

# “All talk with very little action”: Bill 26, *The Accessibility for Manitobans Act*

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S H A R Y N E   H A M M

## I. INTRODUCTION

Accessibility in Manitoba is a significant issue. In a 2012 survey by Statistics Canada,<sup>1</sup> 15.6 percent of Manitobans over the age of 15 reported that they had a disability that limited their daily activities. This number exceeds the national average, and will likely increase as Manitoba’s population ages. By introducing accessibility legislation, the province of Manitoba took a crucial step in attempting to improve quality of life for this segment of the population.

Bill 26 was introduced in response to pressure from disability rights groups in Manitoba. Prior to this accessibility legislation, these rights were narrowly contested via specific complaints to either the Manitoba or Canadian Human Rights Commissions, depending on which level of government had jurisdiction over the matter at issue.<sup>2</sup> These administrative bodies could then order the responding parties to improve their own accessibility standards. In 2011, over 51 percent of complaints filed with the Manitoba Human Rights Commission were based on disability.<sup>3</sup> Many hope that legislation like Bill 26, which creates

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<sup>1</sup> Canada, Statistics Canada, “A profile of persons with disabilities among Canadians aged 15 years or older” (2012), online: <[www.statcan.gc.ca/pub/89-654-x/89-654-x2015001-eng.htm#a1](http://www.statcan.gc.ca/pub/89-654-x/89-654-x2015001-eng.htm#a1)>.

<sup>2</sup> In many cases, legislative jurisdiction over business lies with the province, under section 92(13) of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5. Certain areas (such as aeronautics, and banking) fall into federal jurisdiction. The subject matter for constitutional purposes will determine which statutory regime applies.

<sup>3</sup> Manitoba, Manitoba Human Rights Commission, *Your Rights Start Here: Manitoba Human Rights Commission, Annual Report 2011* (Winnipeg: Government of Manitoba, 2012), online:

accessibility standards, will decrease the number of complaints heard by these administrative bodies.

This paper assesses Bill 26, and it begins by providing a background and summary of the Bill, followed by an outline of how it was passed in the Legislative Assembly. The paper will analyze whether or not the legislation as it has been put forward is likely to be effective in the removal of barriers to accessibility, and will consider some of the critiques of the Bill. It will also include a brief comparison to similar legislation in Ontario, and a consideration of whether this legislation has been effective. This paper argues that this Bill, which passed relatively easily, has significant shortcomings. Only time will tell whether these shortcomings will be rectified through the creation of strong regulations.

## II. BACKGROUND

The road to this type of accessibility legislation in Manitoba was a long one. Canada signed the *United Nations Convention on the Rights of Persons with Disabilities* on March 30, 2007.<sup>4</sup> The Government of Canada ratified the Convention on March 11, 2010.<sup>5</sup> The Convention covers rights in many areas, including accessibility, access to justice, participation in political and public life, education, employment, freedom of movement, and freedom from torture, exploitation, and violence. Ratification of a UN Convention does not create law in Canada unless and until the implementing legislation is adopted. The provinces and territories are responsible for implementing legislation to protect the rights of persons with disabilities within their jurisdictions.<sup>6</sup>

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<[http://www.manitobahumanrights.ca/publications/annual\\_reports/annual\\_report\\_2011.pdf](http://www.manitobahumanrights.ca/publications/annual_reports/annual_report_2011.pdf)>.

<sup>4</sup> Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008, ratification by Canada 11 March 2010) [*Convention*].

<sup>5</sup> *Ibid.*

<sup>6</sup> “Building an inclusive and accessible Canada: Supporting people with disabilities”, Council of Canadians with Disabilities (2013), online: <[www.ccdonline.ca/en/socialpolicy/actionplan/accessible-canada](http://www.ccdonline.ca/en/socialpolicy/actionplan/accessible-canada)>.

In September of 2008, Barrier-Free Manitoba met with provincial officials about effective accessibility rights legislation.<sup>7</sup> The goal of this organization is to lobby the Province of Manitoba to enact strong and effective legislation that requires the removal of existing barriers and prevents the creation of new ones.<sup>8</sup> Barrier-Free campaigned for five years to secure accessibility legislation in Manitoba. They are continuing to work towards the timely and effective implementation of the *Accessibility for Manitobans Act* (AMA). Barrier-Free is led by a steering committee, consisting of members from multiple disability rights groups across Manitoba.<sup>9</sup> In 2011, Barrier-Free thought that they had succeeded in convincing the provincial government about the importance of this legislation. With a looming election, however, the government introduced Bill 47 rather than the bill for which Barrier-Free had campaigned.

On June 16, 2011, the legislature passed Bill 47, *The Accessibility Advisory Council Act and Amendments to the Government Purchases Act*.<sup>10</sup> This Bill did not establish accessibility standards, but instead provided a process whereby the Council gave recommendations to the Minister, with the aim of eventually entrenching these recommendations and standards in legislation or regulations at a later date.<sup>11</sup> The Advisory Council gave its initial recommendation to the Minister on June 15, 2012. This recommendation was to create and pass accessibility legislation in Manitoba.<sup>12</sup> The initial report also stated that the main goal of the recommendations given was to “remove barriers by working with the public and private sectors to make proactive, long-range plans, standards

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<sup>7</sup> “Home”, Barrier-Free Manitoba, online: <[www.barrierfreemb.com/home](http://www.barrierfreemb.com/home)> [Barrier-Free].

<sup>8</sup> Barrier-Free, *supra* note 7.

<sup>9</sup> These organizations include the Society for Manitobans with Disabilities, Abilities Manitoba, the Children’s Coalition, and the Manitoba Supported Employment Network. “Who We Are”, Barrier-Free Manitoba (2015), online: <[www.barrierfreemb.com/aboutus](http://www.barrierfreemb.com/aboutus)>.

<sup>10</sup> *The Accessibility Advisory Council Act*, SM 2011, c 37, as repealed by *The Accessibility for Manitobans Act*, SM 2013, c A1.7 [AMA].

<sup>11</sup> Karine Levasseur, “Unnecessary delay? Bill 47, *The Accessibility Advisory Council Act and Amendments to The Government Purchases Act*” (2012) 35 Man LJ 221 at 224.

<sup>12</sup> Manitoba, The Accessibility Advisory Council, *Initial Recommendations to the Minister Responsible for Persons with Disabilities on Accessibility Legislation* (Manitoba: Disabilities Issues Office, 2012), online: <[www.gov.mb.ca/dio/pdf/aac\\_report\\_june15-12.pdf](http://www.gov.mb.ca/dio/pdf/aac_report_june15-12.pdf)> at 2.

and regulations that enhance accessibility for everyone.”<sup>13</sup> The report also emphasized its commitment to developing a “made-in-Manitoba” approach towards legislation of this type, while at the same time being aware of successes and challenges that were experienced in Ontario.<sup>14</sup>

### III. SUMMARY OF BILL 26

This purpose of this legislation is to improve accessibility for Manitobans who are disabled through the prevention and removal of barriers.<sup>15</sup> Section 3 of the Bill defines a barrier as “anything that interacts with that disability in a way that may hinder the person’s full and effective participation in society on an equal basis.”<sup>16</sup> The preamble points to legislation such as the *Canadian Charter of Rights and Freedoms*,<sup>17</sup> the *Human Rights Code*,<sup>18</sup> and the *United Nations Convention on the Rights of Persons with Disabilities*<sup>19</sup> as complementary and influential legislation. In particular, section 2(3) of the Act points to the *Human Rights Code* and states that nothing in the Act diminishes the regulations under any other enactment.<sup>20</sup> This provision keeps the complaints-based regime of the *Human Rights Code* in play, and maintains the power and discretion in the Manitoba Human Rights Commission to hear and adjudicate such disputes.

This Act establishes accessibility standards intended to remove barriers across the province. Any person or organization that becomes subject to such standards will be required to take actions to identify and remove barriers, and to prevent new barriers from being created. In achieving these accessibility standards, the Act seeks to uphold four principles: Access, Equality, Universal Design, and Systemic Responsibility.<sup>21</sup> These principles are founded on the beliefs that persons should have barrier-free

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<sup>13</sup> *Ibid* at 1.

<sup>14</sup> *Ibid*.

<sup>15</sup> AMA, *supra* note 10, s 2(1).

<sup>16</sup> *Ibid*, s 3(1).

<sup>17</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

<sup>18</sup> *The Human Rights Code*, SM 2013, c H175.

<sup>19</sup> *Convention*, *supra* note 4.

<sup>20</sup> AMA, *supra* note 10, s 2(3).

<sup>21</sup> AMA, *ibid*, s 2(2).

access to places, events and other functions that are generally available in the community, and that they should have access to those things that will give them equality of opportunity and outcome. Additionally, this access should be provided in a manner that does not establish or perpetuate differences based on a person's disability, and the responsibility to prevent and remove these barriers should be placed upon the people and organizations that are responsible for establishing or perpetuating the barrier.<sup>22</sup> These are the overarching principles of Bill 26, and what it seeks to accomplish, but what remains to be discussed is the process by which the Bill will attempt to attain these objectives.

As noted above, this legislation maintains the provincial Accessibility Advisory Council,<sup>23</sup> but under section 39 of the Bill it repeals *The Accessibility Advisory Council Act*.<sup>24</sup> The purpose of the Council is now to create recommendations of accessibility standards to be presented to the Minister, which in turn become regulations. This process can be summarized in a few steps.

The first step requires the Minister Responsible for Persons with Disabilities to create terms of reference to be followed by the Council in the drafting of their recommendations. These terms of reference must include the sector, persons, and organizations that may be made subject to the standard.<sup>25</sup> Within these terms of reference, the Accessibility Advisory Council develops and drafts an accessibility standard. In doing so, the Council can establish a committee of experts to give recommendations, and it must consult with a number of different groups. These groups include persons disabled by barriers,<sup>26</sup> representatives of those organizations that may be subjected to the proposed standard, representatives of the government that have responsibilities relating to the activity or undertaking, and any other person the Minister considers

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<sup>22</sup> *Ibid*, s 2(2).

<sup>23</sup> *Ibid*, s 13.

<sup>24</sup> *Ibid*, s 39.

<sup>25</sup> *Ibid*, s 8(2).

<sup>26</sup> *Ibid*, s 3(1) provides the following definition of a "barrier": "For a person who has a long-term physical, mental, intellectual or sensory impairment, a barrier is anything that interacts with that impairment in a way that may hinder the person's full and effective participation in society on an equal basis." These barriers can be architectural, physical, communication, attitudinal, technological or organizational. AMA, *supra* note 10, s 3(2).

advisable.<sup>27</sup> The Council begins by considering the accessibility objectives for the area to which the standard relates, as well as the measures, policies, practices and requirements of the standard, including how and when these standards should be implemented.<sup>28</sup> Once the Council has developed a standard, the standard must be subjected to public review. The Council must consider this public feedback as it finalizes the standard for submission to the Minister. When the proposed standard is submitted, the Minister reviews it and decides whether it should be enacted as a regulation.<sup>29</sup>

The government identified five areas by which the Council will meet and propose regulations. These areas are Accessible Customer Service, Accessible Information and Communication, Accessible Built Environment, Employment Accessibility, and Accessible Transportation.<sup>30</sup> These standards, once implemented, will attempt to address business practices needed to provide better customer service to people with disabilities, the removal of barriers in access to information, access into and within buildings and outdoor spaces, employment practices in relation to employee-employer relationships, and aspects of accessible public transportation.<sup>31</sup>

## IV. DEBATE IN THE LEGISLATURE

### A. First Reading

On April 24, 2013, the Honourable Jennifer Howard, Minister Responsible for Persons with Disabilities and MLA for Fort Rouge, introduced Bill 26 to the Legislative Assembly of Manitoba. The stated purpose of the Bill at this time was to remove barriers by working with the public and private sectors to make proactive long-range plans that enhance accessibility for everyone.<sup>32</sup> No other MLAs rose to speak about the Bill at

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<sup>27</sup> AMA, *supra* note 10, s 9(3).

<sup>28</sup> *Ibid*, s 9(1).

<sup>29</sup> *Ibid*, s 7.

<sup>30</sup> Manitoba, Disabilities Issue Office, “Introducing *The Accessibility for Manitobans Act*”, online: <[www.gov.mb.ca/dio/pdf/introducing\\_accessibility\\_for\\_manitobans\\_act.pdf](http://www.gov.mb.ca/dio/pdf/introducing_accessibility_for_manitobans_act.pdf)> at 11.

<sup>31</sup> *Ibid*.

<sup>32</sup> Manitoba, Legislative Assembly, *Debates and Proceedings*, 40th Leg, 2nd Sess, Vol LXV No 29 (24 April 2013) at 703 (Hon Jennifer Howard).

this time, although there were members of the public present in the gallery who applauded the introduction of the Bill.

## B. Second Reading

Bill 26 was read for a second time on September 12, 2013. The theme of this stage of the process was an overall acceptance of the principles of the Bill. The Opposition, however, expressed concerns that this Bill would not obtain its objectives in an effective manner.

At this time, Mr. Kelvin Goertzen, Progressive Conservative Member for Steinbach, addressed the Bill. Mr. Goertzen criticized the government for not selecting this Bill as one of their top ten priority bills for the session.<sup>33</sup> He stated his belief that this Bill was pushed aside to instead debate the proposed PST bill. He did not address the contents of the Bill at this time.<sup>34</sup>

Ms. Leanne Rowat, Progressive Conservative Member for Riding Mountain, echoed Mr. Goertzen's concerns, and stated that the public shared these concerns.<sup>35</sup> Ms. Rowat then discussed some areas of the Bill that, in her view, required improvement.

The first issue she outlined was the fact that the legislation "enables but does not actually require" the government to take any steps towards the prevention and removal of barriers to accessibility.<sup>36</sup> The actions required of the government are the preparation and release of annual plans and reports. Ms. Rowat critiqued this requirement, stating that these reports would only be useful when coupled with clear and progressive standards for the removal and prevention of barriers.<sup>37</sup>

A second issue brought forward by Ms. Rowat involved the Bill's definition of disability. She challenged the government to put forward a more comprehensive and inclusive definition, as she foresaw the exclusion of certain groups of persons with disabilities.<sup>38</sup>

Finally, she stated that steps should be taken through other legislation to improve the economic stability of those with disabilities.<sup>39</sup>

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<sup>33</sup> Manitoba, Legislative Assembly, *Debates and Proceedings*, 40th Leg, 2nd Sess, Vol LXV, No 107A, (12 September 2013) at 4992-4993.

<sup>34</sup> *Ibid* at 4992.

<sup>35</sup> *Ibid* at 4993.

<sup>36</sup> *Ibid* at 4994.

<sup>37</sup> *Ibid*.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid*.

Dr. Jon Gerrard, Liberal Member for River Heights, was the next to speak to the Bill. He heavily criticized the Government's delay in bringing this Bill forward for debate, stating that they were "all talk with very little action."<sup>40</sup> He then introduced what is, in my view, the strongest criticism of this piece of legislation. Dr. Gerrard claimed that the legislation merely establishes a process, but that this process will be completely ineffectual because it has no target or goal.<sup>41</sup> He pleaded for an amendment of this kind to be implemented at the committee stage.

Dr. Gerrard also commented on issues that had been previously spoken to, regarding the widening of the definition to be used, as well as the importance of parallel legislation to improve the lives of those Manitobans living with a disability.<sup>42</sup>

Mr. Ralph Eichler, Progressive Conservative Member for Lakeside, was the last address Bill 26 at the second reading. He echoed the words of those who spoke previously, and expressed his disappointment in the Government for not making this Bill a higher priority.<sup>43</sup>

### C. Committee Stage

Bill 26 went before the standing committee on Social and Economic Development on October 29, 2013. Nearly 20 people spoke to the Bill at this time. Later speakers reiterated many of the comments, but there were various perspectives that came from this stage of the process.

The first to speak was Mr. David Lepofsky, the Chair of the Accessibility for Ontarians with Disabilities Act Alliance.<sup>44</sup> This group advocates for the effective achievement of a barrier-free Ontario. As well, Mr. Lepofsky was the Chair of the coalition that fought for the enactment of the *Accessibility for Ontarians with Disabilities Act*.<sup>45</sup> Mr. Lepofsky described the experience in Ontario, which began with the passing of the 2001 *Ontarians with Disabilities Act*<sup>46</sup> before it was repealed by Ontario's

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<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid* at 4995.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> Manitoba, Legislative Assembly, *Standing Committee on Social and Economic Development*, 40th Leg, 2nd Sess, Vol LXV, No 11 (29 October 2013) at 708 [Committee (29 October 2013)].

<sup>45</sup> *Accessibility for Ontarians with Disabilities Act*, SO 2005, c 11 [AODA].

<sup>46</sup> *Ontarians with Disabilities Act*, SO 2001, c 32, [ODA] as repealed by AODA, *ibid.*

current legislation in 2005. He warned of the weaknesses that were included in the first Bill, and gave the committee suggestions for improvements to the Manitoba legislation.

Mr. Lepofsky first suggested that a specific requirement of full accessibility be set within the Bill.<sup>47</sup> Speakers following Mr. Lepofsky also addressed the importance of incorporating deadlines into the legislation. Secondly, Mr. Lepofsky argued that the Bill fell short in terms of the language used.<sup>48</sup> In many places, it states that accessibility standards “may be made” rather than requiring that they must be made. He compared the Bill to Ontario’s first piece of legislation. Third, he suggested that recommendations brought forward under the Bill should come from a committee with representation of 50 percent of people with disabilities, or their representatives, to appropriately include their voices.<sup>49</sup> He also stated that the Bill could be improved by the inclusion of consultation in amending the law. Mr. Lepofsky feared the government’s ability to “gut” the legislation without any requirement of public consultation.<sup>50</sup> He also claimed that the enforcement provisions in the Bill were not strong enough to help it effectively reach its goals. Finally, he suggested that a clause be included requiring the government to never spend money creating, perpetuating or exacerbating barriers through the creation or procurement of infrastructure.<sup>51</sup>

Gail Mores was the next to speak on Bill 26. She is the Director of Community Engagement and Accessible Services for March of Dimes Canada. Her main critiques of the Bill included the clarity with which obligations were imposed, the need for timelines, and that any standards should apply immediately to government.<sup>52</sup> Ms. Mores gave constructive criticism of the Bill, and directed the Committee’s attention to the importance of having the Accessible Customer Service standard implemented first, as it is most centrally involved in attitudinal issues.

Another important perspective on the Bill came from Patrick Falconer, a representative of Barrier-Free Manitoba. Falconer raised several priority areas. These included: making the definition of disability more

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<sup>47</sup> Committee (29 October 2013), *supra* note 44 at 708.

<sup>48</sup> *Ibid* at 708–709.

<sup>49</sup> *Ibid* at 709.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid* at 712.

inclusive, requiring the Legislative Assembly itself to become more accessible, moving up the timeline for presentation of the first plan of the Minister, providing information on this Bill in accessible formats, and adding a clause requiring the public release of recommendations made by the Council.<sup>53</sup>

A final notable speaker was David Steen, who spoke as a private citizen, but is the President of the Society for Manitobans with Disabilities. He commended the Bill for raising the profile of disability issues.<sup>54</sup> He cited Article 9 of the UN Convention of the Rights of Persons with Disabilities to suggest that Canada has a responsibility to respond to accessibility issues.<sup>55</sup>

In the end, the Committee made six amendments to the original Bill. The first involved replacing “impairment” with “disability.”<sup>56</sup> The second was the removal of the word “long-term” from clause 3(1), expanding the definition of a barrier.<sup>57</sup> The Committee also addressed potentially changing the definition of “residential premises” in clause 6(4) to narrow the number of properties that would be exempt from the Bill’s standards. The most important amendment at this stage was the addition of clause 8(4) of the Bill: “The Minister must ensure that the terms of reference prepared under this section will enable the implementation of the measures, policies, practices and other requirements necessary to make significant progress towards achieving accessibility by 2023.”<sup>58</sup> Many speakers had criticized the Bill for its lack of deadlines. The Committee also included a clause that any information regarding the recommendations or plans be published in an accessible format, as well as a clause binding the Legislative Assembly of Manitoba to the standards presented. In the analysis section that follows, this paper will consider whether enough recommendations were incorporated at the Committee Stage to render Bill 26 effective.

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<sup>53</sup> *Ibid* at 717-719.

<sup>54</sup> *Ibid* at 725.

<sup>55</sup> *Convention*, *supra* note 19, art 9.

<sup>56</sup> *Committee* (29 October 2013), *supra* note 44 at 755.

<sup>57</sup> *Ibid*.

<sup>58</sup> *AMA*, *supra* note 10, s 8(4).

## D. Third Reading

The Third Reading of Bill 26 took place on December 3, 2013, the United Nations International Day of Persons with Disabilities.

At this stage, Ms. Leanne Rowat, who spoke to the Bill at the second reading, commended the work of Barrier-Free Manitoba, and expressed her excitement regarding caucus' support of Bill 26.<sup>59</sup> She did so in a Private Member's Statement.<sup>60</sup>

The Honorable Jennifer Howard moved to present the Bill for its third reading. Her speech focused on the different groups, councils, and individuals who aided in the development of the bill.<sup>61</sup> The House adopted Bill 26 unanimously.<sup>62</sup>

## E. Royal Assent and Coming into Force

This Bill received royal assent, and therefore came into effect, on December 5, 2013, two days after the third reading.

## V. AFTERMATH AND MEDIA COVERAGE

On October 29, 2013, the *Winnipeg Free Press* wrote an article describing the improvements that were suggested at the committee stage. This article highlighted many of the critiques brought forward by Barrier-Free Manitoba, and discussed the perspectives expressed by the PC MLAs and the Minister Responsible for Persons with Disabilities. The article also mentioned that both sides thought that the legislation was essential, but that they had some differing views on the way in which it should be implemented.<sup>63</sup>

Barrier-Free Manitoba has been continually present and engaged in policy conversations surrounding this Bill. Barrier-Free followed the progress of the Advisory Council and has continually recommended improved standards. Following the release of the first standard, Barrier-Free outlined their findings from their preliminary review of the proposed

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<sup>59</sup> Manitoba, Legislative Assembly, *Debates and Proceedings*, 40th Leg, 3rd Sess, Vol LXVI, No 15B (3 December 2013) at 582.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid* at 384.

<sup>62</sup> *Ibid.*

<sup>63</sup> Bruce Owen, "Improve Accessibility for people with disabilities, province urged", *Winnipeg Free Press* (29 October 2013), online: <[www.winnipegfreepress.com](http://www.winnipegfreepress.com)>.

standard, and made 17 further recommendations for improvement.<sup>64</sup> It further refined this statement in a brief released on July 10, 2014.<sup>65</sup>

Barrier-Free also recently became concerned with the NDP leadership race. The November 2014 Throne Speech contained no reference to the Accessibility Act nor did it discuss any commitment to making progress on disability issues.<sup>66</sup> Barrier-Free Manitoba, along with Abilities Manitoba, sent a letter to each of the NDP leadership candidates requesting clear statements regarding their commitment to three key disability and accessibility issues. These included: fully implementing the AMA, endorsing and acting upon Abilities Manitoba's "five-priority pathway," and developing and implementing an action plan for Manitoba to meet its obligations under the *UN Convention on the Rights of Persons with Disabilities*.<sup>67</sup>

## VI. ANALYSIS

### A. Has this legislation effected change within the province?

Before consideration of the issues brought forward in the legislature, it is important to look into what effect this legislation has had in the province thus far. When this paper was completed, there had not yet been an accessibility standard presented by the Advisory Council that was accepted by the Minister.<sup>68</sup> However, the Council presented their first discussion paper of the Accessibility Standard for Customer Service for public review on April 19, 2014.

The Minister took the advice of Gail Mores to first develop the Customer Service standard. The Government stated that they chose to implement this standard first due to its focus on three areas of public

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<sup>64</sup> "Equality of Service: Preliminary Comments on the Proposed Customer Service Standard", Barrier-Free Manitoba (30 May 2014), online: <[www.barrierfreemb.com/bfmbmaterials](http://www.barrierfreemb.com/bfmbmaterials)>.

<sup>65</sup> "Equality of Service: Final Brief on the Proposed Customer Service Standard", Barrier-Free Manitoba (10 July 2014), online: <[www.barrierfreemb.com/bfmbmaterials](http://www.barrierfreemb.com/bfmbmaterials)> [BFM Brief].

<sup>66</sup> *Barrier-Free*, *supra* note 7.

<sup>67</sup> *Ibid.*

<sup>68</sup> Editor's note: the first accessibility standard came into force in November 2015. See for example: "Manitoba's new accessibility rules welcomed by disability-rights advocate", *CBC News* (2 November 2015), online: <[cbc.ca](http://cbc.ca)>.

consciousness in which change is needed: attitudes towards people with disabilities, knowledge surrounding disabilities and disability rights, and basic practices.<sup>69</sup> This standard seeks to establish accessibility for customer service, and it applies to every public sector organization, as well as every person or organization that provides goods or services to members of the public.<sup>70</sup> Sixty days after the publication of the first discussion paper, the Province held a public consultation event. The event lasted two days, and over 150 people provided commentary and suggestions for the improvement of this Act.<sup>71</sup> Additionally, the Council accepted written submissions at this time.<sup>72</sup>

Barrier-Free presented its commentary by written submission. The group provided 17 recommendations for amendments to the standard, of which eight were adopted into the formalized standard.<sup>73</sup>

The first draft of the proposed standard was presented on October 3, 2014. This standard had a focus on the policies of organizations, their training and communication practices, and contained avenues through which to address the lack of knowledge about persons disabled by barriers.<sup>74</sup> One strength of this proposed standard is the breadth of its application. It applies to all providers of goods and services across public, and private entities, and not-for-profit organizations. The intention behind the standard is to build on the *Human Rights Code* of Manitoba by setting out a specific process for both the removal and prevention of barriers within the customer service industry.

The Customer Service accessibility standard will apply to government entities one year after the standard becomes a regulation; it will apply to private and non-profit organizations after three years.<sup>75</sup> This standard requires the providers of goods and services to create policies that uphold the duty to accommodate, remove and prevent barriers, support the use of

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<sup>69</sup> Manitoba, The Customer Service Development Committee, *Initial Recommendations for a Proposed Customer Service Standard to the Minister Responsible for Persons with Disabilities* (Manitoba: Disabilities Issues Office, 2014), online: <[www.gov.mb.ca/dio/pdf/CSS\\_report\\_to\\_govt.pdf](http://www.gov.mb.ca/dio/pdf/CSS_report_to_govt.pdf)> [Customer Service Recommendations] at 1.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid* at 2–3.

<sup>72</sup> *Ibid* at 3.

<sup>73</sup> *Barrier-Free*, *supra* note 7.

<sup>74</sup> *Customer Service Recommendations*, *supra* note 69 at 2.

<sup>75</sup> *Ibid* at 3.

assistive devices, and provide equivalent and inclusive customer service.<sup>76</sup> These policies will be implemented by allowing the use of support persons and service animals, using notices of temporary disruption of accessible means of service, and staff training to ensure positive interactions between the service providers and their customers.<sup>77</sup>

This standard has been criticized. Barrier-Free suggested that this regulation too closely resembles the Ontario regulation that is already in place.<sup>78</sup> It took an inordinate amount of time to be made public after Bill 26 came into force for it to so closely mirror what is said in the Ontario regulation. Another main criticism coming from Barrier-Free Manitoba was that this standard should also apply to the providers of information and facilities.<sup>79</sup> They also directed attention towards the lack of a compliance regime. This issue is arguably one of the most significant limitations of the initial customer service standard in Ontario, which may render the regulation much less effective in the absence of an equally strong and consistently enforced compliance regime.<sup>80</sup> It remains to be seen which further recommendations the Advisory Council will adopt after the second round of public consultation ends, and they present the finalized proposed standard to the Minister.

The finalized standard will likely be presented to the Minister in the near future. Then, she will determine whether to recommend the standard to the Lieutenant Governor in Council to create the regulation. Until this process is completed, this Act is still without any force. If and when a standard comes into force, the *Accessibility for Manitobans Act* requires review of the standard five years after its implementation to ensure that the objectives, measures, policies, and practices of the standard are being upheld.<sup>81</sup> The Advisory Council may then recommend updates or amendments to the Customer Service standard. Four years after the Act has come into force, a person appointed by the Minister must review the effectiveness of the Act.<sup>82</sup> These review periods point to the continually

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<sup>76</sup> *Ibid* at 4.

<sup>77</sup> *Ibid* at 7-9.

<sup>78</sup> *BFM Brief*, *supra* note 65 at i.

<sup>79</sup> *Ibid* at iii.

<sup>80</sup> *Ibid* at vi-vii.

<sup>81</sup> *AMA*, *supra* note 10, s 11(1).

<sup>82</sup> *Ibid*, s 37(1).

evolving nature of the legislation at issue, and it is one positive aspect of the legislation that may allow it to effect change within the Province.

## B. Comparison with the Ontario legislation

In 2005, Ontario enacted legislation that is very similar to the legislation at issue. *The Accessibility for Ontarians with Disabilities Act* has a stated purpose of recognizing the history of discrimination against persons with disabilities in Ontario by “(a) developing, implementing and enforcing accessibility standards ... and (b) providing for the involvement of persons with disabilities...in the development of the accessibility standards.”<sup>83</sup> This is not the first legislation of its kind in Ontario. In 2001, the Ontario government introduced the first piece of accessibility legislation in Canada, *The Ontarians with Disabilities Act*.<sup>84</sup> This legislation was heavily criticized for allowing the government to retain control over the implementation of requirements, the exemption of the public sector from compliance, and the lack of enforcement mechanisms or the requirement of an oversight agency.<sup>85</sup>

The Ontario experience had the potential to greatly inform the Manitoban process. Similarities between the two pieces of legislation include the current legal obligations, a similar process for the creation and adoption of accessibility standards as regulations, as well as the inspection process. Reports from the Minister and review periods are also the same. Both jurisdictions have also created advisory councils.

There are some major differences between the two pieces of legislation. These differences involve the addition of fuller protections to the Ontario legislation, which make it more enforceable and thereby stronger. The “Purpose” section of the Ontario legislation explicitly requires the involvement of those with disabilities in the development of its standards. It is crucial to have input from representatives of this group, as without it legislators cannot fully appreciate the challenges faced by persons with disabilities. Under the Ontario legislation, the majority of the Advisory Council must be persons with disabilities.<sup>86</sup> This requirement

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<sup>83</sup> AODA, *supra* note 45, s 1.

<sup>84</sup> ODA, *supra* note 46.

<sup>85</sup> Phyllis Gordon, Harry Beatty, & Bill Holder, “An Analysis of The Ontarians with Disabilities Act, 2001” (2002) 17 JL & Soc Pol’y 15 at 24.

<sup>86</sup> AODA, *supra* note 45, s 31(2).

is not included in the Manitoba Act; the Council must only consult with persons with disabilities.<sup>87</sup>

Secondly, the language used throughout the acts is quite different. The Ontario legislation is much more likely to use the word “must,” thereby obligating the government or the Advisory Council to take action towards the creation and implementation of standards. The *Accessibility for Manitobans Act* often uses the word “may” in these provisions and sections. This language occurs in two important sections. The first is “Application”: The Manitoba Act states that “an accessibility standard *may* apply,”<sup>88</sup> whereas the analogous provision in the Ontario legislation creates an obligation by use of mandatory language.<sup>89</sup> Another area in which this type of language is essential is investigation. Again, the Manitoba Act uses weaker language, giving wide discretion to the Minister regarding whether to appoint an investigator for enforcement of the Act.<sup>90</sup> The level of discretion given to government in these areas substantially weakens the effect of the Manitoba legislation.

Thirdly, the Ontario Minister must recommend or discard a proposed standard within a set timeframe, but no such limit is established in the Manitoba Act. In Ontario, the Minister has ninety days, once presented with a finalized proposed standard, to recommend to the Lieutenant Governor in Council that the standard to be passed into regulation.<sup>91</sup> This is entirely absent in the *Accessibility for Manitobans Act*, and seems to be something that could place greater accountability on the Minister, and therefore possibly make the legislation more effective. Accountability of the provincial government is absent across the board in the Manitoba legislation, and placing it into the Act in small ways such as this 90-day period in the Ontario legislation could be a step towards creating a lasting effect in the Manitoba.

Another difference relates to obligations placed on municipalities. There is a requirement in the Ontario legislation that all municipalities with a population of over 10,000 must establish an advisory committee to

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<sup>87</sup> AMA, *supra* note 10, s 9(3).

<sup>88</sup> *Ibid*, s 6(3).

<sup>89</sup> AODA, *supra* note 45, s 4.

<sup>90</sup> AMA, *supra* note 10, s 23(1).

<sup>91</sup> AODA, *supra* note 45, s 9(7).

consider accessibility issues that are relevant to their specific area.<sup>92</sup> This is a major step in a province with such a large population. Such a requirement would enhance the Manitoba Act, because it would give voice to those in remote communities who will be affected by the regulations of this Act. This requirement could also enhance the uniqueness of the regulations, truly making it a “made-in-Manitoba” statute.

An essential component of the Ontario legislation that caused a high degree of criticism in discussions regarding Bill 26 is the inclusion of tougher penalties for non-compliance with provisions of the legislation. The Ontario legislation places greater financial penalties on businesses and organizations that fail to comply with its standards.<sup>93</sup> This approach has a great deal of support in Manitoba, yet it was not included in the Act.

Finally, another inclusion in the Ontario legislation that is noticeably absent in the Manitoba Act is the use of incentive agreements. These agreements may be entered into by the Minister, with “any person or organization required under this Act to comply with an accessibility standard in order to encourage and provide incentives” to exceed the requirements of the standards.<sup>94</sup> This approach was not contemplated in the passing of the Manitoba Act, and is one more way in which the Ontario legislation appears superior.

As previously mentioned, Mr. David Lepofsky spoke at the Committee stage of the legislative process. He felt that with the absence of obligatory language and lack of enforcement and compliance provisions, Manitoba was likely to encounter difficulties in these areas, similar to the way the 2001 Ontario legislation did. A further suggestion he provided was the inclusion of a provision requiring the review of all provincial statutes to see if they perpetuated or created barriers. He mentioned that this was a process that was beginning in Ontario. Such a provision could enhance the “made in Manitoba” nature of this legislation.<sup>95</sup> This task would not be simple, but it could have far-reaching impacts.

It appears as though the Ontario legislation was given greater enforcement powers, and on the surface seems to be a more effective way of legislating on this issue. This legislation was introduced for similar reasons as the Manitoba legislation: to complement the complaints-driven

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<sup>92</sup> *Ibid*, s 29(1).

<sup>93</sup> *Ibid*, s 21(1)–25.

<sup>94</sup> AMA, *supra* note 10, s 33(1).

<sup>95</sup> Committee (29 October 2013), *supra* note 44 at 708–709.

process already in place under the Human Rights Commission. It does not appear, however, that the introduction of such legislation in Ontario has had any effect on the number of complaints on the grounds of disability heard by the Ontario Human Rights Commission each year. From 2008 to 2012, more than half of all claims filed annually were on the grounds of disability.<sup>96</sup> In fact, this number is steadily increasing: in 2010-2011, 53 percent of all complaints were disability claims, and in 2012-2013, this number increased to 57 percent.<sup>97</sup> It is somewhat shocking that so many Ontarians continue to turn to these administrative bodies in order to have their rights upheld.

Overall, the Manitoba Act seems much weaker than Ontario's legislation, and that legislation has nevertheless failed to reduce reliance on a complaints-driven system. Given the Manitoba Act's lack of enforcement powers, obligation on the government, and timelines that may inhibit effectiveness, the trend of filing a complaint rather than having the underlying issues fixed with accessibility legislation may continue in Manitoba.

### **C. What could have been done to make this Bill better?**

This section focuses on criticisms of Bill 26 that were not introduced into amendments, as well as the sections that are included in the Ontario legislation that are absent from the Manitoba version. The Manitoba Act has been praised for taking a “made-in-Manitoba” approach to accessibility legislation, but proposed regulations so far closely mirror the Ontario legislation. What appears to be missing, however, are a few key provisions that were added to Ontario's legislation to ensure that it effects change. There are also steps that could have been taken by the Ontario government to improve their legislation, and provisions that may work in the Manitoban context.

There are a few positive aspects of the Act. The best thing to be said about the proposed Customer Service Standard is that it seems to apply very broadly. Another positive aspect is that Manitoba is one of the first

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<sup>96</sup> Ontario, Ontario Human Rights Commission, *Annual Report* (2012), online: <[www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human\\_rights/Pinto\\_human\\_rights\\_report\\_2012-ENG.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human_rights/Pinto_human_rights_report_2012-ENG.pdf)> at 227.

<sup>97</sup> Ontario, Social Justice Tribunals Ontario, *2012–2013 Annual Report* (2013), online: <[www.sjto.gov.on.ca/](http://www.sjto.gov.on.ca/)> at 21.

provinces to be taking steps in the direction of change. Finally, the requirements for review of both the accessibility standards and the effectiveness of the Act as a whole point suggest that the provincial government will be held at least somewhat responsible for achieving the objectives of the Act.

Arguably one of the strongest provisions that the provincial government included in this Act is section 21. This section applies if the Act conflicts with any other enactment or provision, and it reads:

If a provision of this Act or the regulations conflicts with a provision of any other enactment, the provision of this Act or the regulations prevails unless the other enactment provides a higher level of accessibility for the persons disabled by barriers.<sup>98</sup>

This provision strongly identifies Manitoba's commitment to accessibility. This falls short of the proposed review of all provincial statutes suggested by Mr. Lepofsky, but it enables the laws of Manitoba to be challenged on the basis of accessibility. Ontario has a similar provision,<sup>99</sup> the existence of which suggests that it may still be necessary to complete a review of the existing provincial legislation to fully rid them of barriers.

Throughout the legislative process, many parties expressed concerns about when accessibility standards would be reached. A timeline for accessibility was added at the Committee Stage. It was thought that setting this deadline would improve the Bill and force the provincial government to implement standards within good time. Ontario's legislation has a goal for full accessibility by 2025. Manitoba's similar provision is "significant progress" by 2023. The Ontario Bill was introduced eight years prior to Manitoba's, yet the Manitoba government expects to attain this level of progress in Manitoba first. It is commendable that Manitobans were so optimistic regarding when this could be achieved, but it seems foolish to believe that Manitoba could reach this goal before Ontario, considering their head start. An enormous oversight in my view is that there were no timelines set regarding when the accessibility standards must be published. In the 15 months after Bill 26 was given royal assent, it has had no concrete effect. Setting goals for when accessibility standards were to come

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<sup>98</sup> AMA, *supra* note 19, s 21.

<sup>99</sup> AODA, *supra* note 45, s 38.

out may have enabled more action on this issue, and less talk. Discussions with stakeholders about the first Customer Service standard garnered attention, but this first standard is generally considered to be the simplest matter. When the Advisory Council is to submit its recommendations for the next four proposed standards, it should set these timelines at the outset, or an amendment should be made to the Act that the Minister should set this goal from within the terms of reference given to the Council. This simple additional step has the potential to greatly speed up the path towards “significant progress” by 2023.

Another criticism that was frequently addressed both in the legislature and at the committee stage was that the Bill had no “teeth”. This is due to two main factors that are absent in the legislation. The first is that the Act, as it stands, contains inadequate enforcement measures. This is coupled with criticism of the complete lack of language requiring the government to take action. A recurring recommendation by speakers at the Committee Stage was to increase the fines for non-compliance with the Act, and to make these fines be “not less than the cost of compliance with the act.”<sup>100</sup> The Ontario legislation contains many of these features missing from the Manitoban scheme. With these types of provisions present in legislation that was passed more than eight years prior to Bill 26, it seems strange that the Province of Manitoba would pass legislation weaker than another piece of legislation already in force in Ontario.

One of the most worrisome aspects of this Act is that it could be repealed at any time. There is no provision requiring public consultation before the Act is amended or repealed. Under the Act, it is stated “The Lieutenant Governor in Council may amend a regulation that establishes an accessibility standard when it considers it advisable to do so.”<sup>101</sup> The provincial government is not required to consult any other party in this amendment process. This significantly weakens, to the point of nullification, the requirements throughout the Act for consultation with multiple stakeholders, particularly those from the disability community. This problem could be rectified by simply adding a clause requiring public consultation before an amendment can be made. Such a provision could make this legislation more effective, and instill public confidence as the government creates and amends these standards.

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<sup>100</sup> Committee (29 October 2013), *supra* note 44 at 242 (Jennifer Frain).

<sup>101</sup> AMA, *supra* note 10, s 35(2).

Aside from the aforementioned areas in which the Act can be improved, two more recommendations can be made. As has been alluded to, many benefits can be gained by listening to the community of persons with disabilities in Manitoba. To truly develop “made-in-Manitoba” legislation, the perspectives of this community must be both heard and considered. Many support this legislation, but many more believe that room for improvement remains. Secondly, there is a lot to be said for learning from mistakes and shortcomings in other jurisdictions. Manitoba may be only the second province in Canada to introduce legislation of this kind, but we are certainly not the first nation. The Government should examine legislation from elsewhere in the world more closely. It is possible to learn from others’ shortcomings and therefore give the legislation within our province stronger effect.

## **VII. CONCLUSION**

Bill 26, *The Accessibility for Manitobans Act*, has generally been viewed as a step forward in the recognition of accessibility rights in Manitoba. It is ground-breaking Canadian legislation, but it has also garnered criticism. It remains to be seen whether this legislation will create any meaningful change. The Minister Responsible for Persons with Disabilities must pass effective regulations in order for this Act to become a meaningful step forward in disability rights. Overall, the length of time that it has taken for this legislation to be passed, and the time it took to create the first standard suggest that Manitobans may have a long wait before they see the impacts of this Act.