technology remains a pressing issue. An analysis of Canadian and international jurisprudence has demonstrated that while litigation is a powerful tool for addressing

[94] Jutta Treviranus, Kevin Stolarick, and Mark Denstedt, Catherine Fichten & Jennison Ascunsion "Leveraging Inclusion and Diversity as Canada's Digital Advantage"(2013) Social Sciences and Humanities Research Council of Canada at 5.
[95] *Ibid* at 20.
[96] *Ibid* at 20.
[97] *Supra* note 11 *Satz.*

inaccessibility it is not flexible or influential enough change to address the inaccessibility of a rapidly changing digital environment. Though government efforts have attempted to eradicate existing and continuous barriers through the *Code* and the *AODA*, technologically-based media such as the Internet and Television remain inaccessible for many individuals with disabilities. Further, accessibility standards implemented under the *IASR*, are not being complied with by Ontario businesses and government entities.

Action must take place from several different angles, not exclusively from legislative reform. A social dialogue must take place involving the many stakeholders of the *AODA*: persons with disabilities, Canadian society, the Canadian government and Ontario service providers. The dialogue should give a voice to persons with disabilities facing barriers to accessibility while also raising awareness to all stakeholders to understand the importance of the *IASR* standards in achieving accessibility. Further, the dialogue should be broadened to include discussion of the economic lens to accessibility. A blending of the social, civil rights, and vulnerability theoretical disability models can also help strengthen this dialogue by considering accessibility issues universal and constant for all stakeholders.

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