

# **Federal Accessibility Legislation**

*Potential Implications for First Nations and  
First Nations Persons with Disabilities*



***Working Together to Build  
Inclusive and Accessible First Nations***





## ABOUT THE ASSEMBLY OF FIRST NATIONS

The Assembly of First Nations (AFN) is the national, political representative of First Nations governments and their citizens in Canada, including those living on reserve and in urban and rural areas. Every Chief in Canada is entitled to be a member of the Assembly. The National Chief is elected by the Chiefs in Canada; who in turn are elected by their citizens.

The role and function of the AFN is to serve as a national delegated forum for determining and harmonizing effective collective and co-operative measures on any subject matter that the First Nations delegate for review, study, response or action and for advancing the aspirations of First Nations.

55 Metcalfe Street, Suite 1600  
Ottawa, ON K1P 6L5

Telephone: 613-241-6789  
Toll-Free: 1-866-869-6789  
Fax: 613-241-5808

AFN Web site: [www.afn.ca](http://www.afn.ca)



## 1. INTRODUCTION

First Nations persons with disabilities benefit from Indigenous People’s fundamental and collective right to self-determination; this must be respected when enacting legislation or regulations that could affect the rights of First Nations persons with disabilities.<sup>1</sup> This includes the right to participate in life-affecting decisions, to participate in political and public life, and the right of Indigenous Peoples to maintain and develop their political, economic and social systems or institutions.<sup>2</sup> Furthermore, First Nations persons with disabilities ought to be active participants in their political and organizational systems.

Improving accessibility and removing barriers for First Nations persons with disabilities will cut across multiple areas of responsibility, such as health, social services, funding, and on-reserve considerations. Both the Federal and Provincial governments will need to play a role in the implementation of contemplated potential accessibility legislation. To be effective, this legislation will need to address the jurisdictional issues that First Nations have been caught in between the federal and provincial governments regarding provision of equitable services on-reserve.

The opportunity for First Nations to provide input to the federal government prior to potentially drafting legislation is one that could benefit both First Nations and Canada. Canada benefits from hearing directly from First Nations on the issue of how First Nations are uniquely affected by disabilities and how this proposed legislation may impact them in ways that are different from other communities in Canada. Further, First Nations have a constitutional right to be meaningfully consulted on any proposed legislation that may impact Aboriginal and treaty rights– this includes accessibility legislation.

First Nations on-reserve may benefit from an open process through which to express their unique perspectives and address their priorities in regards to matters relating to First Nations persons with disabilities. Additionally, it is an opportunity to express the long-standing, historic and systemic challenges First Nations face in trying to seek equity and equality for persons with disabilities on-reserve, especially as it pertains to equitable access to programs and services that are provided to persons with disabilities living off-reserve.

It is the ultimate concern and constitutional obligation of the federal government to ensure these rights are considered in drafting legislation that will heavily affect First Nations persons with disabilities and their communities.

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<sup>1</sup> *United Nations Declaration on the Rights of Indigenous Peoples* (the *Declaration*) preamble

<sup>2</sup> These are rights codified in the preamble of Chapter 7, articles 4(3), 29 of the *Convention on the Rights of Persons with Disabilities* (CRPD), and articles 5, 11, 18, 19, 20, and 33(3) of the *Declaration*.



## 2. BACKGROUND

In 2015, the federal Liberals campaigned, in part, on introducing Canada’s first federal accessibility legislation. After taking office, Prime Minister Trudeau appointed Carla Qualtrough as the first ever Minister of Sport and Persons with Disabilities. In her mandate letter, the Prime Minister states one of her top priorities is to “[l]ead an engagement process with provinces, territories, municipalities, and stakeholders that will lead to the passage of a *Canadians with Disabilities Act*.”<sup>3</sup> Minister Qualtrough anticipates introducing a Bill before the House of Commons by late 2017 or early 2018.<sup>4</sup>

Employment and Social Development Canada (ESDC) is the department taking the lead on the engagement process to develop federal accessibility legislation with the goal to “increase the inclusion and participation of Canadians in society and promote equality of opportunity by improving accessibility and removing barriers in areas of federal jurisdiction.”<sup>5</sup>

In mid-2016, ESDC released a Discussion Guide to solicit feedback on the potential proposed federal accessibility legislation. The ESDC Discussion Guide is a public document available at: [www.canada.ca/accessible-canada](http://www.canada.ca/accessible-canada).

It provides information on the proposed legislation and public engagement, including:

1. Objectives
2. How to Participate
3. Background and Context to the Development of accessibility legislation
4. Topics for discussion on accessibility legislation
5. Contact information

In addition to the information, the Discussion Guide asks 8 sets of questions regarding:

- Attitudes and Awareness
- Goals of the Legislation
- Improving accessibility and Removing barriers
- Who should be covered by the legislation
- Accessibility issues and barriers
- Compliance, monitoring and enforcement

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<sup>3</sup> Prime Minister of Canada. “Minister of Sport and Persons with Disabilities Mandate Letter”, online: *Prime Minister of Canada*. online: <<http://pm.gc.ca/eng/minister-sport-and-persons-disabilities-mandate-letter>>

<sup>4</sup> Monsebraaten, Laurie. “Blind MP to draft Canada’s first national accessibility law | Toronto Star”, (28 August 2016), online: *thestar.com* <<https://www.thestar.com/news/canada/2016/08/27/blind-mp-to-draft-canadas-first-national-accessibility-law.html>>

<sup>5</sup> Employment and Social Development Canada. “Accessibility Legislation: What does an Accessible Canada mean to you?”, online: <<https://www.canada.ca/content/dam/esdc-esdc/documents/programs/disability/consultations/No.653-Layout%20Discussion%20Guide-EN.PDF>> p



- Support for organizations to improve accessibility, and
- Effectiveness, Reporting, and Outcomes<sup>6</sup>

The Minister has stated that the idea is to create proactive legislation that will create some standards/guidelines to be applied nationally. The Minister is not sure what the wording of the anticipated legislation will include, but says it will set expectations on businesses, service providers and program deliverers regarding what an accessible Canada should look like.<sup>7</sup> Overall, the Minister appears to be proposing a proactive law that will allow for intervention in advance of a complaint of discrimination.

Input from First Nations governments, citizens, and persons with disabilities into the new accessibility legislation is optional but is also important because:

- First Nations perspectives are essential in the development of any federal government legislation that affects the rights of First Nations, with special considerations for legislation that impacts First Nations persons with disabilities;
- The regional, cultural and individual diversity of First Nations need to be expressed and considered;
- Jurisdictional issues and gaps should be considered and addressed; and
- Any new legislation needs to ensure that equality for persons with disabilities in Canada means equality for First Nations people with disabilities.

### 3. ISSUES

The essential issues that will be reviewed in this document are:

- Facts – information regarding disability and First Nations; existing federal and provincial legislation; and international mechanisms
- Aboriginal and Treaty rights
- Jurisdiction
- Potential implication of proposed legislation
- Priority areas for the First Nations

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<sup>6</sup> Employment and Social Development Canada. “Accessibility Legislation: What does an Accessible Canada mean to you?”, online: <<https://www.canada.ca/content/dam/esdc-edsc/documents/programs/disability/consultations/No.653-Layout%20Discussion%20Guide-EN.PDF>> at p. 3

<sup>7</sup> “Minister Carla Qualtrough says Canada's new disability act will 'make history'”, (25 October 2016), online: CBCnews <<http://www.cbc.ca/radio/thecurrent/a-special-edition-of-the-current-focused-on-disability-for-october-21-2016-1.3814141/minister-carla-qualtrough-says-canada-s-new-disability-act-will-make-history-1.3814165>> at 1:20



## 4. FACTS

### A. Disability and First Nations Communities

It is difficult to know the full extent of the issues for consideration because data relating to the disability and First Nations communities is sparse. A 2014 report entitled “Expanding the Circle: Aboriginal People with Disabilities Know their Rights” (Expanding the Circle) states that “[w]hile a substantial body of literature exists that analyzes statistical data concerning aboriginal Canadians more generally, there is relatively little work addressing the situation of aboriginal Canadians *with disabilities*.”<sup>8</sup>

Where data is available, there are discrepancies in the findings. Anecdotal claims have stated that the disability rate of Indigenous persons with disabilities is twice the rate of the non-Indigenous population in Canada. In 2006, the Council of Canadians with Disabilities noted that “[t]he incidence of disability among Aboriginal Peoples in some age categories is almost twice that of the rest of the Canadian population.”<sup>9</sup> The 2002 First Nations Regional Health Survey (RHS) reported that the proportion of First Nations adults living with a disability was 1.6 times that of the general Canadian population.<sup>10</sup> In 1991, Statistics Canada found that persons with disabilities were highly overrepresented in Aboriginal communities (31%) compared with the total Canadian population (13%).<sup>11</sup> However, a more recent 2009 Health Canada study found that the age-standardized prevalence of disability reported among First Nations adults on-reserve (28.5%) was similar to the prevalence among the general Canadian population (25.8%).<sup>12</sup> Unfortunately, more recent studies on disabilities in Canada, such as the 2012 Canadian Survey on Disability, excluded sampling from the population living on-reserve for ‘operational reasons’.<sup>13</sup>

Even without recent data, approaches to developing accessibility legislation that will be meaningful to First Nations persons with disabilities must consider their unique personal and community histories, environments, and circumstances.

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<sup>8</sup> York University. “Expanding the Circle: Aboriginal People with Disabilities Know their Rights” (Spring 2014), online: <<http://drpi.research.yorku.ca/NorthAmerica/ExpandingTheCircle>>

<sup>9</sup> “A Federal Disability Act: Opportunities and Challenges”, (October 2006), online: *A Federal Disability Act: Opportunities and Challenges | Council of Canadians with Disabilities* <<http://www.ccdonline.ca/en/socialpolicy/fda/1006#firstnations>>

<sup>10</sup> “Quick Facts - RHS 2002/03 | FNIGC”, online: First Nations Information Governance Centre <<http://fnigc.ca/our-work/regional-health-survey/quick-facts-rhs-200203.html>>

<sup>11</sup> Ng, Edward. “Disability among Canada’s Aboriginal Peoples in 1991” (1996) 8:1 Health Reports 25, online: <<http://www.statcan.gc.ca/pub/82-003-x/1996001/article/2823-eng.pdf>>

<sup>12</sup> A Statistical Profile on the Health of First Nations in Canada: Self-rated Health and Selected Conditions 2002 to 2005, 2009, A Statistical Profile on the Health of First Nations in Canada: Self-rated Health and Selected Conditions 2002 to 2005. online: <<http://www.hc-sc.gc.ca/fniah-spnia/pubs/aborig-autoch/2009-stats-profil-vol3/index-eng.php>> at p. 14

<sup>13</sup> Canadian Survey on Disability, 2012: Concepts and Methods Guide, January 2014, Canadian Survey on Disability, 2012: Concepts and Methods Guide. online:<<http://www.statcan.gc.ca/pub/89-654-x/2014001/mi-rs-eng.htm>>.



As noted in the Expanding the Circle report:

*“Due to the intersectional impact of aboriginal status and disability status, this disproportionately large population of aboriginal Canadians with disabilities faces massive barriers and challenges in accessing appropriate educational opportunities, accessible transportation, housing, support services, employment, recreation, and cultural opportunities...*

*... Indigenous people with disabilities in Canada also experience disproportionately high rates of homelessness ... face many barriers when attempting to access local and/or culturally appropriate support services. In remote communities, mobility and accessibility are often issues, and resources and services are often not available for someone with a disability ... As a result, many aboriginal people with disabilities have to move away from their family, community and culture in order to access services and supports ... even when individuals do relocate in an effort to access these, and/or if they live in an urban centre, many are still marginalized and excluded from such services due to jurisdictional issues, discrimination and/or due to the lack of culturally relevant services available to them.”<sup>14</sup>*

The above captures similar sentiments that First Nations have expressed in terms of the realistic, logistical and systemic challenges First Nations face in trying to seek justice, equity and equality for First Nations persons with disabilities and their families.

## **B. Existing Federal Legislation**

Although the proposed accessibility legislation will be new, there are other related federal laws, which provide some guidance. By reviewing existing and related legislation, First Nations may be able to draw some similarities as to how proposed accessibility legislation may impact First Nations persons with disabilities, as well as their families, communities and regions. In contemplating the proposed accessibility legislation, First Nations may want to consider gaps that could be filled by this new legislation, opportunities it presents for First Nations persons with disabilities, while considering the potential additional responsibilities new legislation may add to First Nations.

### *i. The Canadian Charter of Rights and Freedom*

The *Canadian Charter of Rights and Freedoms*<sup>15</sup> (the “Charter”) is part of the Constitution of Canada. Section 52(1) of the *Constitution Act, 1982* provides that “[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the

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<sup>14</sup> York University. “Expanding the Circle: Aboriginal People with Disabilities Know their Rights” (Spring 2014), online: <<http://drpi.research.yorku.ca/NorthAmerica/ExpandingTheCircle>> at p 8.

<sup>15</sup> online:<<http://laws-lois.justice.gc.ca/eng/const/page-15.html>>



Constitution is, to the extent of the inconsistency, of no force or effect.” In other words, any law that is inconsistent with the Charter can be struck down as unconstitutional.

Section 15(1) of the Charter provides

*“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”* [emphasis added].

Generally speaking, it has not been definitively settled that the *Charter* applies to First Nations governments.<sup>16</sup> For example, section 25 of the *Charter* provides that the rights and freedoms guaranteed therein “shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal Peoples of Canada.” Moreover, section 32 provides that the *Charter* applies to the Parliament, the Government of Canada as well as to the legislature and government of each province. Further, any Charter decisions in relation to a section 15 challenge on physical disability would only be applicable to First Nations to the extent that the decision does not abrogate or derogate from Aboriginal and treaty rights. Charter challenges can also be very burdensome on the party bringing forth the challenge.

## ***ii. The Canadian Human Rights Act***

The *Canadian Human Rights Act* (CHRA) protects people, including First Nations, in Canada from discrimination based on 11 prohibited grounds of discrimination, including race and disability, when they are employed or receive services from entities under federal jurisdiction.<sup>17</sup> Until its repeal in 2008 (which took effect in 2011), section 67 of the *CHRA* shielded decisions or actions by First Nation band councils made under or pursuant to the *Indian Act* from human rights complaints.<sup>18</sup> It also shielded the federal government from human rights complaints brought by First Nations.

The repeal of section 67 exposed the federal government to human rights complaints by First Nations. A case in point is *First Nations Child and Family Caring Society of Canada et. al. v. Attorney General of Canada*, the child welfare case in which the Canadian Human Rights Tribunal found that the federal government discriminates against First Nations children by underfunding child welfare services on-reserve and in the Yukon. But it also exposed First

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<sup>16</sup> With the exception, for example, of the guarantee of gender equality under section 28; see McNeil, Kent. “Aboriginal Governments and the Canadian Charter of Rights and Freedoms.” *Osgoode Hall Law Journal* 34.1 (1996) : 61-99 at pp. 89-90;

online:<<http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1632&context=ohlj>>

<sup>17</sup> Canadian Human Rights Act, RSC, 1985, c H-6 s 3(1).

<sup>18</sup> “Canadian Human Rights Act - Repeal of Section 67,” online: Government of Canada; Aboriginal Affairs and Northern Development Canada <<https://www.aadnc-aandc.gc.ca/eng/1394023867658/1394024066806>> at paras 1-2



Nations governments to potential liability for human rights complaints arising from band members. For example, in its 2013 Annual Report,<sup>19</sup> the Canadian Human Rights Commission noted that between 2011 and 2013, they received 317 human rights complaints against First Nation governments.<sup>20</sup> Subsequently, between 2013 and 2015, the Commission received an additional 265 human rights complaints against First Nations governments.<sup>21</sup>

Notably, among the 11 prohibited grounds of discrimination under the *CHRC*, 58% of complaints received by the Commission in 2015 were on the grounds of disability.<sup>22</sup>

These figures are not an anomaly, as ‘disability’ typically ranks highest among grounds of discrimination that form the basis of human rights complaints. For example, in 2014, ‘disability’ constituted 57% of all complaints<sup>23</sup> and in 2013 ‘disability’ constituted 55% of all complaints.<sup>24</sup> Therefore, not only has there been a surge in human rights complaints against First Nations governments specifically due to the repeal of section 67 but generally speaking the majority of human rights complaints are generated on the basis of ‘disability’. The enactment of federal legislation that may involve promoting accessibility and place positive obligations on public authorities that fall under federal jurisdiction may alleviate the need for human rights complaints. If the rights of First Nations persons with disabilities are upheld, then they will be less likely to be discriminated against, and therefore compelled to file a human rights complaint.

The Canadian Human Rights Commission (CHRC) also took steps to be more inclusive of First Nations. The *CHRA* was amended to add a non-derogation clause that the CHRC, the CHRT and other courts interpreting the *CHRA* are required to consider s. 35 Rights in all decisions. Further, interpretive provisions were developed to give guidance on and mandate consideration of First

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<sup>19</sup> 2013 Annual Report to Parliament: 35 years of protection and promotion, 2014, 2013 Annual Report to Parliament: 35 years of protection and promotion, online:< <http://www.chrc-ccdp.gc.ca/sites/default/files/pdf/chrc-annual-report-2013.pdf>>

<sup>20</sup> 2013 Annual Report to Parliament: 35 years of protection and promotion, 2014, Canadian Human Rights Commission, online:< <http://www.chrc-ccdp.gc.ca/sites/default/files/pdf/chrc-annual-report-2013.pdf>> at p. 2.

<sup>21</sup> 2014 Annual Report to Parliament, 2015, Canadian Human Rights Commission, online:<<http://www.chrcreport.ca/sites/chrc-annual-report/files/chrc-annual-report-2015.pdf>> at p 86.

<sup>22</sup> 2015 Annual Report to Parliament, 2016, Canadian Human Rights Commission, online:<<http://www.chrcreport.ca/sites/chrc-annual-report/files/chrc-annual-report-2015.pdf>> at p 89.

<sup>23</sup> 2014 Annual Report to Parliament, 2015, Canadian Human Rights Commission, online:<<http://www.chrc-ccdp.gc.ca/sites/default/files/pdf/chrc-annual-report-2014.pdf>> at p 18.

<sup>24</sup> 2013 Annual Report to Parliament: 35 years of protection and promotion, 2014, 2013 Annual Report to Parliament: 35 years of protection and promotion, online:< <http://www.chrc-ccdp.gc.ca/sites/default/files/pdf/chrc-annual-report-2013.pdf>> at p 24.



Nations legal traditions and customs while balancing individual and collective rights, as well as gender equality.<sup>25</sup>

### *iii. The Employment Equity Act*

Canada's Employment Equity Act (EEA) was enacted:

*“to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal Peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences”<sup>26</sup> [emphasis added].*

The Act defines “persons with disabilities” to include:

“persons who have a long-term or recurring physical, mental, sensory, psychiatric or learning impairment and who (a) consider themselves to be disadvantaged in employment by reason of that impairment, or (b) believe that an employer or potential employer is likely to consider them to be disadvantaged in employment by reason of that impairment, and includes persons whose functional limitations owing to their impairment have been accommodated in their current job or workplace.”<sup>27</sup>

For the EEA to apply, employees must self-identify to an employer or agree to be identified by an employee.<sup>28</sup>

Employers are obligated to:

- 1) identify and eliminate employment barriers against persons in designated groups that result from the employer's employment systems, policies and practices that are not authorized by law; and
- 2) institute such positive policies and practices and make such reasonable accommodations as will ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation in
  - a) the Canadian workforce, or

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<sup>25</sup> Canadian Human Rights Commission. “Now a Matter of Rights: Extending Full Human Rights Protections for First Nations”, (June 2011), online: <<http://www.chrc-ccdp.gc.ca/eng/content/now-matter-rights-part-2>>

<sup>26</sup> *Employment Equity Act*, SC 1995, c 44, s 2.

<sup>27</sup> *Employment Equity Act*, SC 1995, c 44, s 3.

<sup>28</sup> *Employment Equity Act*, SC 1995, c 44, s 9(2)



- b) those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw employees.<sup>29</sup>

Employers are not required to implement measures that would constitute ‘undue hardship’; hire persons without essential qualifications; promote someone without merit where merit is required, or; create new positions.<sup>30</sup> Additionally, every employer must collect information and analyze their workforce to determine the degree of underrepresentation of persons in designated groups and review of their employment systems, policies and practices in order to identify employment barriers against persons in designated groups.<sup>31</sup> Furthermore, employers shall keep employment equity records in respect of their workforce, employment equity plan and the implementation of employment equity.<sup>32</sup>

The Canadian Human Rights Commission is responsible for enforcement of the obligations listed above.<sup>33</sup> However, the guiding policy of the compliance regime is that, wherever possible, cases of non-compliance shall be resolved through persuasion and the negotiation of written undertakings on the part of employers to take specified measures to remedy non-compliance; while orders/directions are only to be issued as a measure of last resort.<sup>34</sup> The Commission may also establish an Employment Equity Review Tribunal that can make any order it considers appropriate and reasonable in the circumstances to remedy non-compliance.<sup>35</sup>

### **C. Existing Provincial Legislation**

Similar to the federal laws, an overview of relevant, existing provincial legislation also provides First Nations with some parallels as to what could be included and what should be avoided in the proposed federal accessibility legislation from a First Nations on-reserve perspective.

It should be noted that all provinces have human rights legislation (territories utilize the federal process) and none of the provincial statutes impose the requirements of their respective Acts on-reserve or on private corporations or residences.

#### ***i. Manitoba: Accessibility for Manitobans Act (“AMA”)***

The *AMA* became law on December 5, 2013. The *AMA* is broad, as it applies to employment, accommodation, buildings and transportation, in businesses, and “a prescribed activity or

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<sup>29</sup> *Employment Equity Act*, SC 1995, c 44, s 9.

<sup>30</sup> *Employment Equity Act*, SC 1995, c 44, s 16.

<sup>31</sup> *Employment Equity Act*, SC 1995, c 44, s 9.

<sup>32</sup> *Employment Equity Act*, SC 1995, c 44, s 17.

<sup>33</sup> *Employment Equity Act*, SC 1995, c 44, s 22(1).

<sup>34</sup> *Employment Equity Act*, SC 1995, c 44, ss 22(2) & 25(1).

<sup>35</sup> *Employment Equity Act*, SC 1995, c 44, ss 28(1) & 30(1)(b).



undertaking”.<sup>36</sup> The focus of the *AMA* is to develop and enforce mandatory accessibility standards in 5 areas: Customer Service (regulations passed in November 2015); Employment (under development); Information and Communication; Transportation (sector specific), and; the Built environment.<sup>37</sup> The *AMA* does not define the term “disability” and is subordinate to the Manitoba Human Rights Code.

In order to develop standards, the Manitoba government established an Accessibility Advisory Council to engage public stakeholders and develop standards. Once draft standards are developed, they go through a public review before being presented to the Minister. Standards can be incorporated into regulations.

## *ii. Ontario: Accessibility for Ontarians with Disabilities Act (AODA)*

Ontario’s accessibility legislation, the *Accessibility for Ontarians with Disabilities Act*<sup>38</sup> (AODA) was introduced in 2005 and has the goal to make Ontario fully accessible “with respect to goods, services, facilities, accommodation, employment, buildings, structures and premises” *through* development and enforcement of standards.<sup>39</sup> The AODA does apply to “every person or organization in the public and private sectors of the Province of Ontario.

The term “disability” is also defined broadly to include:<sup>40</sup>

- (a) *any degree of physical disability [...] caused by bodily injury, birth defect or illness [...].*
- (b) *a condition of mental impairment or a developmental disability,*
- (c) *a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,*
- (d) *a mental disorder, or*
- (e) *an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997; (“handicap”)*

Further, the AODA applies to more than just physical barriers. Section 2 (Definitions) defines the term “barrier” to mean:

*anything that prevents a person with a disability from fully participating in all aspects of society because of his or her disability, including a physical barrier, an architectural*

<sup>36</sup> *Accessibility for Manitobans Act*, SM 2013, c 40, s 2(1).

<sup>37</sup> “The Accessibility for Manitobans Act”, online: *Frequently Asked Questions: The Accessibility for Manitobans Act* <<http://www.accessibilitymb.ca/>>.

<sup>38</sup> *Accessibility for Ontarians with Disabilities Act*, 2005, SO 2005, c 11.

<sup>39</sup> *Accessibility for Ontarians with Disabilities Act*, 2005, SO 2005, c 11, s 1(a)

<sup>40</sup> *Accessibility for Ontarians with Disabilities Act*, 2005, SO 2005, c 11, s 2



*barrier, an information or communications barrier, an attitudinal barrier, a technological barrier, a policy or a practice; (“obstacle”)*<sup>41</sup>

Similar to the AMA, the AODA also allows the Lieutenant Governor in Council to make accessibility standards through regulations and provides that these standards apply to the public sector within Ontario.

***iii. Québec: Loi assurant l’exercice des droits des personnes handicapées en vue de leur intégration scolaire, professionnelle et sociale (An Act to Secure the Exercise of the Rights of Persons with Disabilities with a View to Their Educational, Occupational and Social Integration) (the Act)***

The *Act* was originally adopted in 1978 with a review by the National Assembly in 2004. The Act essentially delegates an authorized body of 16 people (the “Board”) to ensure compliance with the objective of the *Act*. Additionally, the government policy called “In Every Respect: For a real exercise of the right to equality” that establishes the Board that coordinates implementation and evaluation was adopted in 2009.

There are three main areas outlined in the Act:

1. Increased involvement
  - a. Make public services more accessible
2. Responsibilities
  - a. Develop annual plans for people with disabilities
  - b. Develop transportation plans
  - c. Supply of accessible goods and services
3. Establishing the Office of Disability Québec with duties and powers of monitoring
  - a. Provide advice to the Minister, government and public/private partners
  - b. Ensure society is making progress in improving opportunities
  - c. Be the watchdog, coordinator, conduct assessments and provide support for people with disabilities and their families<sup>42</sup>

Similar to the *AMA* and *AODA* the Board may make regulations, but its regulations are limited to internal management, to establish a committee, and to determine powers and duties of staff.

***iv. Other Provinces***

None of the other Provinces or the Territories have accessibility legislation. However, most of the Provinces have laws or regulations in regards to building accessibility (ex. Alberta’s *Safety Code Act*, or New Brunswick’s *Community Planning Act*). British Columbia has a 10-year action plan called “Accessibility 2024”. Nova Scotia’s *Accessibility Act* was introduced in the

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<sup>41</sup> *Accessibility for Ontarians with Disabilities Act*, 2005, SO 2005, c 11, s 2



legislature on November 2, 2016 and is currently going through the legislative process to become law.

#### **D. International Mechanisms**

The examination of international mechanisms is useful in contemplation of ensuring First Nations representation with proposed federal accessibility legislation because international mechanisms provide guidance on a rights-based approach to the implementation of domestic measures.

At the international level, there are Indigenous-specific mechanisms such as the United Nations Permanent Forum on Indigenous Issues, Expert Mechanism on the Rights of Indigenous Peoples, and Special Rapporteur on the Rights of Indigenous Peoples. Additionally, the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) was adopted by the UN General Assembly in 2007 and was endorsed with qualifications by Canada in 2010 (with an unqualified endorsement in 2016). There are also other international mechanisms that are of significance to Indigenous Peoples, but are not specific to Indigenous Peoples. Those are the Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child, Universal Periodic Review and Convention on the Rights of Persons with Disabilities.

The *International Labour Organization Indigenous and Tribal Peoples Convention No. 169*, created in 1989, was one of the first pieces of international legislation that recognized the rights of Indigenous peoples on an international level. This Convention recognizes health rights.<sup>42</sup> Even though this convention is not signed by Canada, it is nevertheless an instrument that can be used in draft legislation pertaining to disabilities and indigenous rights. Canada is urged to sign on to this Convention; and in doing so, Canada would be signaling that they intend to live up to the commitments that they have made to the Indigenous peoples of Canada.

The two main international instruments regarding Indigenous Peoples and disability are the *Convention on the Rights of Persons with Disabilities (CRPD)* and the *United Nations Declaration on the Rights of Indigenous Peoples (Declaration)*.

##### ***i. United Nations Convention on the Rights of Persons with Disabilities (“CRPD”)***

Canada ratified the *United Nations Convention on the Rights of Persons with Disabilities (“CRPD”)* in March 2010.<sup>43</sup> The Convention adopts a broad categorization of persons with

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<sup>42</sup> "C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)." Convention C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169). Accessed January 18, 2017.

<sup>43</sup> “Loi assurant l'exercice des droits des personnes handicapées en vue de leur intégration scolaire, professionnelle et sociale”, online: *Office des personnes handicapées*



disabilities and reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms. It clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptations have to be made for persons with disabilities to effectively exercise their rights and areas where their rights have been violated, and where protection of rights must be reinforced.

The preamble of the *CRPD* specifically references Indigenous Peoples as a group of persons of special concern due to being subject to “multiple or aggravated forms of discrimination.”<sup>44</sup> As a signatory, Canada must report to the Committee on the Rights of Persons with Disabilities (the Committee) every four years. The last report Canada submitted in 2012 contained very little information in regards to Aboriginal People and disability.<sup>45</sup> Canada’s next report is due in 2017, and the Committee has specifically requested that Canada report on: measures to eliminate multiple and intersectional discrimination including against Indigenous Peoples (including remedies and redress); measures for the advancement, development and empowerment of, in particular, indigenous women and girls; violence against indigenous women and girls with disabilities; measures to prevent and eliminate all forms of violence; steps taken to implement the recommendations of the Truth and Reconciliation Commission and repeal section 43 of the Penal Code; sexual and reproductive health rights of indigenous women with psychosocial impairments, and; disaggregated information about indigenous persons with disabilities who receive funding for housing and adaptation.<sup>46</sup>

The approaches to draft accessibility legislation may include provisions of the *CRPD*, and if this is the case, then Canada would be expected to consult with First Nations on any adverse impacts, and if necessary, Canada would also be expected to accommodate First Nations concerns before the ratification of this particular instrument.

Canada has not yet signed on to the *CRPD* complaints mechanism. The *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (“protocol”) is a side agreement that established a complaints mechanism for contraventions of the *CRPD*. The *CRPD* Optional

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<<https://www.ophq.gouv.qc.ca/loffice/loi-et-politiques/loi-assurant-lexercice-des-droits-des-personnes-handicapees.html>>

<sup>44</sup> Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, (entered into force 3 May 2008, accession by Canada March 2010), online:

<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#preamble>, preamble.

<sup>45</sup> Committee on the Rights of Persons with Disabilities, *Consideration of reports submitted by States parties under article 35 of the Convention: Initial reports of States parties due in 2012*. Canada. *CRPD UN Doc CRPD/C/CAN.1* (2014).

<sup>46</sup> “List of Issues in relation to the initial report of Canada,” UN Committee on the Rights of Persons with Disabilities. *CRPD/C/CAN/Q/1*, (2016), online:<[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCAN%2fQ%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCAN%2fQ%2f1&Lang=en)>



Protocol Committee can accept complaints from individual or group complainants who feel their individual human rights under the convention have been violated.<sup>47</sup>

In addition, the protocol allows complainants bring forth inquiries concerning systemic violations of the CRPD.

While Canada has not yet formally ratified the Optional Protocol to the CRPD,<sup>48</sup> Canada made a commitment on December 1, 2016, where both the Honourable Minister Carla Qualtrough, Minister of Sport and Persons with Disabilities and the Honourable Stéphane Dion, then Minister of Foreign Affairs announced that Canada would ratify the Optional Protocol in 2017.<sup>49</sup>

First Nations once again, will have to be consulted before the Optional Protocol is signed and ratified. This protocol requires ratification and implementation in a manner that is consistent not only with Indigenous constitutional rights, but also with regard to other rights that they have under other domestic laws such as those under the Canadian Human Rights Act. As such, any steps to ratify this protocol through legislative means would have to reflect the concerns of First Nations pertaining to disabilities. Such steps to consult with First Nations would have to be in place in the very near future.

***ii. United Nations Declaration on the Rights of Indigenous Peoples (“the Declaration”)***

In November 2010 Canada endorsed and in May 2016 provided its unqualified support for the *United Nations Declaration on the Rights of Indigenous Peoples* (“the Declaration”).<sup>50</sup>

The Declaration codified the rights of Indigenous Peoples and provides guidance on the implementation of Indigenous rights. In interpreting the articles of the Declaration, it calls for special consideration for Indigenous persons with disabilities.<sup>51</sup>

Article 21 specifically places an obligation on states to take effective and appropriate measures to address the issues of disability. While the Declaration is not a legally binding instrument,

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<sup>47</sup> *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 13 December 2006, GA resolution A/RES/61/106, at article 1.

<sup>48</sup> United Nation Human Rights, “Status of Ratification Interactive Dashboard”, online:<<http://indicators.ohchr.org/>>.

<sup>49</sup> Council of Canadians with Disabilities, “Canada to Ratify CRPD’s Optional Protocol”, (23 December, 2016) online:<<http://www.ccdonline.ca/en/international/un/canada/CRPD-OP-23Dec2016>>.

<sup>50</sup> Canada, Indian and Northern Affairs Canada, *United Nations Declaration on the Rights of Indigenous Peoples*, (Ottawa: INAC, 2016) online:<<https://www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958>>.

<sup>51</sup> UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, at article 21.*



nevertheless, this article is of value when considering implementation through the accessibility legislation.

### *iii. UNPFII Study on Situation of Indigenous Peoples with disabilities*

In 2013, the UNPFII published a study on the situation of Indigenous Peoples with disabilities.<sup>52</sup> This study confirms that there is a lack of data globally on Indigenous Peoples with disabilities and that there is a:

*“serious gap in the implementation and enjoyment of a wide range of rights, ranging from self-determination and individual autonomy to access to justice, education, language, culture and integrity of the person. There are significant unmet needs and rights that are not being addressed, of which gaps in access to health, life expectancy, educational qualifications, income, safety of the person and participation in decision-making are just a few examples.”<sup>53</sup>*

In its recommendations, the UNPFII urges action from Member States, Indigenous Peoples organizations, and the UN system, highlighting urgent intersectional and interconnected nature of the issue. As such, it would be advantageous to Indigenous peoples to advance this work by addressing the concerns of this study in any accessibility legislative provisions, especially in light of the accessibility legislation proactive approach.

## **5. ABORIGINAL AND TREATY RIGHTS**

First Nations have Aboriginal and constitutional rights as Indigenous Peoples in Canada. In addition, some rights also flow from the various Treaties that were signed between First Nations and the Crown. Although Indigenous rights are now provided for in the *Declaration*, the Indigenous rights framework in Canada has evolved differently than at the international level. Separate from the rights that are outlined in Treaties, the common law on what constitutes an “Aboriginal right” according to Canadian law has developed to mean a practice or activity that was “integral to the distinctive culture” at the time of first contact with Europeans and still exists in some form today.<sup>54</sup> Aboriginal rights are protected from unnecessary infringement under section 35 of the Constitution Act, 1982.<sup>55</sup>

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<sup>52</sup> online:<<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/224/58/PDF/N1322458.pdf?OpenElement>>

<sup>53</sup> Permanent Forum on Indigenous Issues, Study on the situation of Indigenous persons with disabilities, with a particular focus on challenges faced with regard to the full enjoyment of human rights and inclusion in development, 5 February 2013, E/C.19/2013/6, online:<<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/224/58/PDF/N1322458.pdf?OpenElement>> p 15.

<sup>54</sup> Olthuis, Kleer, Townshend LLP. *Aboriginal Law Handbook*, 4th i (Toronto, ON: Thomson Reuters Canada Limited, 2012) at p 33.

<sup>55</sup> *Constitution Act*, 1982, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.



First Nations persons with disabilities also have the full benefit of their rights as Aboriginal Peoples, Indigenous Peoples, Treaty People (if they are such), and as persons with disabilities. First Nations children with disabilities, like all children, carry these rights in addition to their rights as children. First Nations could recommend that the government include enabling provisions within the legislation whereby First Nations can choose to adopt or modify aspects of the legislation based on their inherent right to self-government.

In contemplating legislation, the government should consider any impacts on Aboriginal and Treaty rights, including the inherent right to self-government, but also where Treaties include health (medicine chest) or education clauses. In sum, accessibility legislation should be consistent with section 35 of the Constitution, 1982, which protects Aboriginal and Treaty rights.

## 6. JURISDICTIONAL DISPUTES

Section 91(24) of the *Constitution Act*, 1867, provides the federal government with exclusive authority to make laws with respect to “Indians, and Lands reserved for the Indians”<sup>56</sup> meaning First Nation affairs and reserve lands falls within the federal sphere of jurisdiction. The main piece of federal legislation governing Indian affairs is the *Indian Act*.<sup>57</sup> The *Indian Act* provides that First Nation bands<sup>58</sup> may enact by-laws with respect to, among other things: the health of residents on reserve<sup>59</sup> and the regulation of the construction, repair and use of buildings.<sup>60</sup> The *Indian Act*, and the powers it prescribes, creates delegated authority and potential liability for decision making by First Nation governments.

Of course, First Nation governments also assert a right to self-determination and an inherent right to self-government, which is protected under s. 35 of the Constitution Act, 1982. Any federal accessibility legislation needs to be mindful of this right and work towards its recognition and implementation. This includes ensuring that there are options for First Nations to adopt or adapt aspects of the legislation to meet the needs of their community. In addition, adequate resourcing will have to be provided to First Nation governments in order to fulfill their responsibilities to their citizens who are persons with disabilities.

The federal government is responsible for matters relating to First Nations living on-reserve. Yet, provincial governments are responsible for matters relating to health and social services. This split in responsibility is referred to as the division of powers under the Constitution, 1867.

A recent and prominent example of the issues with jurisdiction is the efforts to meaningfully operationalize Jordan’s Principle.

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<sup>56</sup> *Constitution Act*, 1867, 91(24).

<sup>57</sup> *Indian Act*, RSC 1985, cI-5.

<sup>58</sup> *Indian Act*, RSC 1985, cI-5, s 2(1).

<sup>59</sup> *Indian Act*, RSC 1985, cI-5, s 81(1)(a).

<sup>60</sup> *Indian Act*, RSC 1985, cI-5, s 81(1)(h).



As stated in the landmark Canadian Human Rights Tribunal ruling on First Nations children in care:

*“Jordan’s Principle is a child-first principle and provides where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province/territory or between departments in the same government regarding services to a First Nations child, the government department of first contact pays for the service and can seek reimbursement from the other government/department after the child has received the service. It is meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them.”<sup>61</sup>*

Jordan’s Principle could be expanded in contemplation of accessibility legislation to apply to any First Nations person, regardless of age, with any type of disability or disabilities caught in a jurisdictional dispute where those services are available off-reserve.

First Nations may want to consider providing materials and recommendations relating to Jordan’s Principle in any submissions to Canada on accessibility legislation to ensure jurisdictional disputes are resolved in the contents of the legislation itself and not left for First Nations governments and First Nations persons with disabilities to have to resolve.

## **7. POTENTIAL IMPLICATIONS / IMPACTS OF FEDERAL ACCESSIBILITY LEGISLATION**

It is challenging to attempt to consider potential impacts of something that does not yet exist. This is why the above information was provided: to give examples of what has occurred in other jurisdictions and provide some indication potential impacts of this proposed legislation.

### **A) Opportunities/Processes for Policy Input**

Clearly First Nations have rights, interests and obligations that stand to be significantly affected by federal accessibility legislation. Therefore, it is important for the AFN and First Nations to consider the various points in the policy/legislative process to provide input into the proposed federal accessibility legislation. The following points are intended to provide some areas for consideration for First Nations to provide input and feedback into this process, should they choose to do so.

First and foremost, because of the potential impact on constitutionally protected aboriginal and treaty rights, the federal government must ensure that First Nations are meaningfully consulted and engaged early in the policy/legislative process. First Nations are not simply stakeholders. The process for their engagement must meet the unique circumstances of First Nations and must

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<sup>61</sup> *First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada*, 2016 CHRT 2 at para 351.



be consistent with the nation to nation relationship which the Trudeau government has promised to build with First Nations. As the organization representing First Nations in Canada, the AFN can facilitate the federal engagement in a manner consistent with the nation to nation relationship. Regional feedback processes that include First Nation persons with disabilities and First Nation researchers in health, law and governance might be helpful in the development of a national response.

In addition, the AFN and First Nations will have the opportunity to be involved in the Parliamentary legislative process. Upon completion of the stakeholder and public engagement, the Government typically drafts the legislation and at that point First Nations should still have the opportunity to have input. The draft legislation will be required to go through the same procedure as all legislation. Before it comes into force, proposed legislation (a “Bill”) will be introduced in Parliament (First reading); debated by Members of the House of Commons (Second reading); undergo House of Commons Committee review (Committee Stage); Debated again in the House of Commons after committee review (Report Stage); Voted on by the House of Commons (Third reading); Senate review (First, Second and Third readings in the Senate); and finally Royal Assent (granted by the Governor General).

Such processes would not replace the federal government’s constitutional obligation to consult but rather is another opportunity for the AFN to create a national response with the unique regional considerations from the community level. It could also serve as means to prepare First Nation communities to participate in a consultation process with Canada on the accessibility legislation.

Overall, federal accessibility legislation has the potential to be beneficial for First Nations, particularly First Nation persons with disabilities, by imposing positive obligations on organizations, service providers and other entities under federal jurisdiction to ensure that their programs, services, buildings and operations are accessible to First Nations persons with disabilities.

However, the proposed legislation could also be unhelpful or even harmful if it does not take account of the unique interests and circumstances of First Nations. For example, under current human rights legislation, the onus is on the individual or group to prove prima facie discrimination first before being able to seek remedies. Such a burden on a First Nations person with disabilities effectively perpetuates systemic issues against persons with disabilities. One measure in assessing the approaches in the legislation will be the user-friendliness of the redress process that results in a quick resolution and is responsive while not limiting access to a human rights complaint. Likewise, the legislation will be harmful if the burden of addressing the needs of persons with disabilities is simply off-loaded onto First Nation governments without adequate resources to meet those needs. It will also be harmful if it is not culturally sensitive to the customs and traditions of First Nations.



## **B) Factors the AFN and First Nations may use to Assess Impacts**

In addition, here are some other factors that First Nations may want to consider in assessing impacts of proposed accessibility legislation:

### **Legislative Drafting**

- Will the legislation, when drafted, contain a non-derogation clause?

### **Standards**

- Will standards express recognition of the Rights and the unique circumstances (history, socioeconomic conditions, etc.) of First Nations?
- How will standard development consider historic disadvantage of First Nations (as a result of the history of colonialism, and governmental assimilation policies, particularly Indian Residential Schools) and keep standards contextual to First Nations capacity and respective history?
- How will the legislation reduce excessive exposure to liability due to requirements on First Nations to administer and enforce standards?
- How will the government ensure that First Nations have the means, including the financial, institutional and infrastructural capacity, to fulfill the obligations under the legislation?

### **Committees**

- If advisory or standards committees are established, will there be guaranteed inclusion of First Nations and First Nation persons with disabilities representation?

### **Compliance**

- Will First Nations be subject to the legislation?
- Will First Nations have a role in enforcing the legislation?
- What measures will be put in place to ensure the legislation is not merely aspirational, but helps meet the needs of First Nations persons with disabilities?
- Will the legislation contemplate compliance mechanisms to hold federal departments to account?
- Will the federal government consider including positive obligations for government departments to coordinate services to alleviate the burden on First Nations governments and persons with disabilities to navigate complicated systems?



- Will there be inspections or audits?
  - If so, who will conduct them?
  - Will there be adequate, culturally appropriate/sensitive ongoing training for inspectors or auditors?
- Will there be measures to ensure inspections or audits are contextual to First Nations?
- Who will decide what constitutes non-compliance?
- Will there be penalties for non-compliance?
  - If penalties are levied, could they be placed in a separate fund for First Nation research support or additional funding for First Nation compliance

### **Reporting**

- Will reports add to First Nations' already-heavy reporting burden?
  - If reports are required, will they be made available to First Nation researchers conducting research relating to under-examined First Nations accessibility issues?

### **Monitoring and Implementation**

- What should be the role of First Nations in monitoring?
- What types of remedies should be available for lack of implementation?
- What happens if First Nations governments are held to be non-compliant?
- Will there be periodic review of the legislation?
  - If so, what would be the periodic review period?
- Would there be a body established to write interpretative provisions, develop policy guidelines, or model policies?
- What does effectiveness look like from a First Nations perspective?
- Will the legislation also consider specific supports for First Nations persons with disabilities who may also be Two-Spirit, Gay, Lesbian, or Trans?
- How will the legislation balance individual rights and collective rights and interests?

### **Complaints**

- Would the CHRC or another Tribunal be charged with hearing complaints?
- Will there be First Nations adjudicators?
- Will there be specific training for adjudicators relating to historic disadvantage, and other contexts to keep in mind while enforcing standards?
- Will there be a specific tribunal or hearing process dedicated to Accessibility?

### **First Nations Role in Building and Maintaining Accessible Communities**



- Would there be funds or other opportunities available through the legislation for First Nations to be proactive and propose measures to building and maintaining accessible communities?

### **Awareness Raising and Training**

- Would there be supports available for the development of culturally- relevant/appropriate training and awareness raising? For First Nations, general public, and public institutions (ex. Service providers, bureaucrats, etc.)
- Who would or could provide ongoing culturally-sensitive accessibility training?
- Could training be eligible for credit (ex. for lawyers, social workers, doctors, etc.)?
- Are there any incentives that could be offered?
- Would there be supports to develop and promote rights-based community resources to raise awareness and tackle stereotypes?
- What will be developed to provide clarity between disability and human rights legislation

### **Jurisdictional Issues**

- Would legislation contemplate evolving the relationship between provincial and federal governments, especially service providers in health, social services, and education to ensure First Nations persons with disabilities, especially children and elders, have full access to essential services?
- How would this legislation ensure provision of equitable health and social services and access to education accommodations for students with special needs?

### **Funding**

- Will there be a funding pot to assist communities meet legislative obligations?
- Who would be able to apply?
- What would the fund cover?
- Could the legislation create a research institute or body, funded by the federal government and staffed by Indigenous researchers, to research First Nations accessibility issues?<sup>62</sup>

## **8. PRIORITY AREAS FOR FIRST NATIONS AND FIRST NATIONS PERSONS WITH DISABILITIES**

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<sup>62</sup> This point in particular would help meet the Calls to Action 53, 65 and 78 of the Truth and Reconciliation Commission Final Report. Truth and Reconciliation Commission of Canada: Calls to Action, 2015, online:<[http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls\\_to\\_Action\\_English2.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf)>



It is important for the Federal Government to be aware of First Nations priorities in regards to disability and accessibility. These priorities will differ from region to region and First Nation to First Nation.

The ESDC Discussion guide requests feedback into what accessibility issues and barriers the legislation should address. They would like to know whether it is better to identify and prioritize key thematic areas, to describe a process for identifying the issues, or have a combination of both.

The ESDC Discussion Guide highlighted the following six areas as potential priority areas:

- The Built Environment
- Employment
- Procurement of Goods & Services
- Program and Service Delivery
- Transportation
- Information and Communications

In addition to the priority areas that were identified, First Nations may have additional priority areas. Some of these areas may include, but are not limited to:

- Education
- Emergency Planning
- Non-Insured Health Benefits
- Fetal Alcohol Spectrum Disorder (FASD)
- Violence against Indigenous women and girls

First Nations may identify with the above-noted lists or may also want to consider other priority areas that affect the persons with disabilities in their communities.

Choosing to prioritize static thematic areas may be problematic because they may not adequately reflect the diversity of First Nations. Additionally, for any community or individual who falls outside an enumerated priority, they may end up falling through the cracks. The benefit is that fewer priorities may result in more action being undertaken in those areas.

The procedural option may focus too much on the makeup of the process and not enough on the outcomes. In essence, the process could become the outcome. Alternatively, a procedural approach may allow for flexibility and ability to react to current or emergent issues.

## **9. CONCLUSION**

First Nations persons with disabilities should have the full benefit of their rights and equitable opportunities to contribute to the well-being of their communities, both individually and



collectively, in ways that do not compromise their autonomy or self-determination, or that of their First Nations. First Nations governments and Canadian society should embrace and promote opportunities to eliminate social, economic, physical and attitudinal barriers and provide accessible policies, programs, and services.

First Nations persons with disabilities face discrimination and barriers twice over based on their Indigenous status and disability, and First Nations already face barriers to access to health care, education, and employment opportunities. First Nations persons with disabilities face layered disadvantages due to lack of access to services and exclusion because of barriers on everyday activities.<sup>63</sup> For these reasons, and more, First Nations persons with disabilities ought to be afforded proper support to fully participate in their communities.<sup>64</sup>

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<sup>63</sup> Division for Social Policy and Development Disability, “The United Nations and Indigenous Peoples with disabilities, online:<<https://www.un.org/development/desa/disabilities/issues/the-united-nations-and-Indigenous-persons-with-disabilities.html>>.

<sup>64</sup> United Nations Economic and Social Council, “Study on the situation of Indigenous Peoples with disabilities, with a particular focus on challenges faced with regard to the full employment of human rights and inclusion in development” 5 February 2013, at page 4. online:<<http://www.un.org/disabilities/documents/ecosoc/e.c.19.2013.6.pdf>>