Federal Court  Cour fédérale

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Docket: T-1190-07

Citation: 2010 FC 1197

Ottawa, Ontario, November 29, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

DONNA JODHAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for a declaration under section 18.1 of the *Federal Courts Act* R.S.C. 1985, c. F-7 that the standards implemented by the federal government for providing visually impaired Canadians with access to government information and services on the Internet, and the way in which those standards are implemented, has denied the applicant equal access to government information and services, and thereby violated her rights under section 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter).

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THE PARTIES

[2] The applicant, Donna Jodhan, is a Canadian citizen, resident in Toronto, Ontario. She is legally blind. She graduated from McGill University in 1981 with a Masters in Business Administration and a Diploma in Management. She is the owner of "Sterling Creations", a consulting business which provides analyses and recommendations to clients regarding the accessibility of their products or services to special needs users. Her qualifications and profession support the applicant's characterization of herself as a sophisticated computer user, familiar with accessing the Internet.

[3] The respondent, the Attorney General of Canada, is named as a representative of the departments and agencies of the Government of Canada.

[4] This application is based on the applicant's inability to access government informational and transactional services online, notwithstanding the government's accessibility standards for the visually impaired which have been in effect since 2001. Before this Court, the applicant provided five examples of her failed attempts to access federal government services online, which she claims are due to the failure of the federal government websites to meet accessible design standards. The applicant submits that these examples are representative of systemic failures of the government to implement the accessibility standards for the visually impaired. Accordingly, the applicant seeks a systemic remedy.

BACKGROUND FACTS

The government's presence on the Internet – "the government online"

[5] The government has approximately 146 departments and agencies that provide a range of services and programs to Canadians. The parties agree that since the late 1990s one focus of the government has been to use the Internet to enhance the delivery of information and services to Canadians. For example, under a program that ran from 1999 to 2006, 34 government departments worked together to provide the 130 most commonly-used federal government services to Canadians on the Internet, i.e. "online".

[6] The government has two types of online services – informational and interactive. These include a single website from which applicants can access online applications to all federal government job postings; online applications for social services, such as Employment Insurance and Canada Pension Plan benefits; online passport applications; and online guides and tools for accomplishing such diverse activities as starting a new business, and finding travel advisories and recommendations for travel abroad.

[7] The security of some of the interactive services is protected through a group of services called the "Secure Channel." One of the Secure Channel security services is "ePass," which is a service used to protect the confidentiality of information that users provide to government departments over the Internet. These services were described by the respondent's witness, Ken Cochrane, who has been Chief Information Officer of the Treasury Board since 2006, and responsible for overseeing Information Technology and Information Management projects at government agencies. Mr. Cochrane describes the ePass service as the required technology for all Government departments where personal information is to be inputted by website users. Examples of such websites include those that allow users to access and update information on Employment Insurance and to apply for passports online. The uncontested evidence is that in 2008 the ePass program was used by 23 government departments to deliver a total of 83 programs.

The Government's Communication Policy and Accessibility Policy

[8] The *Communications Policy of the Government of Canada*, a policy issued by the Treasury Board pursuant to section 7 of the *Financial Administration Act*, R.S.C., 1985, c.F-11, governs communications, including online communications, made by the federal public administration. One of the purposes of the Communications Policy is to ensure that communications by the Federal Government comply with various statutes and policies, for example, the Charter, *Official Languages Act* R.S.C. 1985 (4th Supp.), C. 31, and the *Privacy Act* R.S.C. 1985, c. P-21.

[9] One of the policies to which the Communications Policy makes federal institutions subject is the *Common Look and Feel for the Internet: Standards and Guidelines*, which were first issued in May 2000 (the CLF 1.0 Standard), with 2001 as the required implementation date. The CLF 1.0 Standard was developed to ensure that federal government websites conform to a common look and feel, designed to ensure that online services be provided in an efficient and accessible manner. The CLF 1.0 Standard consisted of four mandatory standards and two guidelines. The 4 standards included instructions on developing websites that would be accessible to, *inter alia*, visually impaired individuals by 2001.

[10] An updated standard came into effect on January 1, 2007, with an implementation deadline of December 31, 2008 for all federal institutions. The updated standard consists of four parts. The Internet accessibility standards of the updated standard are contained in Part 2, "Standard on the Accessibility, Interoperability and Usability of Web Sites" (the CLF 2.0 Standard). The Parties

agree that the Internet accessibility standards are essentially the same between the CLF 1.0 Standard, which came into effect in 2001, and the CLF 2.0 Standard.

[11] The Communications Policy recognizes the importance of providing information to Canadians via a variety of channels. Under the heading "Policy Statement", the Communications Policy states:

> Government must . . .
>
> **4. Employ a variety of ways and means to communicate, and provide information in multiple formats to accommodate diverse needs.** Government information must be broadly accessible throughout society. The needs of all Canadians, whose perceptual or physical abilities and language skills are diverse, must be recognized and accommodated. Information must be accessible so citizens, as responsible members of a democratic community, may be aware of, understand, respond to and influence the development and implementation of policies, programs, services and initiatives. Information must be available in multiple formats to ensure equal access. All means of communication -from traditional methods to new technologies -must be used to reach and communicate with Canadians wherever they may reside. Modern government requires the capacity to respond effectively over multiple channels in a 24-hour, global communications environment.

The Communications Policy enumerates "service centres", the telephone, mail, print and broadcast media and the Internet as examples of the multiple channels for service delivery that government organizations should consider in providing services to the public.

[12] In this regard, Requirement 3 of Part 2 of the CLF 2.0 Standard, titled "Accessible alternate format of documents on Web sites", similarly recognizes the importance of utilizing multiple channels for service delivery to the blind:

> . . . . Where best efforts cannot make the content or application accessible -that is, where a document cannot be represented in XHTML 1.0 Strict or a language described by World Wide Web Consortium (W3C)Recommendations -the institution must; include an Accessibility Notice on the same page, immediately preceding the inaccessible element(s), that informs site visitors how to obtain accessible versions including print, Braille, and audio: and include an Accessibility Notice on the "Help" page(s) of the Web site. Providing accessible versions other than accessible XHTML is a "last resort" measure. It is not intended to be a convenient method of avoiding the often-minimal effort necessary to make Web pages or Web applications accessible.

How visually impaired Canadians access the Internet – "How the blind read the Internet"

[13] According to the applicant's witness John Rae, in 2001, Statistics Canada identified 610,950 Canadians as blind or visually impaired. Visually impaired and blind individuals can independently access Internet content online using specific assistive technologies. These include "screen readers," which are software devices that "read" website content aloud to the user, and "Braille output devices," which are devices that convert website content into Braille for the user to "read" tactilely. Screen readers are long established software programs to make computers accessible to blind and visually impaired users.

The Federal Government's accessibility standards – "Making online government accessible to the blind"

[14] As stated above, the Internet accessibility standards established by the federal government are set out in the CLF 1.0 Standard, which was to be implemented by 2001. The CLF Standard is built upon international guidelines, called the *Web Content Accessibility Guidelines 1.0* (WCAG

1.0) produced in 1999 by the World Wide Web Consortium, an international organization devoted to developing technical standards for the Internet.

[15] The WCAG 1.0 provides detailed instructions to developers of Internet content, such as website designers, regarding how to help make Internet content accessible to people with disabilities, including the visually impaired. These instructions are created in the form of "checkpoints" that developers can reference to ensure that their websites conform to the WCAG 1.0. The checkpoints are prioritized into three categories.

[16] The first category, Priority 1 checkpoints, is described as a basic requirement, necessary to ensure that no group finds it impossible to access the website content. Ms. Waddell, the respondent's expert witness, described priority 1 checkpoints as follows at para. 62 of her affidavit. Ms. Waddell is a United States-based expert on website accessibility, and is Executive Director of the International Center for Disability Resources on the Internet and the author of books and publications on Internet accessibility. Although the applicant suggested that she may lack expertise in certain areas of web accessibility, the Court accepts her qualifications as an expert with regard to all of the issues to which she testified. Her evidence is referred to below.

> ¶62. Priority 1 Checkpoints consist of 16 technical rules that must be met by the web developer. Otherwise, one or more groups of persons with disabilities will not be able to access content on the web. These checkpoints are a basic requirement for some groups to access web content.

An example of a Priority 1 checkpoint is that all images displayed on websites should have "text equivalents" that convey the same function or purpose as the image itself. Thus, an image on the

screen that a sighted user would know to click in order to follow a link to another website should not only describe the picture in its text equivalent, but should explain that the picture will link the user to another website. This is because properly rendered text can be accessed by almost all assistive technologies like screen readers, and therefore can be made accessible to most users, while images are often inaccessible to assistive technologies. The WCAG 1.0 also specifies the way in which developers should code the text in order to ensure that it will be accessible by assistive technologies.

[17] The second category, Priority 2 checkpoints, is described as checkpoints that a developer of website content "should" implement, in order to ensure that no group will "find it difficult" to access the website. In para. 62 of her affidavit, the respondent's expert Ms. Waddell described Priority 2 checkpoints as follows:

> ¶62. Priority 2 Checkpoints consist of 30 technical rules that should be met by the web developer. Otherwise, one or more groups will find it difficult to access content on the web. Satisfying Priority 2 Checkpoints removes significant barriers to accessing Web content.

An example of a Priority 2 checkpoint is that developers should refrain from using the style of a "header" to create text effects (for example, to create bold text).

[18] The final category, Priority 3 checkpoints, are checkpoints that a developer of website content "may" implement, in order to prevent some groups from finding it "somewhat difficult" to access website content.

[19] The CLF 1.0 Standard requires that government website developers design and implement all of the Priority 1 and Priority 2 checkpoints of the WCAG 1.0. The CLF Standard allows individual institutions to apply for exemptions if required.

[20] The WCAG 1.0 was replaced as a recommendation by the World Wide Web Consortium when it issued updated *Web Content Accessibility Guidelines* in December 2008 (WCAG 2.0). The CLF 2.0 Standard does not reference WCAG 2.0 (which was only finalized after the CLF 2.0 Standard was issued).

Enforcement standards

[21] The CLF 2.0 Standard explicitly requires the "deputy heads" – which it defines in its Glossary as "equivalent to "deputy minister", "chief executive officer" or some other title denoting this level of responsibility" – of each institution to be responsible for implementing the standards in their institutions. Deputy heads are also required to monitor their departments' continued compliance with the CLF Standard. Although the CLF 1.0 Standard did not explicitly set out these responsibilities, neither party suggested that they represent a change in role.

[22] According to the CLF 2.0 Standard, the Treasury Board has an oversight and implementation role with regard to the CLF Standard:

> The Treasury Board Secretariat will monitor compliance with all aspects of this standard in a variety of ways, including but not limited to assessments under the Management Accountability Framework, examinations of Treasury Board Submissions, Departmental Performance Reports and results of audits, evaluations and studies.

[23] The Treasury Board accomplishes this oversight role through the Treasury Board Secretariat and a Common Look and Feel Office (CLF Office). The CLF Office was established in early 2000. It develops the Common Look and Feel policy instruments, and supports federal institutions in implementing the CLF Standard by providing them with a toolkit, templates, and guides. The CLF Office also works with departments to develop the departments' understanding and capacity to implement the CLF Standard, by creating consultation forums such as "Centres of Expertise," which are groups of experts within each department who are identified by the CLF Office to help developers within their respective institutions implement the CLF Standard. There are 93 CLF Centers of Expertise set up on different departments and agencies. The CLF Office does not conduct ongoing monitoring of departmental websites to ensure compliance with the CLF Standard.

[24] In practice, this means that the Government relies upon deputy heads to develop appropriate policies to ensure that the CLF Standard is being implemented and enforced, and to communicate that compliance to the Treasury Board Secretariat.

THE EVIDENCE – FIVE TYPES

[25] The evidence provided by the parties can be categorized into five types. First, the parties submitted international reports on the performance of Canadian government websites in terms of their accessibility to the visually impaired and their overall service delivery. Second, the parties submitted Canadian reports of both internal and external reviews of government websites with respect to their accessibility to the visually impaired. Third, the parties provided reports on the accessibility of the ePass security service to the visually impaired. Fourth, the applicant submitted

her own witness evidence of specific barriers to access encountered by herself and other visually impaired individuals when accessing government websites. Fifth, the respondent provided the evidence of its own witnesses regarding the accessibility of government websites to the visually impaired.

1st type of evidence: International reports surveying the accessibility of Internet websites around the world

[26] The parties introduced two international reports that evaluate websites with respect to their accessibility to persons with disabilities. The United Nations Report concluded that leading websites around the world do not comply with international accessibility standards for the visually impaired. The European Commission Report concluded that ePass accessibility for the visually impaired across all countries is "very low". It also concluded that Canada was ranked on a par with the United States and with nine EU countries in which it was found that only between one and twenty-five percent of governmental websites achieved "basic" levels of accessibility. Moreover, Canada's European G8 partners were consistently ranked ahead of Canada in this Report. The details of these Reports are as follows:

(i) The *2006 United Nations Global Audit of Web Accessibility* (Nomensa Bristol, London: 2006), performed for the U.N. by Nomensa in November of 2006. This audit investigated the accessibility of one site from each of five sectors in 20 countries, with the aim of obtaining an indication of the status of website accessibility across different sectors around the world. In Canada, the website audited as a representation of the "government" sector was the website of the Prime Minister's Office, a site not subject to the CLF Standard. While this audit did not look at any Canadian government websites subject to the CLF Standard, its overall conclusion was that leading websites around the world do not comply with international standards for accessibility; and

(ii) A report commission by the European Commission, *Measuring Progress of eAccessibility in Europe*, dated October 2007, which looked at 6 public sector and 6 private sector websites in each of the EU member states, Australia, the US and

> Canada. In evaluating the public sector sites, this report provided an evaluation of policy strength, determined by both the adequacy of the accessibility standards themselves and the mechanisms each country used for implementation of the standards, in addition to an assessment of the status of public website accessibility in each state. The basic finding of this report echoes the others by concluding that "levels of eAccessibility achieved across all countries included in the investigation are very low." In terms of its specific rankings, Canada's policies were ranked as "strong," putting it behind 4 EU countries with "very strong" policies, but approximately on par with the US, Australia and 12 other EU-25 countries, and ahead of 9 EU-25 countries with lower rankings. In terms of the actual accessible status of Canadian government websites, Canada was ranked roughly on par with the US and with 9 EU-25 countries, in which it was found that between 1 and 25 percent of governmental websites achieved "basic" levels of accessibility – meaning compliance with Priority 1 WCAG 1.0 checkpoints. In contrast, in 4 EU-25 countries 25 to 50 percent of government websites achieved "basic" levels of accessibility, while in 2 EU-25 countries over 50% of government websites achieved that level of accessibility. While it is therefore clear that no country can boast accessible websites, it is also clear that Canada, which purports to be a leader in the provision of government services online, is not a leader in ensuring the accessibility of its government websites. Indeed, Canada's European G8 partners were consistently ranked ahead of it in this report.

[27] The other international reports submitted by the parties dealt with global e-government readiness, which concluded that, as the respondent has submitted, Canada is a world leader in providing its government services online. However, these reports do not speak to their accessibility to the blind.

2nd type of evidence: Canadian Reports regarding compliance of government websites with accessibility standards

[28] The parties provided a number of reports demonstrating that federal government websites significantly fail to meet the CLF Standard for accessibility:

(i) An internal audit conducted by the CLF Office in 2007 and early 2008 of 14 web pages from the websites of 47 federal government departments, designed to help the departments understand their obligations leading up to the December 31, 2008

implementation deadline for the new CLF Standard, the CLF 2.0 Standard. All of the departments failed Priority 1 and 2 checkpoints of the WCAG 1.0. The CLF Office followed-up with the 22 departments that it determined suffered from "serious" violations of the CLF web accessibility provisions by writing to their respective deputy heads. No responses from the deputy heads or other follow-up information was presented to the Court.

(ii) An external audit conducted in 2007 by coopérative AccessibilitéWeb, a nongovernmental organization based in Montréal, Québec, entitled *Accessible, les site web au Québec?* The audit consisted of an evaluation of 3 representative web pages on each of the 200 websites most popular among French Canadians. Of these websites, the Canadians government websites were ranked highly, but none of the websites were completely accessible.

(iii) An external report commissioned by the Alliance for Equality of Blind Canadians, *Common Look and Feel Report*, in 2005. The author of the report, an employee of the Alliance, evaluated the main Common Look and Feel website for compliance with the CLF Standard, and found a number of failures of Priority 1 and 2 checkpoints of the WCAG 1.0. In addition, the author conducted cursory checks of a select few major government websites, including the welcome pages of the Government of Canada and Industry Canada. The author concluded:

> While this report was aimed at evaluating the CLF site, it was the Random Site Checks that were the most worrisome. Even though the deadline set out above is almost 3 years old, there were sites that didn't pass Priority 1, had no Accessibility features and used coding that rendered links invisible to text only browsers and I only scratched the surface. Without more research into other sites, it's difficult to tell if this is just an anomaly or another consistency.

3rd type of evidence: Reports regarding the accessibility of ePass

[29] The parties submitted reports that evaluated the accessibility of the government's ePass security channel. These reports show that the ePass service is not accessible to the visually impaired. This means that important interactive services are not accessible online to the applicant and the blind. The reports are as follows:

(i) An audit jointly conducted by Environment Canada and Service Canada in April 2008 entitled *Comprehensive Accessibility Evaluation of ePass R7.8*. The audit

found that ePass failed six of the Priority 1 and 23 Priority 2 checkpoints of the WCAG 1.0, and among other conclusions stated: "citizens with vision related disabilities WILL require assistance during initial sign up."

(ii) A second ePass audit, *CLF 2.0 Assessment of epass R7.8*, conducted by the CLF Office in April 2008, identified a total of 254 places where ePass failed to comply with accessibility requirements of the CLF Standard.

(iii) A 2008 report on ePass conducted by Team Bell Canada Enterprise, the developers of ePass, found 17 violations of Priority 1 and 2 checkpoints of the WCAG 1.0.

(iv) A follow-up report from the CLF Office done in response to the findings made in the Team Bell Canada Enterprise report.

4th type of evidence: The applicant's evidence regarding barriers to access on government websites

[30] First, the applicant's own affidavit details specific problems that she encountered while accessing federal government services online. In particular, the applicant provides five examples of instances in which she encountered accessibility barriers online. In each case, the applicant also provides evidence regarding the alternative options available to her when online access was precluded.

First example: Searching for jobs online at jobs.gc.ca

[31] The applicant testified that in September, 2004 and again between March and June, 2007, she visited the jobs.gc.ca website maintained by the Public Service Commission on behalf of the Public Service Resourcing System. As the respondent's witness Diane Beauchamp explained, the jobs.gc.ca website is the only official site for all externally advertised federal government positions. Interested applicants may apply directly through the website for jobs that interest them. Users can also create a Public Service Resourcing System profile online, which allows them to automatically search for all jobs that match their profiles.

[32] The applicant provided a list of difficulties that she encountered in browsing for jobs online. One difficulty that the applicant mentions is that she was unable to access the "Job Bank" and "Job Match" links on the website. Ms. Beauchamp explained that the Job Bank and Job Match sites are

external sites maintained by a different government department. From the evidence of the respondent's witness Nancy Timbrell-Muckle, it appears that the Job Bank and Job Match services are provided by the Service Offerings and Implementation Directorate of the Citizen Service Branch of Service Canada at jobbank.gc.ca. Ms. Timbrell-Muckle agreed that "[d]espite efforts, the Job Search, Job Alert, and Job Match systems were not compliant with Part 1 of the CLF in June of 2007." Ms. Timbrell-Muckle further testified that the Job Match and Job Alert services would not be compliant with the CLF 2.0 Standard by the December 31, 2008 implementation deadline.

Second example: Creating an online profile at Jobs.gc.ca

[33] The applicant testified that in addition to encountering difficulties in browsing the jobs posted at the jobs.gc.ca website, she was unable to complete an online profile at the website without sighted assistance. She testified that the barrier that she encountered occurred when trying to enter the correct date in the "date available" field. In response, Ms. Beauchamp explained that such a problem would be encountered if a user entered the numbers in the wrong format, and therefore suggested that the problem was not with the design of the website. Ms. Beauchamp stated that during the relevant time period, 236 users who self identified as visually impaired created profiles online. We do not know, however, whether these profiles were created with sighted assistance.

[34] Ms. Beauchamp did, however, recognize the applicant's complaint that with the "date available" field in an error state, the applicant had to repeatedly uncheck the "no pop-up windows" option in order to prevent pop-up windows – which blind users cannot navigate – from arising. Ms. Beauchamp stated that this is a "bug" that remains on the site and is to be fixed in the future. This problem, however, while, as the applicant stated, "time consuming and inconvenient," is not a barrier to access.

[35] The applicant further testified that she was not able to get help with completing the online profile on her own. Instead, she was provided with a telephone number that was not "in service".

[36] The applicant was, however, able to complete a jobs profile and apply for jobs with the help of a sighted federal government employee. Mr. Clifford Scott of the Public Service Commission completed the applicant's online Public Service Resourcing Commission profile and helped her to apply for jobs in which she was interested.

Third example: Accessing Statistics Canada statistics online

[37] The applicant testified that in June 2007 she attempted to access information on the consumer price index and unemployment rate from the Statistics Canada website. She stated that actual statistics were, however, only available in "pdf" format, which is not accessible to screen reader technology.

[38] The applicant testified that when she called the information number provided on the website to access the statistics in an alternative form, she was told that they were unavailable.

Fourth example: Completing Census 2006 online

[39] The applicant stated that she was unable to complete online the 2006 Census conducted by Statistics Canada. Instead, she completed the census over the telephone with the help of a sighted employee. The respondent's witness, Anil Arora, testified, however, to the extensive efforts undertaken by Statistics Canada to ensure that the 2006 Census was as accessible as technologically possible. These efforts included a March 2004 report that Statistics Canada commissioned into the compliance of the online Census with the CLF Standard, and a study commissioned in November 2004 from IBM regarding the accessibility of the online census to visually impaired users. These reports made recommendations regarding how accessibility could be improved, and Mr. Arora explained that "all of the improvements related to *accessibility* were completed, while most of the improvements to *usability* that were low risk, low cost and provided a high return on investment were completed." Moreover, the respondent's evidence is that 84 householders completed the online form using screen reading technologies.

[40] The applicant has countered that none of the testing was conducted with technologies other than JAWS, which is a technology that is prohibitively expensive to many visually impaired Canadians, and to which the applicant did not have access at the time that she attempted to complete her own census form. We do not know what screen reader technologies were used by the 84 householders who apparently completed the census using screen readers, nor whether those users were visually impaired rather than using the screen reader to assist due to some other disability, for example, a learning disability.

Fifth example: Accessing the Service Canada Portal

[41] Finally, the applicant asserted that she had difficulty accessing the Service Canada main webpage, which she visited in order to access information concerning the Canada Pension Plan and employment programs:

> Also in early June 2007, I tried to access www.servicecanada.gc.ca. It was very difficult for me to load this website and I had to try several times. When I attempted to navigate links on the home page I had to press the tab button several times in order to hear the name of each link. I had to try a few times before gaining access to this website. My browser was unable to read the English version; it stuttered to deal with the content. Also, I had difficulty accessing links in a timely fashion. I was never sure if I would hear the name of

> the next link that I was attempting to access or what was happening on the screen

[42] The applicant further testified that when she called the Service Canada office seeking information in an alternative format she was told to fax her request to the relevant department.

Effect on applicant

[43] The applicant's Affidavit explains the negative effects that impeded access to government services online produces in her life. In particular, the applicant must rely upon sighted assistance to complete tasks that she would otherwise be able to complete independently and on her own time, and it means that she must rely on government employees to provide accurate and timely alternative formats. To emphasize the barriers created by forced reliance upon alternative formats, the applicant provided a Canadian Human Rights Commission 2006 Report that concludes that "people who are print-disabled have less than a 50/50 chance of obtaining the desired publication within reasonable time. Moreover, the quality of these alternative publications is often unsatisfactory": Canadian Human Rights Commission, *No Alternative: A Review of the Government of Canada's Provision of Alternative Text Formats for People Who Are Blind, Deaf-Blind, or Visually Impaired* (N.p.: Minister of Public Works and Government Services, 2006) at 18.

Evidence of John Rae

[44] In support of her contention that other visually impaired Canadians have faced similar barriers to accessing federal government services online, the applicant provided the evidence of John Rae, who at the time of swearing his affidavit was First Vice President of the Alliance for Equality of Blind Canadians. In addition to the report by the Alliance setting out the failures of

government websites to be accessible to the blind, which is referred to above, Mr. Rae attested to his organization's efforts to improve accessibility to government services online.

Evidence of Jutta Treviranus

[45] The applicant also provided the affidavit of an expert witness, Jutta Treviranus. Ms. Treviranus is the founder and Director of the Adaptive Technology Resource Centre at the University of Toronto, and is a Senior Research Associate with the Faculty of Information Studies at the University of Toronto; Status Faculty at the Faculty of Medicine, Department of Occupational Therapy, at the University of Toronto; and Adjunct Professor of the Knowledge, Media and Design Institute at the University of Toronto. Her qualifications as an expert on web accessibility are clear, and include a close involvement in the development of the international WCAG 1.0 and 2.0, chairing the Web Access Initiative, Authoring Tools group of the World Wide Web Consortium, and numerous publications.

[46] Ms. Treviranus's Affidavit provided background into web accessibility standards in general, and an assessment of the CLF Standard and the way in which it is implemented and enforced. Ms. Treviranus described the development of international standards for web accessibility at the World Wide Web Consortium. In this regard, Ms. Treviranus drew the Court's attention to additional standards that could provide guidance on creating accessible websites with new technologies. These include the *Authoring Tool Accessibility Guidelines 1.0* and a draft of an updated *Authoring Tool Accessibility Guidelines 2.0*, which describe tools that can be used by website developers to help them ensure that they are building accessible websites at the design stage. Ms. Treviranus stressed

that initially creating accessible websites is much easier than trying to fix accessibility problems once websites are already designed. She noted that costs of monitoring and enforcement are also lower in such an environment.

[47] Ms. Treviranus also stated that there are problems with the CLF Standard itself and, more importantly, with the implementation of the standards it sets. Ms. Treviranus pointed to the minutes of meetings of the Access Working Group, one of the interdepartmental working groups consulted by the CLF Office in updating the CLF Standard, where issues of non-compliance and general problems were discussed. In particular, Ms. Treviranus stated that there is a general attitude among federal government website developers that results in accessibility issues being "frequently ignored, relegated to the end of the development process, or seen as a constraint on creative or innovative design."

[48] Finally, Ms. Treviranus summarized the "basic accessibility problems" that she says are frequently encountered by visually impaired individuals when they use federal government services online. These problems include:

(i) images or other multi-media elements (such as video) that do not have alternative text descriptions to allow blind users to know what information is conveyed by the element;
(ii) misleading use of structural elements on pages (for instance, using heading text to create bold text that is not in fact a heading);
(iii) lack of alternative information for users who cannot access the technology used by the website (for example, "flash" is a technology that cannot be read by many screen readers. If a website uses "flash" technology, the user will not be able to access that content); and
(iv) tables that are created in a way that makes their content non-sensical to screen readers (so that the tables are "read" horizontally even though their content is organized vertically within table columns).

5th type of evidence: The respondent's evidence

[49] The respondent's evidence is contained in the affidavits and attached exhibits of two (2) expert witnesses and the evidence of ten (10) government employees regarding the specific departmental websites impugned by the applicant.

1st Expert

[50] The respondent's first expert witness, Chuck Letourneau, provided a history of the World Wide Web Consortium and in particular of the development of web accessibility standards.

2nd Expert

[51] The respondent's second expert witness, Cynthia Waddell, whose qualifications are accepted by the Court, first provided a more detailed discussion of web accessibility, including an explanation of how people with disabilities can access the Internet, and a description of how the CLF Standard compares to other countries' efforts to create web accessibility standards. Second, she responded to the specific accessibility barriers cited in the applicant's evidence.

[52] Ms. Waddell defended the CLF Standard as mandating appropriate accessibility guidelines. Contrary to Ms. Treviranus's assertion that draft WCAG 2.0 Standards ought to be considered, Ms. Waddell stated that adopting standards before they become final recommendations may impose additional costs should the standards be substantially different in their ultimate form. In addition, although Ms. Waddell acknowledged that it is preferable to create accessible websites at the design stages and that the *Authoring Tool Accessibility Guidelines* could be helpful in this regard, she

stated that there are no tools in existence that conform fully to the recommended guidelines. Moreover, Ms. Waddell stated that the CLF Standard creates guidelines that compare favourably with standards created in other countries, for example the U.S. and various European countries.

[53] Ms. Waddell also addressed the specific problems encountered by the applicant herself in accessing websites. Ms. Waddell stated that although in many cases the applicant's affidavit did not disclose enough information to precisely identify the cause of her difficulties, most of the problems that she identified are unlikely to have been caused by inaccessible design of the websites. One particular potential cause of the problems that Ms. Waddell identified was that the applicant was using an "outdated" assistive technology, called Home Page Reader. In their reply affidavits both the applicant and Ms. Treviranus contest this explanation, and argue that the technology used by Home Page Reader was standard and would have been able to access any website that was compliant with the CLF Standard.

[54] In addition, Ms. Waddell stated that the Court should distinguish between accessibility and "usability." She stated that many of the accessibility difficulties noted by the applicant and the applicant's other witnesses are difficulties that reduce usability of a website, for example by requiring great user proficiency and better technology, but not accessibility.

[55] The respondent also provided evidence from employees responsible for the development and monitoring of each of the federal government departmental websites that the applicant

mentions. Each of these employees stated that the design of their websites contained few or none of the elements identified by the applicant.

1st Fact witness

[56] Wendy Birkinshaw Malo is Director of Service Policy for the Treasury Board Secretariat and, in that capacity, responsible for the CLF Office, including development, implementation and oversight activities related to the CLF 1.0 Standard She described the overall structure of roles and responsibilities within the federal government and how the Treasury Board and its policies fit within that. Much of the relevant information provided by this witness is summarized above, in the "Background Facts" section. In her answers to undertakings that she gave at her cross-examination, Ms. Birkinshaw Malo provided extensive documentation regarding the development of the ePass/Secure Channel services. The respondent acknowledges that ePass is not compliant with the CLF Standard.

2nd Fact witness

[57] Ken Cochrane, Chief Information Officer of the Government of Canada, explained the context and content of the federal government's commitment to providing services on the Internet. This includes a huge number of departments, each with its own information technology infrastructure and particular needs, and a number of policy requirements, including protection for and security of personal information, compliance with human rights demands, and official language requirements. Mr. Cochrane stated that the CLF Standard applies to more than 100 institutions, each owning multiple domain names, which, in turn, consist of numerous websites. He concluded that

there are between 23 million and 45.8 million web pages with the domain name gc.ca. He stated that the resource implications of converting all government websites into accessible formats are "almost impossible to estimate." Mr. Cochrane recognized that the Deputy Head of each department is responsible for implementing the accessibility standards.

[58] Mr. Cochrane described Canada as a "world leader" in online government service provision, and offered international reports, including a 2005 Accenture study cited in the 2006 United Nations global audit of web accessibility discussed above, and a 2005 U.N. "E-Government Readiness Survey," in support of this statement.

3rd Fact witness

[59] Clifford Scott, a Resourcing Officer responsible for Graduate Student Recruitment for the Public Service Commission, described the Public Service Commission's recruitment campaigns, which consist of various outreach activities designed to attract promising graduate students to apply for positions with the federal government, and described his interactions with the applicant during her attempts to create a profile and apply for jobs online at the Public Service Commission's jobs.gc.ca website. In general, Mr. Scott's and the applicant's evidence agree that the applicant was able to complete a profile and use the online application system with Mr. Scott's sighted assistance. The applicant states that she was never provided with her account information and that she was never able to independently access the jobs website.

4th Fact witness

[60] Diane Beauchamp responded to the applicant's allegations of difficulties encountered on the Public Service Commission job application website. Ms. Beauchamp was the Project Manager responsible for building the system with a team of developers. Ms. Beauchamp stated that she ran tests of the website as it would have looked at the times that the applicant accessed it in 2004 and 2007. She contested the applicant's evidence that there were images without alternative text, or tables or technologies that could not be sensibly read. Regarding the applicant's finding that the structure of the websites was misleading, Ms. Beauchamp offered reasons why each of the structural elements chosen by her team was present. For example, the applicant found "top of page" comments annoying, but Ms. Beauchamp states that these were present in order to convenience users who wanted to return to the top of a webpage quickly without having to scroll up the page. Ms. Beauchamp acknowledged one area where the website had been, and, at the time of swearing her affidavit, continued to be, non-compliant (the pop-up window "bug" described above), but stated that this instance of non-compliance would not have affected the accessibility of the website content.

[61] In support of her statement that the website was accessible, Ms. Beauchamp provided two compliance evaluations of the Public Service Commission website, both conducted in 2003. Ms. Beauchamp states that the Public Service Commission used these evaluations to identify accessibility problems with its website and to improve it.

[62] Ms. Beauchamp stated that between September 2004 and June 2007, 1307 accounts were created on the Public Service Commission's job application website by applicants who self-identified as blind or with visual impairment. It is unclear whether these accounts were created with sighted assistance. She stated further that that no complaints similar to those of the applicant were made. In her reply affidavit, the applicant contests this, and notes that a July 31, 2007 report by Alan Cantor entitled "Review of jobs.gc.ca" identified some accessibility problems with the website, and was submitted to the federal government. She further contends that she carefully entered the date information in the "date available" field in its proper form, and even engaged the help of a friend in so doing.

5th Fact witness

[63] Nancy Timbrell-Muckle, Director of the Citizen Employment Service of the Service Offerings and Implementation Directorate, Citizen Service Branch of Service Canada, provided information about the associated "Job Bank" website, to which the Public Service Commission's jobs.gc.ca website contains links but which is a distinct service. Like the Public Service Commission site, the Job Bank website allows users to search its listings for jobs, create a profile and advertise themselves to potential employers, and store search criteria so as to receive an alert when new jobs are posted that match the stored criteria. The distinction is that the Job Bank website provides access to private sector employment. Ms. Timbrell-Muckle recognized that "despite efforts," the Job Bank websites were not compliant with the accessibility standards of the CLF 1.0 Standard in June of 2007. Moreover, she recognized that the websites would not be fully compliant with the CLF 2.0 Standard by the December 31, 2008 implementation deadline.

6th Fact witness

[64] Anil Arora, who in 2006 was Director General of the Census Program Branch at Statistics Canada, responsible for the 2006 Census, described the measures taken by Statistics Canada to ensure that the 2006 Census was accessible to people with disabilities. These included consultations and testing in the two years leading up to Census Day. Mr. Arora stated that the Census should have supported many types of assistive software devices. The testing, however, was limited to a single technology, called "JAWS," and to the short-form census form 2A. Mr. Arora noted that alternative formats, including Braille, were available.

[65] Mr. Arora stated that he determined that eighty-four householders completed the 2006 Census online using screen reading technology. It is unclear whether any were using technology other than JAWS.

7th Fact witness

[66] Louis Boucher, Director of the Dissemination Division of Statistics Canada, with overall responsibility for the Statistics Canada website, detailed the efforts made by Statistics Canada to ensure the accessibility of its website. In particular, Mr. Boucher noted that Statistics Canada has since 2005 hosted a "Centre of Expertise on Accessibility," which has 3 full-time employees, of whom two are visually impaired, that is responsible for increasing awareness of accessibility issues and of testing and improving Statistics Canada's website content to ensure accessibility. In addition, Mr. Boucher stated that the website was compliant with the CLF 1.0 Standard since 2006, and had created a dedicated project team to ensure implementation of the CLF 2.0 Standard by the

December 31, 2008 implementation deadline. Mr. Boucher recognized that while all current content is tested to ensure that it meets the requirements of the CLF Standard, Statistics Canada does face the challenge of converting older content, called "legacy content", into accessible formats.

8th Fact witness

[67] Don Royce of Statistics Canada explained how the applicant's job application was treated differently, and thereby accommodated, compared with non-visually impaired candidates for a job.

9th Fact witness

[68] Steve Buell was the Project Lead, Accessibility Integration, for the Accessibility Centre of Excellence within Service Canada. In this capacity, Mr. Buell was responsible for advising managers within Service Canada departments regarding including accessibility standards in their projects, and supporting managers or other specialists in the accommodation of employees with disabilities. Mr. Buell explained the structure and function of the Accessibility Centre of Excellence within Service Canada and of Service Canada itself. He also described the Service Canada website and the efforts undertaken to ensure its accessibility.

[69] Mr. Buell explained that Service Canada is a portal that provides access to a range of federal government programs and services, each operated by different departments. Service Canada does not provide the services themselves, but rather provides a central location from which users can access them. Service Canada achieves this centralized delivery through four main delivery channels

(in-person, online, by telephone, and by mail) with more than 595 points of service across Canada, in call centres and over the Internet.

[70] The Service Canada website includes a variety of tools that facilitate the usability of the portal. For example, users can create an account online through which they can view their Employment Insurance, Canada Pension Plan, and Old Age Security information online from Human Resources and Skills Development Canada. The website also includes a "persons with disabilities portal" that provides a collection of information from various government departments that would be relevant to persons with disabilities, such as, for example, the Guide to Government of Canada Services for Persons with Disabilities, and information on the Opportunities Fund for Persons with Disabilities, the Disability Vocational Rehabilitation Program, and Entrepreneurs with Disabilities Program.

[71] The Service Canada website is developed and maintained by the Web Channel Office of Service Canada, which is also responsible for ensuring accessibility. Advice and accessibility testing of the site is conducted by the Accessibility Centre for Excellence. Mr. Buell explained that the Accessibility Centre for Excellence can test the website and make recommendations, but has no enforcement power.

[72] Mr. Buell stated that while the Service Canada website was fully compliant with the CLF 1.0 Standard in May and June of 2007, and while his group has been working with the Web Channel Office to ensure that the website be compliant with the CLF 2.0 Standard by the December

31, 2008 implementation deadline, Service Canada is not responsible for all of the applications to which its websites links. He acknowledged that some of those websites were not fully compliant with the accessibility standards of the CLF 1.0 Standard in 2007.

[73] Mr. Buell explained at question 511 when cross-examined on his affidavit, that he will manually evaluate a website to determine if it meets the CLF Standard. He said it will take 5 days for a "normal branch informational site" of 20 to 30 pages.

10th Fact witness

[74] The respondent's final witness is George Smolinski, who was the Program Coordinator for the Government of Ontario's Assistive Devices Program. He testified about funding assistance to the visually impaired requiring devices to assist them retain or regain their independence at home.

ISSUE

[75] The main issue to be decided in this case is whether the federal government has breached the applicant's right to equal treatment under section 15(1) of the Charter, either by creating inadequate Internet accessibility standards or by failing to enforce and implement existing standards.

RELEVANT LEGISLATION

[76] Section 15 of the Charter guarantees equality to all individuals before and under the law, and equal protection and benefit of the law:

15. (1) 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.	15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

[77] Subsection 24(1) of the Charter states the remedies that a Court may order where it finds that an individual's rights under the Charter have been infringed:

24(1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of	24(1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte,

competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

[78] Section 1 of the Charter sets reasonable limits on the scope of the rights and freedoms it grants:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

[79] The remaining relevant legislation, and policies prescribed pursuant to the legislation, are attached hereto as Appendix 1.

ANALYSIS

PRELIMINARY LEGAL MATTERS

Jurisdiction of this Court

[80] In this application, the applicant is seeking a declaration under section 18.1 of the *Federal Courts Act*. Subsection 18.1(1) provides that an application for judicial review may be made by "anyone directly affected by the matter in respect of which relief is sought." Subsection 18.1(3) permits the Federal Court to order a remedy against any "federal board, commission, or other tribunal," on any of the grounds listed in subsection 18.1(4).

[81] The applicant's complaint is one of systemic discrimination, potentially affecting the acts of 146 federal departments and agencies. The applicant presents five alleged specific instances of discrimination and complains of a system wide failure of the government, through each of these institutions, to meet its responsibilities under section 15(1) of the Charter to ensure that the benefit of online services is provided without discrimination on the basis of physical disability.

[82] The respondent does not contest that this is a "matter" sufficient to give the applicant standing under section 18.1(1) of the *Federal Courts Act*. As this Court recognized at para. 76 in *Canadian Association of the Deaf v. Canada* 2006 FC 971, [2007] 2 F.C.R. 323 per Justice Mosley:

> ¶76. The word 'matter' found in s. 18.1 of the *Federal Courts Act, 19*98 is not so restricted but encompasses any matter in regard to which a remedy might be available under s.18 or s-s. 18.1(3): *Morneault v. Canada (Attorney General)*, 2001 1 F.C. 30, 189 D.L.R. (4th) (F.C.A.)

[83] In *Canadian Association of the Deaf*, this Court was faced with an application similar to the one at bar. In that case, the applicants were hearing impaired individuals who sought judicial review of the acts of numerous government departments in failing to provide professional sign language interpretation services at meetings between hearing impaired individuals and federal government officials. The relevant law was a federal government policy issued under the authority of the Translation Bureau of the Department of Public Works and Government Services Canada that delegated to individual departments the responsibility for providing sign language interpretation services to hearing impaired members of the public in meetings with the department's officials. The evidence demonstrated that a number of departments, including Human Resources Development

Canada and Statistics Canada, had failed to provide these services when needed. The applicants sought a declaration that their rights under section 15(1) of the Charter had been infringed.

[84] Although the application was brought against three separate government departments on the basis of the separate experiences of four distinct applicants, Justice Mosley concluded at para. 66:

> ¶66. In this case, the commonality among the four applicants is that their situations arose out of the application of the same set of guidelines for the provision of interpretation services. While each incident involved its own facts and decision-makers (different government departments and different employees), the heart of the matter is the application of the same policy to the same interested community. Accordingly, I agree that it would be unreasonable to split the application.

Systemic complaint

[85] The respondent submits that the Court cannot assess such a system wide complaint without any specific facts to which the respondent can reply. The Court agrees. However, the Court has the government's own CLF audit in December 2007 which proved that the government's online services are not meeting the government's own accessibility standard for the visually impaired. The audit report is huge – it details the failure of each of the 47 departments audited to meet the CLF Standard. Some failures were worse than others in that the CLF office sent letters to the deputy heads of 22 departments which were shown to have "seriously violated" the CLF Standard.

[86] The jurisprudence recognizes that an individual may bring a systemic complaint which affects her and others in the same position. The Supreme Court of Canada, in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, per Justice La Forest at para. 83, held that the

Court was willing to grant a declaration under section 24(1) of the Charter, regardless of whether the claimants had established violations of their own rights:

> ¶83. Finally, I note that it is not in strictness necessary to decide whether, according to this standard, the appellants' s. 15(1) rights were breached. This Court has held that if claimants prove that the equality rights of members of the group to which they belong have been infringed, they need not establish a violation of their own particular rights. . . .

Public interest litigant

[87] The applicant submits that she is a "public interest litigant", namely that she is bringing this litigation on behalf of herself and the public interest to ensure that the visually impaired are not discriminated against with respect to government online services. The respondent has accepted this characterization of the applicant and, indeed, it accords with the understanding of a public interest litigant that emerges from the jurisprudence. In *British Columbia (Minister of Forests) v. Okanagan Indian Band* 2003 SCC 71, [2003] 3 S.C.R. 371 at para. 38, Justice LeBel, in the course of considering when an award of interim costs would be justified, discussed the nature of public interest litigation:

> Furthermore, it is often inherent in the nature of cases of this kind that the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues. In both these respects, public law cases as a class can be distinguished from ordinary civil disputes.

ASSESSMENT OF THE EVIDENCE

The importance of government online services

[88] The applicant has presented the Court with evidence that the Government of Canada made a commitment to provide its information and services online to better communicate its programs, services, and information. This policy originated in the 1999 Speech from The Throne.

[89] As discussed, the government has 146 departments and agencies subject to the *Financial Administration Act* (the Act) that provide a range of online services and programs to Canadians. These departments operate websites with millions of web pages. A person can apply online for a government job or for social services such as Employment Insurance, a Canada Pension Plan and a passport.

[90] Pursuant to section 7 of the Act, the government has issued a Communications Policy which ensures that communications by the government departments comply with various statutes including the Charter.

2000 Government Accessibility Standards for the blind

[91] In 2000, the government issued its CLF 1.0 Standard, which requires that government department websites are designed and programmed to ensure that online services be accessible to the visually impaired by 2001.

[92] In 2007 the Treasury Board "CLF Office" conducted a spot audit of 47 government departments and agencies to assess their compliance with the CLF Standard. This was to help the departments understand their obligations leading up to the December 31, 2008 implementation deadline for the new CLF Standard, the CLF 2.0 Standard. The audit identified a large number of failures by every department to meet Priority 1 and 2 checkpoints of the CLF Standard. Failure to meet a Priority 1 checkpoint often means that the website is not accessible to the visually impaired.

[93] While none of the departments complied with the CLF Standard, the CLF office determined that 22 of the departments had "serious violations", which resulted in the CLF office sending letters to the deputy heads for each of these 22 departments to seek their compliance. No responses from the deputy heads or other follow-up information was presented to the Court.

What is wrong with the CLF Standard

[94] The applicant submits that:

a. the CLF Standard is inadequate; and

b. it is not enforced or implemented.

The CLF Standard is adequate because interactive applications are not accessible

[95] The CLF Standard fails to address or allow “rich Internet applications”, that use ePass as a security channel, which are the interactive applications used by 23 government departments to provide 83 online applications such as for employment insurance or a passport.

[96] In order to function, rich Internet applications use particular technologies, such as “scripts” and “applets.” These technologies pose an access barrier to screen readers used by the blind.

[97] The evidence is that rich Internet applications cannot function with scripts turned “off”. The CLF Standard requires government websites to be made accessible by maintaining functionality with scripts turned off. The CLF Standard effectively prevents government website developers from creating rich Internet applications. Were this standard to be obeyed, the government would be precluded from providing myriad useful online services.

[98] Instead of so limiting itself, the government has ignored the CLF Standard. The applicant’s uncontradicted evidence is that the mere existence of ePass, which is a rich Internet application that depends upon having scripts turned “on” in order to function, is a violation of the CLF Standard.

[99] Whereas the CLF Standard in its current form therefore presents government website developers with the binary option of either using rich Internet applications or complying with the CLF Standard, the applicant states that the CLF Standard could be modified to require that scripts be written in an accessible manner. Since the CLF Standard was written, screen reader technologies have developed so that if scripts and applets are designed properly the rich Internet applications can

be fully accessed with all of their functionality. Thus, WCAG 2.0 (the 2008 international accessibility guidelines) has removed the requirement that accessibility be achieved by providing the same functionality with scripting and applets turned off, and instead provides guidelines for the development of accessible scripts.

[100] Accordingly, the Court finds that the government should update the CLF Standard to refer to WCAG 2.0 guidelines and thereby incorporate the guidelines which allow the accessibility of rich Internet applications using ePass as a secure channel.

The CLF Standard is not enforced or properly implemented for most government websites

[101] For most of the government websites, i.e. those that do not use ePass as a security channel, the CLF Standard is not being properly implemented. If followed, it would ensure equal access to the blind for online government services. But the evidence demonstrates on the balance of probabilities that there is a system wide failure by government departments and agencies to comply with the CLF Standard so that these websites are not fully accessible to the visually impaired.

Three sources of evidence regarding inaccessiblity

[102] The evidence with regard to the inaccessibility of federal government websites comes from three sources. First, a number of reports have demonstrated failures of numerous government websites to meet basic Priority 1 and 2 checkpoints of the CLF Standard, which, as discussed above, means that the blind cannot access the websites. Second, the applicant has submitted affidavit evidence from herself, John Rae, and her expert witness Jutta Treviranus, that describe barriers to

access encountered on government websites. Third, the respondent's witnesses have acknowledged instances of non-compliance on federal government websites.

1st Source: Report Evidence of Non-Compliance

[103] The reports in evidence regarding the accessibility of federal government websites fall into three categories. First there are reports specifically evaluating the accessibility of ePass, which, as discussed above, is a service used on a variety of departmental websites. Second, there are reports evaluating specific departmental websites for compliance with the CLF Standard. Finally, there are international reports evaluating the accessibility of various Canadian government websites.

[104] The respondent's witnesses produced four reports that the government conducted or commissioned to evaluate ePass. All of these reports identify ePass as failing to meet a large number of Priority 1 and 2 checkpoints of the CLF Standard. An inquiry into the specific failures found that they are of a nature that would make ePass inaccessible to visually impaired users.

[105] The evidence demonstrates that the government was aware that ePass violated the CLF Standard and was not accessible to visually impaired users. As the applicant argued, ePass is therefore an important example of ways in which the government has failed to take seriously the accessibility standards that it has created.

[106] Two reports evaluated a number of federal government department websites against the CLF Standard and found extensive failures to comply with Priority 1 and 2 checkpoints. These

reports are detailed above, and include the 2007 Treasury Board CLF Office internal audit of 47 government department websites.

[107] Finally, the parties spoke to two international reports. These reports similarly find widespread failures of those world wide government websites evaluated to comply with Checkpoint 1 and 2 requirements of the *Guidelines*. The international reports demonstrate the difficulty that all actors – public and private- around the world are facing in ensuring the continued accessibility of the Internet. That is, while Government of Canada websites considered in these studies fared poorly, that was the general result for all websites evaluated across all sectors in all countries.

2nd Source: Applicant's Affidavit evidence of non-compliance

[108] The applicant's own evidence regarding her experiences navigating federal government websites is detailed above. In terms of identifying systemic discrimination, the applicant's expert witness, Jutta Treviranus, confirmed that in her experience the barriers identified by the applicant and the reports are common barriers encountered by visually impaired individuals who try to access government websites online:

> I am in contact with many visually impaired consumers of the Federal Government's online material and have reviewed the same sites myself. There are a number of basic accessibility problems which have existed for some time and which could readily be addressed.

Ms. Treviranus lists the basic accessibility problems already cited above. Similarly, the applicant's witness John Rae also states that he and the members of his organization have encountered accessibility barriers:

> The AEBC has long been concerned with the inaccessibility of Internet materials, particularly government Internet services. We receive comments from many members regarding the inaccessibility of federal government Internet sites.

3rd Source Respondent's Witnesses' Evidence of Non-Compliance

[109] The respondent's witnesses acknowledged that ePass does not comply with the CLF Standard, and that this non-compliance impedes accessibility. Ken Cochrane explained that the reason that ePass and Secure Channel do not meet accessibility requirements is that the need to ensure the privacy of personal information provided online superseded the accessibility requirements: "this is one example where fulfilling one imperative impeded fulfilling another." Steve Buell recognized that although access would not "completely block" access to ePass, "there's been some deficiencies in the checkpoints. . . ." Moreover, the evidence is that the contract under which ePass is provided was twice renewed while the government was aware of the accessibility deficiencies, but in neither case were the accessibility deficiencies addressed.

[110] In contrast to their admissions regarding ePass, the respondent's witnesses generally insisted that their departments had websites that were entirely compliant with the CLF Standard. The evidence nevertheless identified instances in each case where the sites were not, in fact, compliant. For example, Diane Beauchamp insisted that the jobs.gc.ca website was always compliant with the CLF Standard. She nevertheless recognized that one of the applicant's complaints – that there were pop-up windows used on the site – was a valid "bug" that remained as of the time that Ms. Beauchamp swore her affidavit. Not using pop-up windows is a Priority 2 checkpoint of the *Accessibility Guidelines 1.0*, and, therefore, a requirement of the CLF Standard.

[111] Anil Arora detailed the efforts undertaken to make the 2006 Census accessible, and stated that it should have been accessible to individuals using less expensive assistive technologies other than JAWS, but, as the applicant noted, Mr. Arora recognizes that no testing was conducted with other technologies.

[112] Nancy Timbrell-Muckle testified regarding the accessibility of the Job Bank services provided via Service Canada. In her affidavit, she acknowledges that the websites comprising the Job Bank services are not accessible:

> Job Search will be compliant with part 2 of *CLF 2.0* on December 31, 2008, and work will then begin on bringing the Job Match and Job Alert systems into compliance as soon as possible thereafter.

[113] The evidence of Steve Buell, who testified regarding the efforts undertaken by Service Canada to ensure the accessibility of its websites, also acknowledges that there are many instances of non-compliance with the CLF Standard on federal government websites. Mr. Buell recognized that:

> Service Canada is not responsible for all of the applications that are linked to the main Service Canada site. Some of these were not fully compliant with Part 1 of CLF 1.0 in 2007.

Mr. Buell does not suggest that these websites were later brought into compliance; instead, he explains that certain technologies must be designed with "great care" and this can be challenging for developers. Moreover, Mr. Buell recognized that while Service Canada has an Accessibility Centre for Excellence in place to help developers should they request it, this does not ensure that websites are accessible. To the contrary,

> Whenever issues are brought to the attention of the Web Channel Office or ACE, all efforts are made to inform those responsible of the requirements to bring the site into compliance with the appropriate standards.

Specific complaints of the applicant with regard to not being able to access government services online

[114] The respondent submits that this Court can only deal with the specific complaints of the applicant and cannot treat this application for a declaration as one with respect to a systemic failure by all government departments and agencies. The Court will first deal with the five examples presented by the applicant. I will ask the reader to refer back to the beginning of this decision for the details with respect to each example.

1st example: Searching for jobs online at jobs.gc.ca

[115] The evidence from the respondent's witness Nancy Timbrell-Muckle agrees that the applicant would not be able to access the "job bank" and "job match" links on the jobs.gc.ca website because they are not compliant with the CLF Standard.

2nd example: Creating an online profile at jobs.gc.ca

[116] The applicant relied upon a report by Alan Cantor, that purportedly found the same problem as the applicant had with the "date available" field. The origin and quality of this report has not been proven to the Court's satisfaction. Accordingly, the Court cannot conclude that the applicant's inability to complete her profile online was, on the balance of probabilities, a problem with the

design of the website. In any event, the applicant was able to complete a jobs profile and apply for jobs with the help of a sighted government employee, Mr. Clifford Scott.

3rd example: Accessing Statistics Canada statistics online

[117] Despite best efforts by Statistics Canada, the Court is satisfied that some modern content on the Statistics Canada website remained inaccessible online to the visually impaired and that some of this information is not available in an alternative format such as Braille which can be read by the visually impaired.

4th example: Completing Census 2006 online

[118] The respondent maintains that the 2006 Census was accessible. The applicant countered that the testing was only done with JAWS, a technology that is prohibitively expensive to many visually impaired Canadians, and to which the applicant did not have access. It is difficult for the Court to evaluate this conflicting evidence in light of the nature of affidavit evidence on an application for judicial review. Given, however, that the applicant has stated that any website that meets the CLF Standard will be accessible to a variety of screen reader technologies, and given that the respondent's witness has testified that the Census was compliant with the CLF Standard, and that the applicant has provided no contrary evidence beyond asserting that she was unable to access it, the Court is not persuaded on the balance of probabilities that the 2006 online Census was not accessible to the applicant by reason of its design.

[119] The respondent's witness, Mr. Arora, stated that the Census was available in Brail and in audio format. It is unclear to the Court how a visually impaired individual could complete such a form without sighted assistance. However, Statistics Canada does provide such assistance.

5th example: Accessing the Service Canada Portal

[120] The respondent's witness, Stephen Buell, explained that there are many possible explanations for the problems encountered by the applicant that would not impugn the design of the websites. Mr. Buell detailed the ways in which Service Canada tries to ensure that its websites are accessible. In particular, Mr. Buell's centre, the "Accessibility Centre of Excellence," is a 10-person team tasked with providing guidance and testing to Service Canada website developers who request it. However, the Accessibility Centre of Excellence at Service Canada does not have any enforcement powers and does not independently conduct accessibility evaluations.

[121] Mr. Buell testified that the Service Canada main website was compliant with the Priority 1 and 2 checkpoints of the Accessibility Guidelines 1.0 in May and June 2007, when the applicant attempted to access it. But Mr. Buell acknowledged that not all applications to which the Service Canada main page provided links were compliant with the CLF 1.0 Standard's accessibility provisions in 2007. For example, he recognized that downloadable forms are often inaccessible, and that ePass is not fully accessible.

[122] Contrary to Mr. Buell's assertion of compliance, however, the applicant points to the CLF Office internal audits which found numerous violations of the Accessibility Guidelines 1.0 on the Service Canada site.

[123] The applicant further testified that when she called the Service Canada office seeking information in an alternative format she was told to fax her request to the relevant department. For obvious reasons, fax is not an adequate alternative for blind persons.

[124] Mr. Buell detailed the alternate formats and other assistance available through Service Canada, including its main 1-800-O-CANADA telephone line. He could not explain why the applicant was told to fax her request, but stated that this was not the proper procedure and that alternate formats should have been made available to her.

Conclusion with respect to the applicant's five examples

[125] The Court is satisfied that in four of the examples cited by the applicant the government websites were not fully accessible to the visually impaired and not in compliance with the CLF Standard. The negative effect on the applicant and the visually impaired is clear. If they have to rely upon sighted assistance they lose their independence, their dignity and their ability to accurate and timely information on an equal basis with a sighted person.

[126] Moreover, in three of the examples, the information was not available to the applicant through another channel (by telephone, in person or by mail) in Braille or audio. The applicant could not receive the online information or service from another channel in examples 1, 3 and 5.

[127] The Court is also satisfied that these examples are consistent with the evidence of a system wide failure by the government departments and agencies to comply with, and implement, the CLF Standard as required by the Treasury Board nine years ago.

Multiple channels and best efforts to make the web content accessible

[128] The Communication Policy requires the government provide its information via a variety of channels. For the visually impaired, that would include the Internet, telephone, mail, and in person. Of course, written material would be provided in Braille.

[129] The CLF 2.0 Standard also recognizes the importance of utilizing multiple channels for service delivery when "best efforts cannot make the content or application accessible".

[130] However, while the CLF Standard requires that "best efforts" be made to make the content accessible, there was a lack of evidence from the respondent as to the "efforts" which the government was making. The Treasury Board witnesses disclaimed responsibility for any concerted effort in this regard by stating that implementation and compliance of the CLF Standard is the responsibility of the deputy head of the 146 government departments and agencies subject to the Act. When the Treasury Board CLF Office conducted a spot audit of 47 departments in 2007, it

found that none of the departments fully complied with the CLF Standard, and that 22 departments were “seriously violating” the CLF Standard. The Treasury Board CLF Office sent letters to the deputy heads of those 22 departments. There was no evidence presented by the respondent whether the deputy heads responded or indicated what effort was being made to comply.

[131] Ninety-three government departments and agencies have CLF Centres within their department. Mr. Buell testified there are 10 persons working at the CLF Centre for Expertise with Service Canada. These centers “may be able to lead the horse to water, but they cannot make it drink”. The deputy ministers seem to be ignoring their responsibility to make their respective online services accessible to the blind.

APPLYING THE LAW

The Charter claim under section 15

[132] This Charter claim is brought under subsection 15(1) of the Charter:

15(1) 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.	15(1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

The purpose of section 15 – "Substantive equality"

[133] The purpose of subsection 15(1) of the Charter was described by the Supreme Court of Canada in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 [*Kapp*] at paras. 14-16 was to ensure "substantive equality" or "an equality of benefit and protection" for people with different characteristics:

> *1. The Purpose of Section 15*
>
> ¶14. Nearly 20 years have passed since the Court handed down its first s. 15 decision in the case of *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143 (S.C.C.). *Andrews* set the template for this Court's commitment to substantive equality — a template which subsequent decisions have enriched but never abandoned.
>
> ¶15. Substantive equality, as contrasted with formal equality, is grounded in the idea that: "The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration": *Andrews*, at p. 171, per McIntyre J., for the majority on the s. 15 issue. Pointing out that the concept of equality does not necessarily mean identical treatment and that the formal "like treatment" model of discrimination may in fact produce inequality, McIntyre J. stated (at p. 165):
>
> > To approach the ideal of full equality before and under the law — and in human affairs an approach is all that can be expected — the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

[134] As a legally blind individual, the applicant is a member of a group identified by the grounds enumerated in section 15, namely, "the physically disabled". That the physically disabled have suffered and continue to suffer discrimination is not contested by the respondent. The history of discrimination that has been faced by the disabled in Canada was described by Justice La Forest for the Court in *Eldridge v. British Columbia (Attorney General)*, [1997] 2 S.C.R. 624, 151 D.L.R. (4th) 577 (*Eldridge*) at para. 56:

> It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. . . . As a result, disabled persons have not generally been afforded the "equal concern, respect, and consideration" that s. 15(1) of the *Charter* demands. . . . One consequence of these attitudes is the persistent social and economic disadvantage faced by the disabled.

Framework for a section 15 analysis

[135] The applicant claims that she and other persons with visual impairment are being denied the equal benefit of the law without discrimination on the basis of physical disability. The principal Supreme Court of Canada cases that guide the determination of whether there has been discrimination are *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Eldridge, supra.*; *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.) and *Kapp, supra.*

[136] The Supreme Court of Canada first dealt with a claim under section 15 of the Charter in *Andrews*. In that case, Justice McIntyre at p. 165 stated for the majority:

> . . . the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

The Court focused the section 15 analysis upon ensuring substantive rather than formal equality. In *Andrews*, Justice McIntyre quoted with approval from *C.N.R. v. Can. (Can. Human Rights Comm.)*, [1987] 1 S.C.R. 1114, 40 D.L.R. (4th) 193, (sub nom. *Action Travail des Femmes v. C.N.R.*) 76 N.R. 161 [Fed.], which in turn quoted the Abella Report on equality in employment (Order in Council P.C. 1983-1924 of 24 June 1983):

> Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics ...
>
> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

The law should not have a less beneficial impact on the blind than on sighted persons.

[137] In *Eldridge*, this section 15(1) focus upon substantive equality was applied to case in which the claimants, like the applicant here, were claiming discrimination on the ground of physical disability. In *Eldridge*, the claimants were deaf and submitted that hospitals which failed to provide sign language interpretation to deaf individuals were violating section 15(1) of the Charter. The Supreme Court agreed. Although the deaf individuals received the same medical services as hearing individuals, this resulted in substantive inequality, or "adverse effects discrimination," because deaf individuals could not communicate effectively to access medical services, while hearing persons could. At para. 64 the Court stated:

> Adverse effects discrimination is especially relevant in the case of disability. The government will rarely single out disabled persons for

> discriminatory treatment. More common are laws of general application that have a disparate impact on the disabled.

The law should not have a "disparate impact" on the blind.

[138] In *Law* the Supreme Court of Canada further developed its approach to determining a claim under section 15(1) of the Charter. In an effort to provide a clear framework for a section 15 analysis, *Law* set out guidelines that a court could follow in conducting its analysis. These guidelines have recently been reinterpreted by the Supreme Court in *Kapp*.

[139] In *Kapp* at paras. 21 and 22, the Supreme Court held that:

> ¶21. At the same time, several difficulties have arisen from the attempt in law to employ human dignity *as a legal test*. There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. . . .
>
> ¶22. But as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be. . . .

[140] As a result, the Court in *Kapp* moved away from the multi-pronged approach suggested in *Law* and returned to the framework laid out in *Andrews*. The Court in *Kapp* concluded at para. 17 that there is simply a two-part test:

> ¶17. The template in *Andrews*, as further developed in a series of cases culminating in *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.), established in essence a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by

> perpetuating prejudice or stereotyping? These were divided, in *Law*, into three steps, but in our view the test is, in substance, the same.

[141] The first stage of the Court's inquiry must therefore be to identify the law or practice that the applicant alleges is discriminatory, and to identify an appropriate comparator group. Following that, the Court must determine whether the law or practice is discriminatory, by creating a distinction based upon an enumerated or analogous ground, and, in so doing, creating a disadvantage by perpetuating prejudice or stereotyping.

First stage: Identifying the impugned law and the appropriate comparator group

[142] It is well-established that a "law" within the meaning of section 15 will include a government policy or activity. In *Eldridge*, the Supreme Court of Canada made clear that discrimination under section 15 can be the result not only of a law that is discriminatory, but also of a policy that denies equal benefits despite a facially non-discriminatory law. One implication of this definition of discrimination is that it imposes upon the government an obligation to take positive steps to ensure that facially neutral laws also have neutral effects. As the Court said in *Eldridge* at para. 77:

> If we accept the concept of adverse effect discrimination, it seems inevitable, at least at the s. 15(1) stage of analysis, that the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services.

[143] In this case, subsection 7(1) of the *Financial Administration Act* provides the Treasury Board of Canada with the power to determine and manage the federal public administration, including "all matters relating to (a) general administrative policy in the federal public administration; (b) the organization of the federal public administration or any portion thereof, and the determination and control of establishments therein. . . ."

[144] Pursuant to this law, the Treasury Board prescribed the "*Communications Policy of the Government and Canada,* dated April 1, 2002", and the "*CLF Standard"*. The Communications Policy provides that the government departments and agencies must maintain an active presence on the Internet to enable 24-hour electronic access to public programs, services and information. E-mail and websites must be used to enable direct communications between Canadians and the government institutions. Section 4 of the "Policy Statement" states that it is the policy of the government to use communications in multiple formats which are broadly accessible to the needs of all Canadians whose "perceptual or physical abilities" are diverse and must be recognized and accommodated. Moreover, the government institutions must manage their websites in accordance with the CLF Standard. The CLF Standard guarantees universal accessibility which ensures "**equitable access to all content on Government of Canada websites"** (emphasis added). The CFL Standard requires:

> Implementation of universal accessibility guidelines lies in designing (web) sites to serve the widest possible audience and the broadest possible range of hardware and software platforms, from assistive devices to emerging technologies.

[145] The CLF Standard states that:

> All Government of Canada websites must comply with W3C Priority 1 and Priority 2 checkpoints to ensure sites can be easily accessed by the widest possible audience.

[146] The Court, in reviewing the statutory scheme created by the *Communications Policy of the Government of Canada* and the CLF Standard, is satisfied they confer the benefit of access to government services online.

[147] The parties agree that the appropriate comparator group is sighted individuals who access government services online.

First part of the test: Does the law create a distinction based on an enumerated ground

[148] Physical disability is an enumerated ground in section 15. If the Communications Policy and the CLF Standard create a distinction between visually impaired and non-visually impaired individuals, then they will have created a distinction based on an enumerated ground.

[149] A law can create a distinction in two ways. First, the law may create the distinction on its face. Second, the law may be facially neutral but may have effects that are discriminatory or differential, and so give rise to "adverse effects discrimination." As the Supreme Court noted in Eldridge at para. 64:

> … [a]dverse effects discrimination is especially relevant in the case of disability. The government will rarely single out disabled persons for discriminatory treatment. More common are laws of general application that have a disparate impact on the disabled.

[150] In this case, the Communications Policy and the CLF Standard are facially neutral with regard to their website accessibility standards: they prescribe standards that are to be applied by the government in delivering services online to all Internet users.

[151] I have reviewed the evidence and for the reasons outlined above I am satisfied that the applicant and other visually impaired individuals were treated differently as a result of their physical disability, namely, visual impairment. The applicant has demonstrated two systemic failures that underlie the government's failure to provide online services in a manner that is accessible to the visually impaired:

1. the CLF 1.0 Standard, which the government directed that its departments and agencies implement nine years ago, has not been implemented, has not been enforced, and has not been made a priority by the deputy heads of the estimated 146 government departments and agencies who are responsible for implementing these standards. These are the standards that apply to ordinary government online information services; and

2. the government has introduced 83 online interactive "rich Internet applications" which use a secure channel called "ePass". This allows persons in Canada to apply for a variety of important government services such as Employment Insurance, Canada Pension Plan, and a passport. These interactive online services are not accessible to the visually impaired and the current CLF Standard could be amended, in accordance with the new international standard, to make them accessible to the visually impaired.

[152] Accordingly, the Court concludes that the impugned law does create a distinction based on the enumerated ground of physical disability, that the applicant has not received the equal protection and benefit of the government policy to make its information and services accessible to the public online, and that this arises from systemic failures pursuant to the application of the Communications Policy and the CLF Standard.

[153] The applicant and other visually impaired individuals have therefore been subject to differential treatment based on an enumerated ground; namely, as a result of their physical disability.

Second part of the test: Does the distinction create a disadvantage

[154] Not every difference in treatment will create a disadvantage. Instead, the Supreme Court of Canada made clear that the equality guaranteed in section 15(1) of the Charter is of a substantive, and not a formal nature. See *Kapp* at para. 15.

[155] Substantive equality often requires specifically distinguishing disabled from non-disabled individuals. In *Eldridge* at para. 65, the Supreme Court quoted, with approval, the words of Justice Sopinka in *Eaton v. Brant (County) Board of Education* (1996), [1997] 1 S.C.R. 241 at para. 67:

> … it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.

[156] "Reasonable accommodation" refers to the positive steps or "special measures" that a government must take to ensure the substantive equality of disabled individuals guaranteed to them by section 15(1) of the Charter. As Justice La Forest stated in *Eldridge* at paras. 77, 78:

> If we accept the concept of adverse effect discrimination, it seems inevitable, at least at the s. 15(1) stage of analysis, that the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services. … The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field. …
>
> (Emphasis added)

Many cases dealing with claims of discrimination on the ground of disability under the Charter have turned on the determination of whether the special measures provided by the impugned entity, are a reasonable accommodation of the needs of disabled individuals.

[157] Both the specific examples provided by the applicant and the evidence of systemic problems with the CLF Standard, demonstrate that the applicant and other visually impaired individuals do not receive the benefit of the government's online services and information equally with non-visually impaired Canadians, and that they encounter significant difficulties in being otherwise accommodated with the same information. In three cases, the applicant could not be otherwise accommodated with written material in Braille. Accordingly, the distinction does create a disadvantage for the blind.

[158] This is an adverse effect caused by differential treatment of the visually impaired, a physical disability enumerated under subsection 15(1) of the Charter. This failure perpetuates a

disadvantage which undermines the dignity of the visually impaired. This differentiation perpetuates the stereotyping and prejudice that blind persons cannot access and benefit from online government information and services which sighted persons can. Of course, the evidence demonstrates that there is long-established computer technology which allows the visually impaired to access computer programs and services, provided the websites are designed according to nine year old accessibility standards.

Two elements of reasonable accommodation

[159] There are two elements of the idea of a "reasonable accommodation." The first element is the demand that section 15 makes for "positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public" (*Eldridge* at para. 78). In this sense, the accommodation required is an integral part of the section 15(1) inquiry itself. The second element of the term "reasonable accommodation" is associated with the need to limit the respondent's obligation to accommodate to only those accommodations that are "reasonable". "Reasonable" in this context has been interpreted to mean to the point of "undue hardship". As Justice La Forest stated in *Eldridge* at para. 79:

> In my view, in s. 15(1) cases this principle is best addressed as a component of the s. 1 analysis. Reasonable accommodation, in this context, is generally equivalent to the concept of "reasonable limits". It should not be employed to restrict the ambit of s. 15(1).

Thus, in a section 15 inquiry the first step must be to determine what reasonable accommodations would be necessary to ensure substantive equality. Any reasons for why these accommodations are not being offered are then to be considered at the justification stage under a section 1 of the Charter

defence. However, the respondent does not plead any justification defence under section 1 of the Charter even though specifically challenged on this by the applicant.

[160] Certain cases give the Court guidance on the first step. *Eldridge* involved a claim by deaf individuals, who generally communicated using sign language, that they were being discriminated against contrary to section 15(1) of the Charter because they were not provided with sign language interpretation services when accessing medical services provided by the Province of British Columbia. The Supreme Court found that by refusing to fund sign language interpretation services, hospitals who were delivering the medical services, and so were acting as agents of the provincial government, were denying the claimants the equal benefit of the law.

[161] At para. 65 in *Eldridge*, Justice La Forest quoted from para. 66 in the decision of the Supreme Court in *Eaton*, in which Justice Sopinka recognized that distinctions will often be necessary in order to realize substantive equality for disabled individuals:

> ¶66. In Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, at p. 169, McIntyre J. stated that the "accommodation of differences . . . is the essence of true equality". This emphasizes that the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.
>
> (Emphasis added)

The CLF Standard, if properly implemented, would so ameliorate the position of the blind.

[162] In *Council of Canadians with Disabilities v. VIA Rail Canada* 2007 SCC 15, [2007] 1 S.C.R. 650, the claimant represented disabled Canadians who were confined to wheelchairs. VIA Rail had purchased new passenger rail cars that were not accessible to personal wheelchairs, but submitted that wheelchair-bound passengers would be accommodated by having VIA Rail staff transfer them to on-board to thinner wheelchairs, and help them access services, including the on-board washrooms.

[163] In *Via Rail*, the Court rejected that alternatives offered by the respondent, including thinner wheelchairs on board, having employees assist disabled passengers, and offering disabled passengers alternatives to rail, including taxi service (see paras. 175-6). The Court concluded at para. 162 that the only accommodation that ensured substantively equal treatment was a design that would allow for access by personal wheelchairs:

> ¶162. The accommodation of personal wheelchairs enables persons with disabilities to access public services and facilities as independently and seamlessly as possible. Independent access to the same comfort, dignity, safety and security as those without physical limitations, is a fundamental human right for persons who use wheelchairs. This is the goal of the duty to accommodate: to render those services and facilities to which the public has access equally accessible to people with and without physical limitations.
>
> (Emphasis added)

[164] In the case at bar, the visually impaired similarly seek independent access to online services and dignity without physical limitations. They want equal access as sighted persons. Applying the Supreme Court of Canada jurisprudence, as this Court is obligated to do, the applicant, and the visually impaired, have this right.

[165] With regard to the justification of its policies on the basis of undue hardship, the Supreme Court considered the meaning of "undue hardship" in the context of past human rights jurisprudence. It upheld the original decision-making tribunal's finding that VIA Rail had failed to show undue hardship under section 1 of the Charter.

[166] The final case is *Canadian Assn. of the Deaf v. Canada*, 2006 FC 971, [2007] 2 F.C.R. 323 (*CAD*). This case bears a similarity to the one at bar. In *CAD*, the claimants were four individual deaf persons and an organization representing deaf persons. They claimed that they were being discriminated against contrary to section 15(1) of the Charter because of the way in which the federal government was applying its *Sign Language Interpretation Policy*, which governed the manner in which sign language interpretation would be provided when needed at meetings between public servants and members of the public. The Court in that case agreed with the applicants. In conducting his section 15 analysis, Justice Mosley recognized that the *Sign Language Interpretation Policy* represented the accommodation provided to deaf persons to ensure that they received substantively equal treatment. He went on, however, at para. 113, to find that the *Sign Language Interpretation Policy* failed to achieve this goal:

> ¶113. The applicants in this case remain unaccommodated and are denied service based on their disability. As stated by the Supreme Court in *Law*, above at para. 71, "underinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination: see *Vriend*, supra, at paras. 94-104, per Cory J." In my view, on the evidence it is clear that although the government has attempted to accommodate and ameliorate the challenges faced by deaf persons employed by the public service, the resulting policy and guidelines are so under-inclusive as to be discriminatory.

[167] In *CAD*, the respondent submitted no evidence of undue hardship. Nor did the respondent in the application at bar justify its policy as a "reasonable limit" of the applicant's rights under section 1 of the Charter.

[168] In this case, the CLF Standard, like the *Sign Language Interpretation Policy* in *CAD*, is the government's attempt at creating what Justice Sopinka called a "reasonable accommodation." The CLF Standard is specifically designed to ensure, *inter alia*, that visually impaired individuals have the benefit of government online services over the Internet equally with non-visually impaired individuals. Failure to implement or enforce the CLF Standard, however, has the same effect as failure to have accessibility standards at all. In this way, as in *CAD*, the CLF Standard is so under-inclusive as to be discriminatory.

Respondent's submission on reasonable accommodation

[169] The respondent submits that the visually impaired can obtain the same information available online to the sighted public by other channels: namely in person, by telephone, and by mail.

[170] In reviewing the Supreme Court of Canada jurisprudence on reasonable accommodation, it is clear that these alternatives do not constitute substantively equal treatment. For example, in *Via Rail*, the proposed accommodation of thinner wheelchairs and employee assistance for the disabled was not substantively equal treatment. The new *Via Rail* cars had to be designed so that the disabled could use their own wheelchairs on the railcar. Similarly the websites must be designed so they are accessible. In *Eldridge*, deaf individuals who generally communicated using sign language had to

be able to communicate at hospitals when obtaining medical services and the hospitals had to provide sign language interpretation services. Other forms of communication, such as by writing, were not a reasonable alternative.

[171] In *CAD*, the Sign Language Interpretation Policy was the government's attempt to accommodate and ameliorate the challenges faced by deaf persons but Justice Mosley held that as it was being implemented, "it was so under-inclusive as to be discriminatory".

[172] In the case at bar, for a blind person to rely on telephoning a government number is not substantive equality with a sighted person who can obtain the same information and services online. First, there is the frustration of trying to reach a government number. Second, there is a loss of independence and dignity when having to rely on a sighted person to provide the information and services which the blind person could obtain online if the website was accessible. Third, the loss of freedom and instantaneous responses is significant. Fourth, there is evidence before the Court of how unreliable government information is when being mailed.

[173] The in-person channel requires the blind person travel to a government office meet the right person, and obtain the right information. This is not easy. Similarly, accessing information for services by mail is even slower and less reliable than by telephone, according to the Canadian Human Rights Commission Report filed by the applicant.

[174] Based on the jurisprudence, the use of alternative channels is not a reasonable accommodation unless the respondent proved that it is not technically feasible to implement the CLF Standard or it would be so expensive that it would cause undue hardship in the context of a section 1 of the Charter defence. The respondent expressly did not plead this defence even though specifically challenged on this by the applicant. The only defence pleaded was that the applicant could obtain the information and services sought through alternative channels. In three (3) of the applicant's examples this was not so. In any event the Court has found that these other channels are so under-inclusive as to be discriminatory.

No Charter justification defence pleaded by the respondent

[175] The respondent did not plead that the online services have not been made accessible to the visually impaired because it would be unreasonable to do so. Indeed, this makes sense. As determined above, the CLF Standard is the government's own attempt at accommodating the needs of, *inter alia*, visually impaired individuals. For the government to then argue that implementation of its own standards is unreasonable would make little sense.

[176] But as discussed above, the Communications Policy and the CLF Standard do provide for alternative measures to be taken in cases where an institution cannot provide the impugned service online. Although the respondent did not argue it, it occurs to the Court that an argument might have been made that this constitutes such a "reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society" and so gives rise to a Charter section 1 defence. Some examples of possible barriers to providing information online might include that it -

would cause undue hardship because the cost would be prohibitively expensive, it is not technically feasible, or the government had made its "best efforts" to make the website accessible but could not achieve complete compliance.

[177] If these reasons had been presented, the Court could have considered them as part of a Charter section 1 justification to explain the government's failure to ensure that its online services are accessible to the visually impaired.

[178] In the event, however, the government has not provided any evidence of either undue hardship that might be suffered by government departments in attempting to implement the CLF Standard nor that any failures to provide services online are justifiable under section 1 as reasonable limits prescribed by law.

CONCLUSION

[179] For these reasons, the Court concludes that:

1. the Government of Canada, through the Treasury Board, nine years ago required its 146 departments and agencies subject to the Financial Administration Act to make their Internet, or online, programs and services accessible to the visually impaired by 2001. In 2001, there were over 600,000 blind or visually impaired persons in Canada;
2. the government prescribed accessibility standards for each department and agency to follow so that their respective websites would be accessible to the visually impaired;

3. a government audit in 2007 found that the 47 government departments and agencies audited had not properly implemented these accessibility standards;
4. the Treasury Board, a centralized agency, has not exercised its power to enforce the accessibility requirements on the departments and agencies, and has not earmarked funds for this purpose;
5. as well as the accessibility standards not being enforced or implemented, they are obsolete to the extent that they fail to address or allow interactive "rich Internet applications" which use a security channel called ePass. These interactive applications are used by 23 departments to provide 83 online service applications such as Employment Insurance, Canada Pension Plan and passports;
6. under section 15(1) of the Charter the Supreme Court of Canada has clearly held that, the government is required to take "special measures" to ensure that disadvantaged groups are able to benefit equally from government services. With respect to the blind, the government created these "special measures" with the government's 2001 accessibility standards to ensure that the government online services are accessible to the blind. This is how the blind can be reasonably accommodated;
7. the government has not sought to justify its failure to implement these accessibility standards for reasons such as:

    1. they would be so expensive as to cause the government "undue hardship";
    2. it is not technically feasible to implement these standards; or
    3. the government has made its "best efforts" to make these websites accessible.

The respondent did not plead a Charter section 1 justification defence;

8. if properly implemented the accessibility standards would ameliorate the position of the blind and visually impaired, and prevent this discrimination;

9. the visually impaired have not been "reasonably accommodated" because they allegedly can obtain the same information available online by other channels, namely in person, by telephone and by mail. These other channels are difficult to access, less reliable and not complete. Moreover, they fail to provide the visually impaired with independent access or the same dignity and convenience as the services online. The Supreme Court of Canada makes unequivocally clear that such alternatives do not constitute "substantively equal" treatment; and

10. for the blind and visually impaired, accessing information and services online gives them independence, self-reliance, control, ease of access, dignity and self-esteem. A person is not handicapped if she does not need help. Making the government online information and services accessible provides the visually impaired with "substantive equality". This is like the ramp to permit wheelchair access to a building. It is a ramp for the blind to access online services.

LEGAL COSTS

[180] The applicant submits, and the respondent has accepted, that she is a public interest litigant. A public interest litigant is one who brings to the Court a matter of public interest.

[181] Rule 400 of the Federal Courts Rules deals with the Court's discretion to award costs. Rule 400(3) provides a non-exclusive list of factors that a court may consider in exercising its

discretion to award costs. These include, in Rule 400(3)(h), "whether the public interest in having the proceeding litigated justifies a particular award of costs".

[182] In *British Columbia (Minister of Forests) v. Okanagan Indian Band* 2003 SCC 71, [2003] 3 S.C.R. 371, the Supreme Court of Canada discussed the relationship between costs awards and litigation undertaken in the public interest. In the context of Charter litigation, Justice LeBel, speaking for the majority, recognized at para. 27, that costs can be used by Courts to promote access to justice:

> ¶ 27. Another consideration relevant to the application of costs rules is access to justice. This factor has increased in importance as litigation over matters of public interest has become more common, especially since the advent of the *Charter*. In special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs so as to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.

[183] After reviewing considerable jurisprudence, Justice LeBel recognized that it may even be appropriate to award costs to a losing party, where that party litigates a matter of public importance. In determining whether a matter is of public importance, the court must consider the importance of the issues to be determined to the broader community, and whether the public interest would be served by a proper resolution of those issues: see, for example *Okanagan*, *supra.* at para. 38.

[184] In this case the parties have agreed that the applicant is a public interest litigant. She is bringing a case of public importance, the proper resolution of which will serve the broader public interest.

[185] Moreover, this case demonstrates many of the qualities that suggest using costs to ensure the access of the applicant as a public interest litigant.

[186] With respect to legal costs, counsel for the applicant filed with the Court an affidavit itemizing the legal costs incurred on behalf of the applicant, but not yet billed. These include substantial disbursements. The total legal costs and disbursements, with day by day itemized time for each counsel, totals $223,921. The applicant has asked that the Court fix the legal costs at $150,000 including disbursements. The respondent made no submission in response to this proposal except that the respondent does not accept that the applicant ought to be awarded its costs as a public interest litigant if the applicant loses its case. Because of my decision in this case, I do not have to cross that bridge. I accept $150,000 is reasonable amount for legal costs in this case. Costs should be set at a reasonable amount so that public interest litigants can bring forward cases of public importance that serve their own interest and the broader public interest especially to enforce constitutional rights.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed and the applicant is entitled to a declaration under section 18.1 of the *Federal Courts Act* that she has been denied equal access to, and benefit from, government information and services provided online to the public on the Internet, and that this constitutes discrimination against her on the basis of her physical disability, namely that she is blind. Accordingly, she has not received the equal benefit of the law without discrimination based on her physical disability and that this is a violation of section 15(1) of the Charter;

2. It is also declared that the applicant's inability to access online certain departmental websites is representative of a system wide failure by many of the 146 government departments and agencies to make their websites accessible. The failure of the government to monitor and ensure compliance with the government's 2001 accessibility standards is an infringement of section 15(1) of the Charter since it discriminates against the applicant and other visually impaired persons;

3. It is also declared that the government has a constitutional obligation to bring itself into compliance with the Charter within a reasonable time period, such as 15 months;

4. This Court will retain jurisdiction over the implementation of this declaration and the Court will resume its proceedings on the application of either party if necessary to ensure the effect of this declaration is properly implemented; and

5. The applicant is a public interest litigant and is entitled to her legal costs including disbursements in the fixed amount of $150,000.

"Michael A. Kelen"
Judge

APPENDIX 1

Remaining Relevant Legislation and Policies Prescribed Pursuant to the Legislation

[1] Section 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, governs applications for judicial review:

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.
(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.	(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.
(3) On an application for judicial review, the Federal Court may	(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
	b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.
. . .	. . .

[2] Section 7 of the *Financial Administration Act*, R.S.C., 1985, c.F-11 sets out the responsibilities of the Treasury Board of Canada:

7(1) The Treasury Board may act for the Queen's Privy Council for Canada on all matters relating to (a) general administrative policy in the federal public administration; (b) the organization of the federal public administration or any portion thereof, and the determination and control of establishments therein; (c) financial management, including estimates, expenditures, financial commitments, accounts, fees or charges for the provision of services or the use of facilities, rentals, licences, leases, revenues from the disposition of property, and procedures by which departments manage, record and account for revenues received or receivable from any source whatever; (d) the review of annual and longer term expenditure plans	7(1) Le Conseil du Trésor peut agir au nom du Conseil privé de la Reine pour le Canada à l'égard des questions suivantes : a) les grandes orientations applicables à l'administration publique fédérale; b) l'organisation de l'administration publique fédérale ou de tel de ses secteurs ainsi que la détermination et le contrôle des établissements qui en font partie; c) la gestion financière, notamment les prévisions budgétaires, les dépenses, les engagements financiers, les comptes, le prix de fourniture de services ou d'usage d'installations, les locations, les permis ou licences, les baux, le produit de la cession de biens, ainsi que les méthodes employées par les ministères pour gérer, inscrire et comptabiliser leurs recettes ou

and programs of departments, and the determination of priorities with respect thereto; . . . (f) such other matters as may be referred to it by the Governor in Council. . . .	leurs créances; d) l'examen des plans et programmes des dépenses annuels ou à plus long terme des ministères et la fixation de leur ordre de priorité; . . . f) les autres questions que le gouverneur en conseil peut lui renvoyer. . . .

[3] Policy Requirement 1, of the *Communications Policy of the Government of Canada*, prescribed by the Treasury Board under section 7 of the *Financial Administration Act*, "Informing and Serving Canadians" describes the government's commitment to open access for all Canadians to government services:

Policy Requirements	**Exigences de la politique**
1. Informing and Serving Canadians	**1. Information et services aux Canadiens**
. . .	. . .
To assure quality service that meets the information needs of all Canadians, institutions must ensure that: a. the *Canadian Charter of Rights and Freedoms* and the *Official Languages Act*, including all regulations and policies flowing from it, are respected at all times; b. trained and knowledgeable staff provide information services to the public; c. service is timely, courteous,	Pour fournir un service de qualité qui répond aux besoins de renseignements de tous les Canadiens, les institutions doivent faire en sorte : a. que la Charte canadienne des droits et libertés et la Loi sur les langues officielles, ainsi que tous les règlements et les politiques qui en découlent, soient respectés en tout temps; b. que le public soit servi par un personnel bien informé

fair, efficient and offered with all due regard for the privacy, safety, convenience, comfort and needs of the public;

d. a variety of new and traditional methods of communication are used to accommodate the needs of a diverse public;

e. published information is available on request in multiple formats to accommodate persons with disabilities;

. . . .

et compétent;

c. que le service soit empressé, courtois, équitable et efficace, tout en tenant compte comme il se doit de la protection des renseignements personnels, de la sécurité, des convenances, du bien-être et des besoins du public;

d. que toute une gamme de méthodes nouvelles et conventionnelles de communication servent à satisfaire les besoins d'un public diversifié;

e. que l'information soit fournie sur demande sur divers supports afin de répondre aux besoins des personnes handicapées;

. . . .

[4] Policy Requirement 18 of the *Communications Policy of the Government of Canada*, "Internet and Electronic Communication," requires that federal institutions provide services online:

18. Internet and Electronic Communication

The Internet, World Wide Web and other means of electronic communication are powerful enablers for building and sustaining effective communication within institutions and with their clients across Canada and around the world.

An important tool for

18. Internet et communications électroniques

Internet, le Web et d'autres moyens de communication électronique sont des outils importants pour permettre et maintenir une communication efficace au sein des institutions et avec leurs clients dans tout le Canada et dans le monde entier.

Important outil pour fournir de

providing information and services to the public, the Internet facilitates interactive, two-way communication and feedback. It provides opportunities to reach and connect with Canadians wherever they reside, and to deliver personalized services.

Institutions must maintain an active presence on the Internet to enable 24-hour electronic access to public programs, services and information. E-mail and Web sites must be used to enable direct communications between Canadians and government institutions, and among public service managers and employees.

Institutions must advance Government of Canada on-line initiatives aimed at expanding the reach and quality of internal and external communications, improving service delivery, connecting and interacting with citizens, enhancing public access and fostering public dialogue.

Institutions must ensure that Internet communications conform to government policies and standards. Government of Canada themes and messages must be accurately reflected in electronic communications with the public and among employees.

l'information et des services au public, Internet facilite la communication interactive et bidirectionnelle ainsi que la rétroaction. Il offre des possibilités de joindre les Canadiens peu importe où ils habitent et de leur fournir des services personnalisés.

Les institutions doivent maintenir une présence active sur Internet pour permettre l'accès par voie électronique, 24 heures sur 24, à l'information, aux programmes et aux services publics. Le courrier électronique et les sites Web doivent servir à assurer la communication directe entre les Canadiens et les institutions gouvernementales, et entre les gestionnaires et les employés de la fonction publique.

Les institutions doivent promouvoir les initiatives en ligne du gouvernement du Canada qui visent à élargir la portée et à améliorer la qualité des communications internes et externes, à améliorer la prestation de services, à se rapprocher des citoyens et à interagir avec eux, à élargir l'accès du public et à favoriser le dialogue avec ce dernier.

Les institutions doivent veiller à ce que les communications sur Internet soient conformes aux politiques et aux normes gouvernementales. Les communications électroniques

. . .	avec le public et entre les employés doivent véhiculer fidèlement les thèmes et les messages du gouvernement du Canada.
Institutions must: 1) manage their Web sites and portals in accordance with the Treasury Board's *Common Look and Feel for the Internet: Standards and Guidelines*;	. . . Les institutions doivent: b. gérer leurs portails et leurs sites Web conformément à la politique sur *l'Uniformité de la présentation et de l'exploitation pour l'Internet : Normes et directives* du Conseil du Trésor;
. . .	. . .

[5] The Treasury Board has also prescribed the *Common Look and Feel for the Internet: Standards and Guidelines*. The first version of this standard was issued in May 2000 and is commonly referred to as the "CLF 1.0 Standard." In its "Accessibility Section" the CLF 1.0 Standard, guarantees the accessibility of federal government websites:

> **Overview**
> . . .
> In keeping with the client-centred approach of the CLF initiative, universal accessibility standards are directed toward ensuring *equitable access to all content* on GoC Web sites. While site design is an important element of the electronic media, universal accessibility guidelines have been developed to ensure anyone can obtain content,

> regardless of the technologies they use. The key to effective implementation of universal accessibility guidelines lies in designing sites to serve the widest possible audience and the broadest possible range of hardware and software platforms, from assistive devices to emerging technologies.
> . . .
>
> **Standard 1.1**
> All GoC Web sites must comply with W3C Priority 1 and Priority 2 checkpoints to ensure sites can be easily accessed by the widest possible audience.

[6] The version of the accessibility standard that is currently in force is commonly referred to as the "CLF 2.0 Standard," and became effective on January 1, 2007, with a mandatory implementation deadline of December 31, 2008. This Standard came into effect after the main evidence closed in this matter. Accordingly, it was referred to only for informational purposes. Part 2, "Standard on the Accessibility, Interoperability and Usability of Web Sites," imposes the same accessibility requirements upon developers of government websites as did the CLF 1.0 Standard:

Context	**Contexte**
Canadians have the right to obtain information and services from Government of Canada Web sites regardless of the technologies they use. The key to effective implementation of	Tous les Canadiennes et Canadiens ont le droit d'obtenir l'information et les services dont ils ont besoin à partir des sites Web du gouvernement du Canada, quels que soient les

universal accessibility lies in designing sites to serve the widest possible audience and the broadest possible range of hardware and software platforms, from adaptive technologies to emerging technologies.

For many Canadians, accessing Web content is more complicated than clicking a mouse and typing on a keyboard. Some Canadians rely on adaptive technologies such as text readers, audio players and voice-activated devices to overcome the barriers presented by standard Internet technologies. Others may be limited by their own technology.

The World Wide Web Consortium's Web Accessibility Initiative (WAI) has developed universal accessibility guidelines. Along with these WAI guidelines and, in keeping with the client-centred approach of Common Look and Feel, this standard is directed toward ensuring equitable access to all content on Government of Canada Web sites.

This standard clearly allows an institution to provide information in multiple formats.

. . . .

outils technologiques qu'ils utilisent. La clé de la mise en oeuvre efficace d'une accessibilité universelle repose sur la conception de sites accessibles au plus vaste auditoire possible et compatibles avec la gamme la plus vaste possible de plateformes logicielles et matérielles, des appareils et accessoires d'aide jusqu'aux technologies naissantes.

Pour bien des gens, l'accès au contenu Web se révèle plus compliqué que de cliquer à l'aide d'une souris et de taper sur un clavier. Certaines personnes comptent sur des technologies d'adaptation, comme des utilitaires de lecture d'écran ou de fichiers sonores et des systèmes activés par la voix, pour surmonter les obstacles posés par les technologies Internet courantes. D'autres peuvent être limités par la technologie même qu'ils utilisent.

Dans le cadre de son initiative d'accessibilité aux contenus Web (WAI), le World Wide Web Consortium (W3C) a mis au point des lignes directrices concernant l'accessibilité universelle. Grâce à ces lignes directrices, et conformément à l'approche axée sur le citoyen de l'initiative de Normalisation des sites Internet, la présente norme vise à garantir un accès équitable à tout le contenu des

Requirements

1. **Compliance with World Wide Web Consortium Priority 1 and Priority 2 checkpoints**

The institution respects the universal accessibility guidelines developed by the World Wide Web Consortium's Web Accessibility Initiative by ensuring compliance of its Web sites with the Priority 1 and Priority 2 checkpoints of the Web Content Accessibility Guidelines 1.0 (WCAG), with the following exception:

- WCAG checkpoint 3.4 is superseded by requirement 2 of the *Common Look and Feel Standards for the Internet, Part 3: Standard on Common Web Page Formats*.

sites Web du gouvernement du Canada.

De toute évidence, cette norme permet à toute institution de fournir de l'information dans divers formats.

. . . .

Responsabilité

1. **Conformité aux critères de la Priorité 1 et de la Priorité 2 du W3C**

Pour respecter les lignes directrices concernant l'accessibilité universelle énoncées dans l'initiative d'accessibilité aux contenus Web du W3C , l'institution doit veiller à ce que ses sites Web satisfassent aux critères des Priorités 1 et 2 des lignes directrices sur l'accessibilité des contenus Web, version 1.0 (WCAG) (en anglais), à l'exception du critère suivant :

- Le critère 3.4 des WCAG est remplacé par l'exigence numéro 2 des *Normes sur la normalisation des sites Internet, partie 3: Norme sur la présentation commune de pages Web*.

FEDERAL COURT -

SOLICITORS OF RECORD -

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APPEARANCES:

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Ms. Gail Sinclair Ms. Christine Mohr	FOR THE RESPONDENT

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