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**‘Humanizing’ Disability Law: Citizen Participation in the Development of Accessibility Regulations in Canada**

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**Abstract**

*Ontario is attempting a new politico-legal experiment to combat disability discrimination. Through consultation processes leading to binding regulations, it is enacting mandatory standards of accessibility under the Accessibility for Ontarians with Disabilities Act, 2005 (AODA). The AODA creates an antidiscrimination regulatory process designed to offer participatory rights to persons with disabilities and other interested stakeholders in the development of accessibility standards. The standards address social areas such as customer service, employment, and information and communication, and aim to break down a host of barriers including architectural and attitudinal ones. Collaborative standard development is a new and proactive approach to addressing disability barriers in society.*

*Consultation with citizens to create accessibility standards is a trend that is now being picked up by other provincial governments across Canada and which is currently garnering interest in other countries. But, how well does it work? Using the theoretical framework created by Cass Sunstein in his most recent work, Valuing Life: Humanizing the Regulatory State, this paper argues that the Canadian regulatory legislation and consultative processes succeed, to varying degrees, in: i) capturing qualitatively diverse goods and promoting sensible trade-offs among them, ii) taking account of values that are difficult or impossible to quantify, and iii) attempting to benefit from the dispersed information of a wide variety of human beings. At the same time, however, unlike Sunstein this paper argues for an approach to humanizing the regulatory process that does not necessarily depend on monetary valuation. Instead, in order to foster disciplinary analysis instead of intuition, further dialogue on points that need clarification is more appropriate and respectful in the context of regulating for the equality rights of persons with disabilities. This evaluation of Canadian regulation is offered in an attempt to fill a gap in the literature relating to how consultation processes of accessibility standards might be evaluated for their effectiveness.*

# “We are hoping that through discussions, through dialogue, through comments we’ve received from the general public, we can come to a more general agreement of what everyone sees as the best interest of Manitoba”[[1]](#footnote-1)

# Introduction

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

The move to the extensive consultation model was prompted by dissatisfaction in the existing approach to remedying disability discrimination concerns. Prior to the enactment of the ODA and the AODA, persons who suffered disability discrimination had, as their only source of redress, the option of filing a complaint before an administrative body or the court.[[5]](#footnote-5) With respect to the administrative bodies, a collection of human rights commissions and tribunals exists in every province and territory and at the federal level. The aim of the statutory administrative bodies is to achieve remedial and transformative change in society by remedying disputes in which discrimination has been alleged. Statutory human rights bodies fit within a swath of administrative actors in Canada and elsewhere that can be described as *reactive regulatory bodies*. I use the term *reactive regulation* to represent the idea that regulation by these administrative actors is triggered only in reaction to a complaint by an aggrieved party. These bodies are not inquisitorial or investigative. They do not rely on the initiative of the administrative actor to initiate a search for wrongs and to remedy them. More importantly, they are also not forward-looking beyond the parties in the dispute. For example, a human rights commission or tribunal may provide systemic remedies when a workplace has been found to have violated the right to be free of discrimination held by an employee or group of employees. A systemic remedy in such a case may involve training at the workplace about discrimination and a requirement that training be ongoing over a period of time. However, while this remedy is systemic (in that it aims to address an underlying repeated behavior of discrimination in the workplace) and forward-looking (in that it takes place over time and hopes to prevent future occurrences), it is rooted in the unique circumstances of the issue that prompted the human rights commission or tribunal’s involvement. It is also confined to the workplace where the incident occurred. In other words, reactive regulation as provided by the statutes establishing human rights bodies in Canada provided remedies only in discrete situations.

In addition to the limited scope of the remedy, members of the disability community were also concerned about the costs of bringing forward complaints over disability discrimination within the reactive regulatory human rights system. In many instances, human rights statutes do not allow for the complainants to be awarded the costs of their litigation. [[6]](#footnote-6) Moreover, persons with disabilities often represent a large proportion of society that lives below the poverty line.[[7]](#footnote-7) The costs of bringing forward litigation can be quite high and therefore out of reach for many persons with disabilities. Finally, many of the complaints that are brought through the reactive human rights process are settled due to an emphasis on alternative dispute resolution, particularly mediation, that has blossomed in the past two decades.[[8]](#footnote-8) Mediated files result in settlements that are generally sealed. This means that the resolution may not be known beyond the two parties and certainly cannot be used as a precedent in other similar cases. In short, although the reactive regulatory system set out through human rights codes and administrative actors mandated to implement them existed, its impact on persons with disabilities was not significant due to the barriers posed by inherent limitations on the impact of remedies, costs, and the increase of sealed mediated settlements.

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

The question that arises with the new proactive regulatory system is how well it works - from both a perspective based on regulatory theory and from the perspectives of persons with disabilities and others whom the change affects. In this paper, I seek to address only the first question. [[9]](#footnote-9) In order to examine the efficacy and shortfalls of the proactive regulatory system, I examine the legislation and consultation processes of the standard-setting regulations through the framework of Cass Sunstein’s *Valuing Life: Humanizing the Regulatory State[[10]](#footnote-10)* .

In addition to the two Ontario statutes mentioned above, the ODA and the AODA, legislation has now also been enacted in the province of Manitoba where consultations are currently taking place to establish the standards. In Part II of the paper, I present a detailed overview of the statutes in Canada that provide for consultation in the context of disability access standards. I also discuss the consultation processes that have taken place and the regulations that have been enacted. In Part III, I set out Sunstein’s framework of analysis for humanizing the regulatory state. I then apply the analysis to argue that the Canadian regulatory legislation and consultative processes succeed, to varying degrees, in: i) capturing qualitatively diverse goods and promoting sensible trade-offs among them, ii) taking account of values that are difficult or impossible to quantify, and iii) attempting to benefit from the dispersed information of a wide variety of human beings. At the same time, analysis of the legislative wording and consultation documents reveals that intuition rather than a disciplined analysis may inform the ultimate development of the regulations. However, these intuitive aspects of the legislation can be clarified through further consultative dialogue as opposed to an analysis based on monetary valuation.

# Overview of the Accessibility Standards Legislation in Canada

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

In addition to Ontario and Manitoba, which have already enacted accessibility standards legislation, the provinces of Nova Scotia and British Columbia have both presented plans to create similar accessibility legislation. More recently, there has been literature from the federal government indicating that it is contemplating the creation of a federal statute to be called the *Canadians with Disabilities Act*.[[11]](#footnote-11) Although the precise issues that the federal statute would address have not yet been flushed out, given the nature of Canadian federalism, the statute could serve to support initiatives taken by the provinces or address slightly different concerns such as employment of federal employees, trans-provincial transportation and health care.

The purpose of the following section is to provide background on the issues addressed by the accessibility legislation and the means by which the legislation contemplates citizen participation. The section first presents a comparative overview of the two Ontario statutes-the ODA and the AODA, as well as comparison between the AODA and the accessibility legislation in Manitoba, *The Accessibility for Manitobans Act* (AMA)[[12]](#footnote-12).

## Ontario

## *Ontarians with Disabilities Act, 2001* (ODA)

### Underlying Philosophy and Guiding Principles of the Statute

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

The preamble acknowledges barriers experienced by persons with disabilities in Ontario. The legislation affirms that persons with disabilities experience barriers and recognizes that the number of persons with disabilities “is expected to increase as the population ages”[[13]](#footnote-13) as the incidence of disability increases with age. The connection between aging and disability has been highlighted throughout the time that accessibility standards began to be created in Ontario.

There is only one strong and clear statement of commitment by the government of Ontario to improving the situation of persons with disabilities. The rest of the statements in the preamble are supportive of this statement. The preamble asserts that the Government of Ontario is committed to moving towards “a province in which no new barriers are created and existing ones are removed”[[14]](#footnote-14). In order to reach this goal, the Government will work with every sector of society to build on what it has already achieved. Moreover, the preamble indicates that the government sees the work of removing existing barriers and avoiding the perpetuation of new ones as a widely shared responsibility among all geographic regions, institutions, and individuals in the province. It is a responsibility that “rests with every social and economic sector, every region, every government, every organization, institution and association, and every person in Ontario”.[[15]](#footnote-15)

An interesting aspect of the preamble that is not seen in any of the other Canadian provincial legislation on disability access is the emphasis on the Government of Ontario**’s** own past leadership. One sees a list of six Ontario statutes, which, the preamble boasts, have already been designed or amended to further the equality rights of persons with disabilities. No rights that have been granted to persons with disabilities under other statutes or regulations are to be diminished in any way by the ODA.[[16]](#footnote-16) Finally, the preamble asserts the government’s support for other jurisdictions in Canada to identify, remove and prevent barriers to persons with disabilities.

The underlying philosophy of the legislation rests on the idea of bringing persons with disabilities into the public policy realm to discuss the barriers that need to be addressed. This philosophy becomes evident when one reads the purpose statement of the ODA which indicates that “the purpose of this Act is to improve opportunities for persons with disabilities and to provide for their involvement in the identification, removal and prevention of barriers to their full participation in the life of the province”. [[17]](#footnote-17) This purpose statement brings together the ideas of the preamble.

### Obligations and consultation under the ODA

* 1. Obligations

The bulk of the statute sets out the obligations of the various levels of government. In doing so, it identifies also the instances in which these levels of government must consult with persons with disabilities and prescribes how the consultations must be completed. In comparison to the statutes later enacted, the duty to consult is limited and the guidance provided minimal.

Obligations are owed by three sectors of the provincial government: the Government of Ontario itself, municipalities and “other organizations, agencies and persons”. The last category captures organizations that provide transportation to the public, educational institutions, hospitals and administrative agencies[[18]](#footnote-18).

In all cases, the nature of the obligation is to provide accessibility but the essence of the obligation and the manner in which the obligation is to be carried out vary within the sector depending on the subject matter. For example, the Government of Ontario is responsible for ensuring accessibility with respect to the built environment (building structures and premises), goods and services, Internet sites, employees, capital programs and accessibility plans within all government ministries.[[19]](#footnote-19) In relation to the built environment, the government’s obligation is to ensure that *guidelines* are created in order to provide barrier free access to buildings, structures and premises.[[20]](#footnote-20) The guidelines are to be created in consultation with persons with disabilities and others. The guidelines must ensure that the level of accessibility is at least the same as what is provided under the province’s *Building Code*. The ODA allows the government to set up a time frame by which the building etc. must meet the guidelines, although it does not set out any sanction for failure to comply. There is therefore a very detailed set of steps that form the collection of the Government’s obligations. By contrast, when it comes to the purchase of goods and services, the government simply has an obligation to “have regard to the accessibility for persons with disabilities to the goods or services.” Unlike its responsibilities with respect to the built environment, there is no duty to consult with persons with disabilities, to set guidelines, etc. One sees a similar pattern within the other governmental sectors.

* 1. The duty to consult with persons with disabilities

The words “consult” or “consultation” come up only 10 times in the ODA, which is rather surprising in light of the proactive orientation of the statute, as reflected in its purpose statement. Many have criticized the ODA for not having sufficient enforcement teeth.[[21]](#footnote-21) In my opinion, the Act may also be criticized for failing to provide a significant number of consultation opportunities. Moreover, the consultation opportunities that are available are inconsistent in their engagement with the disability community itself, suggesting reticence on the part of the government to fully engage in citizen participation. Much fuller opportunities for consultation appear later in the AODA and in Manitoba’s AMA, although, as I discuss in more detail later in this paper, there are challenges with the actual on-the-ground process of engagement.

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

4. (1) In consultation with persons with disabilities and others, the Government of Ontario shall develop barrier-free design guidelines to promote accessibility for persons with disabilities to buildings, structures and premises, or parts of buildings, structures and premises, that the Government purchases, enters into a lease for, constructs or significantly renovates after this section comes into force. [[22]](#footnote-22)

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

Indirect consultation denotes circumstances where the Act requires the government sector to consult with a committee or other body established to represent the interests of persons with disabilities. For example, every government ministry is required to consult with the Accessibility Directorate of Ontario while creating its annual accessibility plan.[[23]](#footnote-23) The Accessibility Directorate of Ontario is an office of civil servants established by legislation to support the administration of the statute under the direction of the responsible Minister. There is no requirement that persons with disabilities be among the employees appointed to this office. Indirect consultation may also signify an obligation imposed on the government sector to consult with persons with disabilities because a representative committee has not been established under the Act for legitimate reason. For example, in preparing its annual accessibility plan, every municipal council must seek the advice of municipality’s accessibility advisory committee. However, municipalities are exempt from establishing accessibility advisory committees if they have a population of less than 10,000 people.[[24]](#footnote-24) In such cases, a municipality without an accessibility advisory committee would be required by default to consult with persons with disabilities directly.[[25]](#footnote-25)

In many instances, no consultation is required. For example, the Government of Ontario may make decisions respecting the purchase of goods or services without having to consult with persons with disabilities or a representative committee. The government is required only to “have regard” to access for persons with disabilities in relation to the goods and services procured. Moving even further along the spectrum of consultation, it is possible for a government sector to avoid the obligation of providing access in certain cases such as where it determines that it is not technically feasible to create accessible Internet sites.[[26]](#footnote-26)

Finally, situations exist under the statute where consultation will only take place on direction by the responsible minister. The situation may occur with respect to the Accessibility Directorate of Ontario. At his or her discretion, the Minister may direct the Directorate to consult with persons with disabilities in order to develop codes, standards guidelines etc.[[27]](#footnote-27)

There is one final situation in which a very weak form of consultation takes place. This is where a person with a disability may request accessibility and the government sector is obliged by the statute to consider the request. There is only one instance of this type of situation in the statute. It deals with government publications and obliges the Ontario government to make a publication available in a format that is accessible to the person who has made the request “unless it is not technically feasible to do so”.

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

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

Four years after the ODA was enacted, the *Accessibility for Ontarians with Disabilities Act, 2005* (AODA) was enacted by the legislature. The AODA provides stronger tools than the ODA for enforcement of and compliance with the obligations it sets out.[[28]](#footnote-28) It also places obligations on for-profit businesses and organizations — a move that is more in keeping with the statutory human rights codes. The human rights codes exist in every province and territory and apply in both the public and private sectors. Surprisingly, the AODA was passed during the term of the conservative government as opposed to the earlier statute which had been passed by the more progressive New Democratic Party.

### Underlying Philosophy and Guiding Principles of the Statute

Similar to the ODA, the AODA shares an underlying philosophy of engaging citizens in the development of laws, policies and programs that affect them. There is no distinct preamble in the statute. In its place is a short and precise statement of purpose which recognizes the “history of discrimination against persons with disabilities in Ontario”.[[29]](#footnote-29) The statement specifies further that the purpose of the statute “is to benefit all Ontarians” through the development, implementation and enforcement of accessibility standards, and to involve persons with disabilities, government and industry in the process of developing the standards. It is worth setting out the purpose statement in full as it lays the foundation and underlying theory for the statute, the terms of reference for the standard development committees and other committees related to the AODA, and for all other regulations and delegated legislation authorized by the statute. The purpose statement reads:

Purpose

1. Recognizing the history of discrimination against persons with disabilities in Ontario, the purpose of this Act is to benefit all Ontarians by,

(a) developing, implementing and enforcing accessibility standards in order to achieve accessibility for Ontarians with disabilities with respect to goods, services, facilities, accommodation, employment, buildings, structures and premises on or before January 1, 2025; and

(b) providing for the involvement of persons with disabilities, of the Government of Ontario and of representatives of industries and of various sectors of the economy in the development of the accessibility standards.[[30]](#footnote-30)

“Accessibility standards” are a central tool in this legislation. They are legal instruments designed to set out measures, policies, practices etc. for the eradication and prevention of barriers affecting persons with disabilities in prescribed areas of society.[[31]](#footnote-31) The social areas that are prescribed in the statute mirror the areas of protection in the *Ontario Human Rights Code*. [[32]](#footnote-32) These areas are: goods, services, facilities, accommodation, employment, buildings, structures, premises. However, the AODA offers the opportunity for additional social areas to be identified and protected as well, by indicating that “such other things as may be prescribed” may also be the subject of accessibility standards.[[33]](#footnote-33)

Like accessibility standards, barriers are also at the heart of the legislation. Under the AODA, a “barrier” means anything that prevents a person with a disability from fully participating in all aspects of society because of their disability, including a physical barrier, an architectural barrier, an information or communications barrier, an attitudinal barrier, a technological barrier, a policy or a practice.[[34]](#footnote-34) Barriers have a wide-reaching scope, the removal of which aims to facilitate the inclusion of persons with disabilities in society. Although the concept of a “barrier” had been mentioned in the earlier ODA, it is developed in detail for the first time in the AODA. The AODA highlights the concept of a barrier for the first time in the legislative sphere of laws affecting persons with disabilities in Ontario.

### Obligations and consultation under the AODA

1. Obligations

Obligations are imposed on the persons or organizations named or described in each accessibility standard. These persons or organizations are required to implement those measures, policies, practices or other requirements set out in the standard within the time periods it specifies.[[35]](#footnote-35) To date, standard development committees have created standards in each of the five areas identified by the Minister shortly after Act came into force: customer service, transportation, information and communications, employment, and the built environment. [[36]](#footnote-36)

A current and significant challenge, though, concerns enforcing the obligations under the standards that have been created. The statute indicates that the obligations are binding and that the goal of the legislation is to make the province accessible by 2025.[[37]](#footnote-37) However, on the ground, there are lapses in compliance caused in part by recognized weaknesses in enforcing inspections and other oversight tools that are at the disposal of the government.[[38]](#footnote-38) The ability to order inspections of businesses that have not complied with the statute lies within the discretion of the government’s ministry and, in particular with the Accessibility Directorate of Ontario. Two years after the first filing due date, 70% of companies had not filed a report, representing 36,000 businesses across the province. They also have not been audited. As of 2016, only four violations have been brought before the responsible tribunal.[[39]](#footnote-39) Clearly, if the legislation is to have an impact, the enforcement and/or incentive piece needs to be rethought.

1. The duty to consult with persons with disabilities

The duty to consult is extensive under the AODA. Consultation is to take place not only with persons with disabilities but also with representatives from government and industries that will be affected. The members of the public who may be involved in consultation under the AODA therefore represent a much wider scope than the earlier statute, the ODA.

Outside of who is to participate, the instances in which affected citizens may participate are also much more consistent and rigorous than under the ODA. In particular, every standard that could possibly be developed is created by a standard development committee.

The process by which the consultations take place can be found in the terms of reference for each of the standard development committees. The terms of reference are soft law documents, created by ministerial discretion. They are now in the archives but at the time that each committee started its work, the terms of reference were posted on a government website dedicated to the AODA.[[40]](#footnote-40)

Consensus is required on committee decisions. However consensus is defined so that it does not require unanimity. The terms of reference indicates that consensus means “substantial agreement of members, without persistent opposition, by a process taking into account the views of all members in the resolution of disputes”.[[41]](#footnote-41)

In addition, the Terms of Reference indicate under “Member Rules and Responsibilities” that every member of the committee has an obligation to present their views and interests and those of the organizations that have endorsed them, to the best of their ability at all committee meetings.[[42]](#footnote-42) The Chair by contrast has an obligation to “encourage the balanced analysis of all relevant issues and questions from a variety of perspectives”.[[43]](#footnote-43) The Chair’s duties are to be completed in a nonpartisan and impartial manner. Both the Chair and all of the committee members are selected by the responsible minister after an open process of application through the public appointments secretariat. As with many other areas of government and administrative law, the minister’s selections may have a profound influence on the outcome of the consultation processes.

## Manitoba

[The section on Manitoba has been omitted.]

# Analysis - Sunstein’s framework

In his 2014 book, *Valuing Life: Humanizing the Regulatory State*[[44]](#footnote-44),Harvard law professor, Cass Sunstein asserts that governments should focus on the human consequences of their actions. In creating regulations, they should consider factors such as the effects of their actions or inaction; the number of lives that would be saved, if any; whether people will be burdened and, if so, the extent to which they will be burdened; and who exactly will be helped and/or hurt.[[45]](#footnote-45) Sunstein opines that governments should “seek a method to allow them to make sensible comparisons and to facilitate choices among values that are difficult or impossible to quantify, or that seem incommensurable.”[[46]](#footnote-46) Furthermore, a wide breadth of knowledge should be brought into the decision-making process. It is important for governments to go beyond the knowledge that they acquire from their public officials. Humanizing the regulatory state requires that they seek knowledge from citizens as well.[[47]](#footnote-47)

The question, of course, is how to go about achieving these objectives. When it comes to determining the consequences of regulations made, evaluating factors such as the effects of actions or the number of lives that would be saved may impose significant information-gathering obligations on government officials. Moreover, how does one value certain benefits or losses? By what method could one assess the value of preventing prison rape, protecting privacy or — an example provided by Sunstein but that fits rather aptly in the context of accessibility standards — providing wheelchair users independent access to public washrooms? Sunstein argues for the use of a breakeven monetary analysis. While he accepts that goods may be qualitatively diverse in the same transaction (e.g. money and the dignity of avoiding prison rape; or money compared to the dignity and equality of social inclusion for persons with disabilities), Sunstein contends that pinpointing some sort of monetary value will provide transparency to the government’s decision-making process in creating regulations. He proposes that it should be possible to determine upper and lower bounds for nonquantifiable goods and that these upper and lower boundaries will help to promote sensible trade-offs.[[48]](#footnote-48) For example, it might be possible to determine the lowest and highest amount that a person with a mobility disability would be willing to pay to have access to washroom facilities.

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

In some cases, however, agencies will not be able to identify lower and

upper bounds in any way, and breakeven analysis will be helpful largely insofar

as it explains what information is missing and why some cases are especially

difficult.[[49]](#footnote-49)

Overall, Sunstein argues that to humanize the regulatory state, it is necessary for government to: i) take account of values that are difficult or impossible to quantify; ii) capture qualitatively diverse goods and promote sensible trade-offs among them; and iii) attempt to benefit from the dispersed information of a wide variety of human beings. [[50]](#footnote-50) In his opinion, if these steps are taken, the result will be regulations based less on intuition and more on disciplined analysis as to what is justifiable.

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

## Taking account of values that are difficult or impossible to quantify

There is no doubt that the accessibility standard-setting processes set up by the Canadian provincial governments take account of values that are difficult or impossible to quantify. In essence, they deal with the rights to equality and specifically equal access, equal opportunity and equality of well-being. Disability scholars would argue further that for persons with disabilities, these equality rights also represent a move towards true citizenship within the community.[[51]](#footnote-51) The areas set out by the government in which standards are to be developed (customer service, transportation, information and communications, employment, and the built environment) all inherently deal with qualitative values such as respect, dignity, time, appreciation and safety, that are difficult to quantify or escape quantification altogether.

For example, in the development of the customer service standard in Manitoba, a discussion ensued during the public hearings relating to whether training materials for customer service representatives in retail stores should simply be adopted from Ontario where a regulation had already been made.[[52]](#footnote-52) The representative from the Retail Council of Canada was of the opinion that adopting the material from another province was an opportunity for store owners with chain stores across the country to have one uniform training standard. The implication was that it would therefore be easier in terms of the time taken to train customer service representatives, especially if done collectively. By contrast, a representative of a prominent national disabled women’s network spoke up to indicate that the Ontario standard had not been tested fully at and that she had experienced a lot of insensitivity on the part of retail store clerks. Her point was that she did not want the perpetuation of this type of insensitivity to be spread across the country when it could be stopped by reassessing and evaluating what was done in Ontario and possibly developing a more effective standard, if necessary.

The ultimate determination by the Manitoba Committee will have to take into account both the time it takes to train employees nationally, which is possibly quantifiable, and the “insensitivity” (indignity) that the disabled population would like to escape and denounce. The second of these is certainly beyond quantification as it deals with a complex interrelation of values such as social interaction, protection of dignity and degradation. This is just one example but certainly, with respect to the various areas in which standards are being developed, other examples are not uncommon.

## Capturing qualitatively diverse goods and promoting sensible trade-offs among them

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

Quantification helps to promote accountability, transparency, and

consistency, and it can also counteract both excessive and insufficient

stringency. When regulators quantify and monetize relevant goods,

the goal is to promote sensible choices, not to erase differences among

qualitatively distinct goods. Nor should this point be unfamiliar from

daily life. People decide how much to spend to educate their children,

on health insurance, to reduce risks on the highway (as, for example, by

purchasing especially safe cars), on food, on housing, and on vacations.

When they make trade-offs among these and countless other diverse

goods, they do not pretend that they are qualitatively identical.[[53]](#footnote-53)

In the disability context, however, qualitatively distinct goods can be distinguished. However, these goods invite manifold answers as to what a “sensible” trade-off might be. Quantification may be one possibility for determining the best outcome. However, it would appear that asserting that one outcome is more “sensible” than another really requires a more thorough canvassing of what “sensible” possibly means. Whose concept of sensible is most appropriate? I argue that it is more effective to capture qualitatively diverse goods and then to focus on the deeper foundational question of why any one choice or preference may be the most appropriate. Promoting further discussion on the very nature of why any one preference should be chosen over another should be at the heart of the regulatory process.

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

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

By contrast, the approach that I suggest would invite all stakeholders to a further discussion over what an appropriate interpretation of “customer” should be. Already, a couple of key concepts can be seen in the transcript of the hearings. For instance, another member of the public who was at the hearing spoke up in order to emphasize that the customer service standard was about equal access. A second individual shared a story illustrating the barrier presented by inaccessible recreation facilities for parents with disabilities who want to participate in watching their children play sports so that they can support their children along with the other parents. A monetary approach would not have addressed or caught these nuances, leading to a result that may not resonate with those affected.

## Attempting to benefit from the dispersed information of a wide variety of human beings

The terms of reference for the customer service standards development committee shows an attempt to benefit from the dispersed information of a wide variety of individuals. They state, for example, that the committee must:

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

A similar approach has been taken with respect to the reviews of the statute required to take place every four years.[[54]](#footnote-54) That though these reviews have come with terms of reference that allowed the appointed reviewer to decide on the method of consultation, the most current reviewer has paid attention to ensuring that there is a regional diversity and has made allowance for tool such as webinars in order to enable persons with mobility challenges to disabilities etc. to attend both orally and in writing.[[55]](#footnote-55)

## Intuition rather than disciplined analysis?

Sunstein argues that the above-mentioned regulatory approach (ie, i) taking account of values that are difficult or impossible to quantify; ii) capturing qualitatively diverse goods and promoting sensible trade-offs among them; and iii) attempting to benefit from the dispersed information of a wide variety of human beings) will provide a disciplined analysis leading to sensible regulatory choices, so long as economic valuation is incorporated in the balancing equation. This will also limit regulatory choices that are based on intuitive responses as to what is most appropriate, moral or just.[[56]](#footnote-56)

The Manitoba public hearing on the proposed customer service standard presents a number of illustrations where the regulatory standard had been crafted on some level of intuition. For example, with respect to the concept of what a “customer” is, discussed above, the hearing panel noted the intuitive nature of what a customer generally is but noted also that the complexities brought forward by the public would require them to clarify the definition. Another intuitive aspect of the standards dealt with disruptions of service. The proposed standard indicated that disruptions should be brought to the attention of persons with disabilities. One might assume intuitively that both disruptions in disability access to the actual goods and services (i.e. a store is shut down temporarily) and disruptions in services on which persons with disabilities rely (for example elevators) would both trigger action under this provision. However, discussions at the public hearings revealed that only the disruption of services that are relied on the persons with disabilities, seemed to be caught by the literal words of the standard. Again, this is an area that required clarification and a discussion of what the trade-offs are and how they should be made. Clarification began with discussions that highlighted the central values to the stakeholders. In defining the term “customer”, the central values of equal access and time were brought into the dialogue. With respect to disruptions of service, again the concept of equal access was raised, this time more indirectly. The discussion of service disruption also brought in the perspectives of elevator service technicians and store owners discussing the on- the- ground practicality of putting up notices when such disruptions can sometimes be very quickly fixed. Quantification would have brought a very different spin on the discussion -- one that would have moved the discussion to a more utilitarian realm, eclipsing the equality debate.

# Conclusion

*--“I was aware of the fact that this issue touches people's lives so profoundly and yet there are very few venues for input.”[[57]](#footnote-57)*

In conclusion, how do you legislate for social change? This is been the central preoccupation of the movement towards disability access standards legislation. It is also still a concern as we move forward through the consultation processes and development of the actual standards. Sunstein offers a useful framework for the beginnings of understanding whether regulatory process has been efficient, especially when dealing with qualitative, and intangible human values that profoundly affect people’s lives. The development of disability access standards to concretize, protect and frankly, to act as a vehicle for persons with disabilities to have fuller connections to society are precisely the types of issues that fit within Sunstein’s theoretical framework.

However, at the same time, when considering both on-the- ground experiences and the Sunstein framework, one sees that there are still very large concrete questions that require more guidance before the effectiveness of any such initiative can be fully determined. These are the harder questions such as how to establish what a “sensible” trade-off might be when one considers qualitatively diverse goods. Whose definition of sensible should count and what if a blended compromise is not possible? Equally, this Canadian case study has illustrated that even when values that are difficult or impossible to quantify are taken into account, there must be an additional way of determining which path is appropriate.

Based on the Canadian case study of using consultation to develop disability access standards regulations, I believe that the answer may be temporal, regional and possibly situational. That is, certain values may prevail at certain times and in certain places that are appropriate for a particular group. In other words, a one-size-fits-all approach cannot be used even in the different provinces of one country. Because of the temporal nature of the answers to these questions, it is important to revisit these issues and be open to change over time. In other words, none of the stakeholders should expect that a standard will prevail for a significantly long period of time. In this light, it is helpful that the statutes being enacted in the provinces and federally allowing for disability access standards make provision for reviews every few years.

Legislating for social change may be challenging but these modes of evaluation as opposed to economic valuation will prove meaningful in terms of equality and citizen inclusion to all involved in the long run.

1. Member of the head table hosting the Manitoba Customer Service Standard Public Consultation-June 14, 2014. [↑](#footnote-ref-1)
2. S.O. 2001, CHAPTER 32. [↑](#footnote-ref-2)
3. Though there are indications that an earlier and much less widespread instance of using consultation to develop standards existed several decades earlier in Toronto municipal government. (Interview with person with disability and former official of Toronto municipal government, notes on file with author.) [↑](#footnote-ref-3)
4. See France Houle, Analyses d’impact et consultations réglementaires au Canada (Éditions Yvon Blais, 2012). [↑](#footnote-ref-4)
5. The constitutional and statutory legal tools protecting human rights and freedoms in Canada, including equality rights for persons with disabilities include the *Charter of Rights and Freedoms* and statutory human rights codes. The UN *Convention on the Rights of Persons with Disabilities* has also been signed and ratified by Canada and is said to be reflected in many of the laws already existing. A concise overview of these laws as they relate to persons with disabilities may be found in *Second Legislative Review of the Accessibility for Ontarians with Disabilities Act, 2005* (Mayo Moran, Reviewer) (Queen's Printer for Ontario: 2014) at 4-8. [↑](#footnote-ref-5)
6. See *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)* 2011 SCC 53 (*Mowat)* which held that very strict interpretation of the legislative wording allowing for the awarding of costs should be followed by human rights tribunals in Canada. [↑](#footnote-ref-6)
7. See Statistics Canada, [↑](#footnote-ref-7)
8. See Julie MacFarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (University of British Columbia Press, 2008). [↑](#footnote-ref-8)
9. The second question is addressed in detail in the qualitative empirical data and analysis of my forthcoming book, Laverne JACOBS, *Do Disabled Voices Make a Difference? Exploring Equality and Fairness in the Enactment of Accessibility Standards* (in progress). [↑](#footnote-ref-9)
10. Cass Sunstein, *Valuing Life: Humanizing the Regulatory State* (Chicago: University of Chicago Press, 2014) [*Valuing Life*]. [↑](#footnote-ref-10)
11. Shortly after being elected to office in October, 2015, Prime Minister Justin Trudeau stated that one of the "top priorities" of the newly established Minister of Sport and Persons with Disabilities would be to "lead an engagement process with provinces, territories, municipalities, and stakeholders that will lead to the passage of a Canadians with Disabilities Act”. See Prime Minister of Canada, “Minister of Sport and Persons with Disabilities Mandate Letter” (letter to Minister Carla Qualtrough) (2015): http://pm.gc.ca/eng/minister-sport-and-persons-disabilities-mandate-letter#sthash.ZH3rG4cy.dpuf [↑](#footnote-ref-11)
12. C.C.S.M. c. A1.7. [↑](#footnote-ref-12)
13. ODA, Preamble. [↑](#footnote-ref-13)
14. *Ibid* [↑](#footnote-ref-14)
15. *Ibid* [↑](#footnote-ref-15)
16. See ODA, s 3, which reads:

“[3.](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01o32_f.htm#s3)  Nothing in this Act, the regulations or the standards or guidelines made under this Act diminishes in any way the existing legal obligations of the Government of Ontario or any person or organization with respect to persons with disabilities.” [↑](#footnote-ref-16)
17. ODA, s 1. [↑](#footnote-ref-17)
18. See ODA, s 2 and ss 14-16. [↑](#footnote-ref-18)
19. *Ibid* ss 4-10. [↑](#footnote-ref-19)
20. The provision indicates that the barrier free design is for buildings that the Government of Ontario " has purchased, leased, or significantly renovated”. Common criticism of the ODA which found itself reproduced with the AODA later on, is that there is no obligation on the government to retrofit buildings to ensure their accessibility. See ODA section 4 and P Gordon et al, “An Analysis of the *Ontarians with Disabilities Act, 2001*” (2002) 17 Journal of Law and Social Policy 15 [Gordon] at 24-25. [↑](#footnote-ref-20)
21. See e.g. Gordon *ibid*, D Lepofsky, “The Long, Arduous Road to a Barrier-Free Ontario for People with Disabilities: The History of the *Ontarians with Disabilities Act* -- The First Chapter” (2004) 15 Nat'l J. Const. L. 125 [Lepofsky, “Arduous”]. [↑](#footnote-ref-21)
22. ODA s 4(1). [↑](#footnote-ref-22)
23. ODA s 10(1)(b). [↑](#footnote-ref-23)
24. ODA s 12. [↑](#footnote-ref-24)
25. ODA s 11(1)(b). [↑](#footnote-ref-25)
26. ODA s 12. [↑](#footnote-ref-26)
27. ODA s 20(1)(f). This section also provides that, in addition to consulting with persons with disabilities, the Accessibility Directorate of Ontario may also be directed by the Minister to consult with the Accessibility Advisory Council of Ontario. [See earlier version of the statute where this Council was established and defined at the now repealed section 19]. [↑](#footnote-ref-27)
28. The AODA provides for the ultimate repeal of the ODA at a future date to be set by the government. [↑](#footnote-ref-28)
29. AODA s 1. [↑](#footnote-ref-29)
30. *Ibid.* [↑](#footnote-ref-30)
31. AODA ss 2, 6(a). [↑](#footnote-ref-31)
32. R.S.O. 1990, CHAPTER H.19. [↑](#footnote-ref-32)
33. AODA s 6(a). [↑](#footnote-ref-33)
34. AODA s 2 (“barrier”). [↑](#footnote-ref-34)
35. AODA s 6(b). [↑](#footnote-ref-35)
36. See *Charting A Path Forward: Report of the Independent Review of the Accessibility for Ontarians with Disabilities Act, 2005* (Charles Beer, Reviewer) (Toronto: Queen’s Printer for Ontario, 2010) at 13. [↑](#footnote-ref-36)
37. AODA s 1(a). The minister may create standards in additional areas under the Act. [↑](#footnote-ref-37)
38. See Laurie Monsebraaten, “Ontario vows to enforce accessibility law: Businesses flout requirements to report on how they are meeting needs of customers with disabilities, while enforcement strategy lags” Toronto Star, February 20, 2014. [↑](#footnote-ref-38)
39. The responsible tribunal is the Licensing Appeal Tribunal. For the decisions, see *8750 v. Director under the Accessibility for Ontarians with Disabilities Act, 2005*, 2014 CanLII 46587 (ON LAT); *8635 v. Director under the Accessibility for Ontarians with Disabilities Act, 2005*, 2014 CanLII 53673 (ON LAT); the other two cases are unreported. [↑](#footnote-ref-39)
40. See eg *Accessibility for Ontarians with Disabilities Act, 2005* Customer Service Accessibility Standards Development Committee Terms of Reference, October 14, 2005, archived at: [https://web.archive.org/web/20060513201642/http://www.mcss.gov.on.ca/accessibility/en/news/reference/customerService.htm](https://web.archive.org/web/20060513201642/http%3A//www.mcss.gov.on.ca/accessibility/en/news/reference/customerService.htm) [Customer Service Terms of Reference] [↑](#footnote-ref-40)
41. See Customer Service Terms of Reference*, ibid.* Section 2 states:

“All standards development committees will be required to achieve consensus on committee decisions that fulfill the Terms of Reference for each committee.

Consensus means substantial agreement of members, without persistent opposition, by a process taking into account the views of all members in the resolution of disputes. Unanimous decisions are not necessarily required to achieve consensus.” [↑](#footnote-ref-41)
42. Ibid. s 7. The section reads in part: "7. Member Roles and Responsibilities

In addition to contributing to the fulfillment of the roles and responsibilities assigned to the committee as a whole, individual members will:

[…]

c) during all committee meetings and activities, present their respective views and interests and, to the best of their abilities, present the views and interests of those organizations, industries, sectors of the economy or other classes of individuals or organizations or communities of interest which have endorsed members for the purpose of representing or presenting such views or interests;[…]”. [↑](#footnote-ref-42)
43. *Ibid* at s 9. [↑](#footnote-ref-43)
44. See *Valuing Life supra.* [↑](#footnote-ref-44)
45. *Valuing Life supra* at 1. [↑](#footnote-ref-45)
46. *Ibid.* [↑](#footnote-ref-46)
47. *Ibid.* [↑](#footnote-ref-47)
48. *Ibid* at chapter 3. [↑](#footnote-ref-48)
49. *Ibid* at 67. [↑](#footnote-ref-49)
50. This is nicely summarized in the Epilogue of *Valuing Life*. [↑](#footnote-ref-50)
51. See eg Marcia H. Rioux, “Towards a Concept of Equality of Well-Being: Overcoming the Social and Legal Construction of Inequality” (1994) 7 Can. J.L. & Juris. 127. [↑](#footnote-ref-51)
52. These observations are taken from observations of the public hearing relating to the Customer Service Standard held in Winnipeg, Manitoba on June 17, 2014. [↑](#footnote-ref-52)
53. *Ibid* at 70. [↑](#footnote-ref-53)
54. See AODA, s 41. [↑](#footnote-ref-54)
55. Interview with 2014 AODA Reviewer, Mayo Moran, July 3, 2015 (notes on file with author). [↑](#footnote-ref-55)
56. See Epilogue of *Valuing Life*. [↑](#footnote-ref-56)
57. Interview with 2014 AODA Reviewer, Mayo Moran, July 3, 2015 (notes on file with author). [↑](#footnote-ref-57)