Federal Court of Appeal  Cour d'appel fédérale

Date: 20120530

Docket: A-478-10

Citation: 2012 FCA 161

CORAM: **NADON J.A.**
SHARLOW J.A.
DAWSON J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

DONNA JODHAN

Respondent

and

ALLIANCE FOR EQUALITY OF BLIND CANADIANS

Intervener

Heard at Toronto, Ontario, on November 15, 2011.

Judgment delivered at Ottawa, Ontario, on May 30, 2012.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: SHARLOW J.A.
DAWSON J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] The Attorney General of Canada (the "appellant" or the "Attorney General"), appeals the Judgment of Kelen J. (the "judge") of the Federal Court, 2010 FC 1197 (rendered on November 29, 2010 and amended on February 9, 2011), which allowed Ms. Jodhan's (the "respondent" or "Ms. Jodhan") application for a declaration under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 ("*Federal Courts Act*"), that she had been denied equal access to and benefit from government

information and services provided online to the public on the Internet and that this denial constituted discrimination against her on the basis of her physical disability, i.e. blindness, and thus, a violation of her rights under subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.), R.S.C., 1985, Appendix II, No. 44 (the "*Charter*").

[2] The judge also declared that Ms. Jodhan's inability to access certain departmental websites was representative of a system-wide failure by many of the 106 government departments and agencies of the Government of Canada to make their websites accessible to the visually impaired. In the judge's view, the government's failure to monitor and ensure compliance with its 2001 Accessibility Standards was an infringement of section 15 of the *Charter* since it discriminated against Ms. Jodhan and other visually impaired persons.

[3] The judge further declared that the government was constitutionally obliged to bring itself into compliance with the *Charter* within a period of 15 months.

[4] Finally, the judge retained jurisdiction over the implementation of his declarations, adding that he would resume proceedings, upon the application of either the Attorney General or Ms. Jodhan, if necessary, to ensure that the declarations were properly implemented.

[5] Although the appeal raises a number of issues, the main one is whether Ms. Jodhan was denied equal benefit of the law contrary to subsection 15(1) of the *Charter*.

The Facts and Context

[6] Ms. Jodhan is legally blind. She runs a consulting business that analyzes the accessibility of products and services for persons with special needs and is a "sophisticated computer user".

[7] She commenced judicial review proceedings in the Federal Court on June 28, 2007, against the Attorney General as representative of the Treasury Board of Canada and Treasury Board Secretariat (jointly referred to hereinafter as "Treasury Board"), the Public Service Commission of Canada and Statistics Canada. In her application, Ms. Jodhan asked for the following declarations:

> The applicant makes application for:
>
> 1. A declaration that the failure of the Treasury Board and the Treasury Board Secretariat to develop, maintain, and enforce standards which ensure that all Government of Canada websites and online services are accessible for all individuals with visual impairments.
>
> (i) infringes the applicant's right to equal protection and equal benefit of the law without discrimination based on physical disability, and therefore violates section 15 of the *Charter*, and
>
> (ii) that such violation is not justified under section 1 of the *Charter*.
>
> 2. A declaration that Statistics Canada's failure to ensure that the 2006 online Census was accessible to those with visual impairments:
>
> (iii) infringes the applicant's right to equal protection and equal benefit of the law without discrimination based on physical disability, and therefore violates section 15 of the *Charter*, and
>
> (iv) that such violation is not justified under section 1 of the *Charter*.
>
> 3. A declaration that the Public Service Commission of Canada's failure to ensure that its website and online application services are accessible to those with visual impairments:
>
> (v) infringes the applicant's right to equal protection and equal benefit of the law without discrimination based on physical disability, and therefore violates section 15 of the *Charter*, and

> (vi) that such violation is not justified under section 1 of the *Charter*.

[8] Ms. Jodhan alleged unequal protection and benefit of the law in two ways. First, the online accessibility standards were inadequate because they failed to deal with "rich Internet applications", i.e. dynamic, interactive websites, through which the government provides interactive services online, which constitute some of the main benefits of online access. Second, the accessibility standards had not been adequately implemented by the departments subject to Treasury Board supervision.

[9] In support of her claim that on numerous occasions she encountered difficulty accessing government websites and that her experience was shared by other visually impaired persons in Canada, Ms. Jodhan gave five examples of inaccessibility.

[10] First, in September 2004, Ms. Jodhan experienced difficulty applying for employment at www.jobs.gc.ca and had to complete the application with assistance by phone. This was followed by failure to access information on the site between March and June 2007.

[11] Second, she was unable to create an online profile at www.jobs.gc.ca because pop-up windows, which blind users cannot navigate, kept popping up. She had to complete her online profile on the website with sighted assistance.

[12] Third, she alleged significant accessibility issues when trying to access information on Statistics Canada and Service Canada websites between March and June 2007 since the information was only available in "pdf" format, which is not accessible to screen reader technology.

[13] Fourth, the 2006 online Census return was only available to the visually impaired by software such as the JAWS program, which made it inaccessible to Ms. Jodhan and other visually impaired users who did not have access to such expensive software. Ms. Jodhan alleged that the form of the Census did not meet the World Wide Web Consortium ("W3C") standards for accessibility.

[14] Fifth, Ms. Jodhan experienced difficulty accessing www.servicecanada.gc.ca in June 2007 to obtain information on the Canada Pension Plan and employment programs.

A. History of the Web and Content Accessibility Guidelines

[15] The World Wide Web (the "WWW") was created in 1989. For approximately ten years, there existed no WWW accessibility guidelines for persons with disabilities. In 1994, the W3C was created in order to develop a consensus on industry standards to ensure that the WWW remained open and accessible to all. In 1997, the W3C launched the Web Accessibility Initiative (the "WAI") to promote web accessibility for people with disabilities.

[16] The WAI, through a process of consultation with its then 170 member organizations and experts from around the world, began to develop a first set of Web Content Accessibility Guidelines

(the "WCAG 1.0"). The WCAG 1.0 provides detailed instructions to web content developers and authoring tools developers with respect to means to make Internet content accessible to people with disabilities, including the visually impaired. The version 1.0 of the WCAG was developed over a period of two years and, by May of 1999, final "W3C Recommendation" status was reached and published. These instructions are created in the form of guidelines which provide the basic goals that authors should work towards in order to make web content more accessible to all users. Each of the fourteen guidelines focuses on a core theme of accessibility and each guideline is divided in "checkpoint" definitions which explain how the guideline applies in typical content development scenarios. Each checkpoint has a priority level assigned by the Working Group based on the checkpoint's impact on accessibility.

[17] Shortly after the publication of the WCAG 1.0, work on the WCAG 2.0 began and, over the next seven years, extensive work was undertaken, with the WAI having grown by then to include over 400 member organizations which included the Government of Canada.

[18] The Government of Canada was actively involved with the WCAG Working Group to ensure that WCAG 2.0 would be compatible with its own standards. On December 11, 2008, the WCAG 2.0 reached "W3C Recommendation" status. WCAG 2.0 builds on WCAG 1.0 and is designed to apply broadly to different web technologies now and in the future, and to be testable with a combination of automated testing and human evaluation.

B. The Communications Policy and Online Activity

[19] In 1999, the government introduced a new project called "Government On-Line", intended to provide electronic services to Canadians as part of a broader strategy aimed at stimulating the provision of better, faster, trusted and more convenient and accessible government services through four delivery channels: in person, by telephone, by mail and over the Internet. Government On-Line was meant to be client-centred, allowing Canadians to acquire information and services on their terms, and according to their needs.

[20] There are approximately 106 departments and agencies ("departments") of the Government of Canada which provide services and programs to Canadians. Since the late 1990s, the departments have increased their presence on the Internet in order to provide more and more information and services to Canadians.

[21] As part of the government's online initiative, the departments provide two types of services online, i.e. informational and interactive. Informational services include guides on starting a new business, travel advisories and information on various matters, such as epidemics. As to interactive services, they include applications for social services (for example, Employment Insurance and Canada Pension Plan benefits), online passport applications, and a single website from which Canadians can access online applications to all federal government job postings. Interactive services allow Canadians to interact with the government and are made possible through the use of dynamic, interactive websites, also called rich Internet applications.

[22] The security of the information provided by those who use the departments' interactive services is protected through a group of services referred to as the "Secure Channel". One of these services is "ePass", which serves to protect the confidentiality of information provided by users to the departments. In 2008, 23 departments used the ePass technology to deliver 83 programs, including online applications for government jobs, passports and social benefits.

[23] The government's decision, *inter alia*, to make its services available online has allowed Canadians to access government information and services at a time and place of their choosing.

[24] Pursuant to section 7 of the *Financial Administration Act*, R.S.C., 198, c. F-11, the Treasury Board developed the *Communications Policy of the Government of Canada* (the "Communications Policy") dated April 1, 2002.

[25] The Communications Policy governs all communications made by the federal public administration, including online communications. In the Communications Policy, the government recognized that information must be made available in multiple formats to ensure equal access and that communications by the federal government had to comply with a number of statutes and policies, for example, the *Charter*, the *Official Languages Act*, R.S.C., 1985 (4th Supp.), c. 31, and the *Privacy Act*, R.S.C., 1985, c. P-21.

[26] The Communications Policy emphasizes the need for providing information to Canadians through a variety of channels, such the telephone, mail, print, broadcast media and the Internet.

[27] As part of the government's initiative, the Communications Policy makes the departments subject to the *Common Look and Feel Standards for the Internet*, Part 2: Standard on the Accessibility, Interoperability and Usability of Web Sites (the "CLF 1.0 Standard"), which was issued by Treasury Board in May 2000 with a required implementation date of 2001. The CLF 1.0 Standard was made mandatory for all government departments and agencies and was created to enable access by all Canadians to information on government websites. The CLF 1.0 Standard provides an effective means for the public and the government to exchange information and for the government to offer its services in the official language and at the time and place of Canadians' choosing. The CLF 1.0 Standard requires that the websites of all government institutions listed in Schedules I, I.1 and II of the *Financial Administration Act* be in compliance with the WCAG 1.0 Priority 1 and 2 checkpoints.

[28] In September 2005, the CLF 1.0 Standard was updated to version 1.1 to bring the standards in line with current best practices. Further, in December 2006, the CLF 1.0 Standard was replaced by the CLF 2.0 Standard ("CLF 2.0 Standard") to, *inter alia*, build on what had been learned from implementing the CLF 1.0 Standard across the various departmental websites. The CLF 2.0 Standard came into effect on January 1, 2007 with an implementation deadline of December 31, 2008. There is no dispute between the parties that there is little difference between the CLF 1.0 Standard and the CLF 2.0 Standard.

[29] The CFL Standard is built upon international guidelines, i.e. the WCAG 1.0. To facilitate equal access to online services and information, Treasury Board incorporated elements of the

WCAG 1.0 into the CLF Standard. The WCAG 1.0 measures web accessibility according to three categories of checkpoints.

[30] Priority 1 checkpoints are basic, necessary requirements because if not met, "one or more groups of persons with disabilities will not be able to access content on the Web". Without Priority 2 checkpoints "one of more groups will find it difficult to access content on the Web". Priority 3 checkpoint may "prevent some groups from finding it 'somewhat difficult' to access website content." The Attorney General notes that "[i]t is common ground between the parties that a checkpoint failure does not necessarily make a web site inaccessible". Under the CLF Standard, all gc.ca websites must meet Priority 1 and 2 checkpoints. Departments may apply to Treasury Board for exemption, if need be.

C. Treasury Board and the CLF Standard

[31] Pursuant to section 7(1)(a) of the *Financial Administration Act*, Treasury Board may act for the Queen's Privy Council for Canada on all matters relating to general administrative policy in the federal public administration. On that basis, the Treasury Board developed the government's Communications Policy which, as I have already indicated, aims to ensure that government communications are well coordinated, effectively managed and responsive to the diverse information needs of the public.

[32] In 2000, the Treasury Board therefore created a Common Look and Feel Office (the "CLF Office"). The CLF Office works with the departments to develop their understanding and capability

to implement the CLF Standard by, *inter alia*, creating consultation forums such as "Centers of Expertise", i.e. groups of experts identified by the CLF Office to provide support to Website developers within the respective departments in implementing the CLF Standard. As no monitoring of departmental websites is effected by the CLF Office to ensure compliance with the CLF Standard, deputy heads of departments are accountable for implementing the CLF Standard within their institutions.

[33] However, pursuant to the CLF Standard, the Treasury Board is to monitor compliance with all aspects of the standard in a variety of ways which include, *inter alia*, assessments under the Management Accountability Framework, departmental performance reports and results of audits, evaluations and studies. Consequences of non-compliance can include informal follow-ups and requests from the Treasury Board, external audits and formal directions.

D. Access to the Internet by the Visually Impaired

[34] The visually impaired access Internet content with assistive technology, such as a screen reader and/or self-voicing browser software. A "screen reader" is a software application that identifies and interprets electronic text that is displayed on a computer screen, and then converts the information to an audible form or into Braille for the user to "read" tactilely. A "self-voicing" browser software is essentially a web browser with a screen reader built in. Screen readers have long been in use as software programs that allow the visually impaired to access online information.

[35] Using one or the other device, a visually impaired person uses keystrokes entered on a standard keyboard in lieu of mouse clicking to operate the screen reader and other software, such as a web browser displaying a web page.

[36] For the above to work, the web content must be designed in a compatible and accessible manner, i.e. designed so that assistive technologies can navigate and interpret the information encoded in the website. Thus, if the website is properly programmed, a visually impaired person can access its content as easily and efficiently as a sighted person. However, if accessibility is not built into a website the information may well be totally inaccessible to a visually impaired person.

[37] It is in the context whereby Canadians are choosing the time and place in which to access government information and services that the visually impaired assert the right to deal with the government over the Internet. Ms. Jodhan says that the possibility of accessing government information online "is more than just a matter of efficiency and reliability; it represents independence and privacy." (Respondent's Memorandum of Fact and Law, p. 7. para. 22).

[38] Ms. Jodhan further argues that because of the Internet, the visually impaired are able to access the same information and services that sighted persons have access to and that it allows them to interact independently and directly with the government, banks and employers.

[39] The technique and tools necessary to render websites accessible include authoring tools, which help Website developers to build in accessibility when creating a website by making access

the default position, and automatic monitoring tools, which help to monitor websites by reason of the difficulty of manually checking websites to ensure their accessibility. Those tools have been in existence for quite a while.

[40] Because using authoring tools means that access is the default position, programmers have to remove access rather than build it in.

[41] The evidence is to the effect that the government does not use, in a consistent way, either authoring tools or automatic monitoring tools.

Relevant Legislation

A. The Federal Courts Act

[42] Subsection 18(1) sets out the Court's jurisdiction with regard to federal administrative tribunals:

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and	a) décerner une injonction, un bref de certiorari, de mandamus, de prohibition ou de quo warranto, ou pour rendre un jugement déclaratoire contre tout office fédéral;
(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a),	b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du

including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.	Canada afin d'obtenir réparation de la part d'un office fédéral.

[43] A person must be "directly affected" by a decision to apply 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.

[44] The Federal Court has authority to provide the following remedies.

18.1(3) On an application for judicial review, the Federal Court may	18.1(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) 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.	b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

B. <u>The Charter</u>

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,	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

in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	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.
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.
24(1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	24(1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

C. The Financial Administration Act

[45] Section 7 of the *Financial Administration Act* 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	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

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 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.

…

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 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.

…

D. ***The Communications Policy of the Government of Canada***

[46] It is the Government of Canada's Policy Statement to:

Policy Statement	Énoncé de la politique
…	…
(1) Provide the public with timely, accurate, clear, objective and complete information about its policies, programs, services and initiatives. In the Canadian system of parliamentary	(1) De fournir au public des renseignements sur ses politiques, programmes, services et initiatives qui sont opportuns, exacts, clairs, objectifs et complets. Dans le système canadien

democracy and responsible government, the government has a duty to explain its policies and decisions, and to inform the public of its priorities for the country. Information is necessary for Canadians – individually or through representative groups or Members of Parliament – to participate actively and meaningfully in the democratic process. It is required for access to government programs and services. The public has a right to such information.

…

(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 its 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

de démocratie parlementaire et de gouvernement responsable, le gouvernement a l'obligation d'expliquer ses politiques et ses décisions et d'informer le public des priorités qu'il établit pour le pays. Les Canadiens ont besoin de renseignements pour leur permettre - à titre individuel ou par le truchement des groupes qui les représentent ou de leurs députés - de participer activement et utilement au processus démocratique. Ces renseignements sont nécessaires pour avoir accès aux programmes et services gouvernementaux, et le public y a droit.

…

(4) D'employer diverses façons et divers moyens de communiquer, et de fournir l'information sur de nombreux supports de manière à répondre à divers besoins. L'information gouvernementale doit être accessible à tous les secteurs de la société. Il faut prendre en compte les besoins de tous les Canadiens, dont les habiletés perceptives et physiques ainsi que les compétences linguistiques sont variées, et y répondre. Les renseignements doivent être accessibles pour que tous les citoyens, en tant que membres d'une collectivité démocratique, soient au courant de l'élaboration et de la mise en œuvre des politiques, programmes, services et initiatives, les comprennent, qu'ils y réagissent et qu'ils exercent une influence à cet égard. Les renseignements doivent être disponibles sur de nombreux supports pour assurer l'égalité d'accès. Il faut utiliser tous les

communications network.	moyens de communication, allant des méthodes conventionnelles aux nouvelles technologies, pour communiquer avec les Canadiens où qu'ils habitent. Un gouvernement moderne doit pouvoir réagir efficacement dans un milieu de communication globale actif 24 heures sur 24, en ayant recours à de nombreux moyens de diffusion.

[47] It is the Government of Canada's Policy Requirement to:

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:	Pour fournir un service de qualité qui répond aux besoins de renseignements de tous les Canadiens, les institutions doivent faire en sorte :
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;	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;
trained and knowledgeable staff provide information services to the public;	b. que le public soit servi par un personnel bien informé et compétent;
service is timely, courteous, fair, efficient and offered with all due regard for the privacy, safety, convenience, comfort and needs of the public;	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;
a variety of new and traditional methods of communication are used to accommodate the needs of a diverse public;	d. que toute une gamme de méthodes nouvelles et conventionnelles de communication servent à satisfaire les
published information is available on	

request in multiple formats to accommodate persons with disabilities;

...

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 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

besoins d'un public diversifié;

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

...

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 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

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.

…

Institutions must:

manage their Web sites and portals in accordance with the Treasury Board's *Common Look and Feel for the Internet: Standards and Guidelines*;

…

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.

…

Les institutions doivent:

a. 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;

…

E. ***The Common Look and Feel for the Internet: Standards and Guidelines "CLF 1.0 Standard***

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. W3C WAI working groups continually test WCA Guidelines against a full range of browsers and assistive devices before recommending widespread implementation.

…

Universal accessibility does not depend on minimal Web page design, it depends on thoughtful design. Along with WAI guidelines, the CLF standards provide direction for Web authors, particularly those using multimedia content, to ensure that all site content and functions are available to all users. Authors should not be discouraged from using multimedia, but rather should use it in a manner that ensures that the material they publish is functional for the widest possible audience. The GoC has adopted the W3C Web Content Accessibility Guidelines (WCAG) to ensure the majority of Canadians will find it relatively easy to use on-line information and services.

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.

Rationale

This standard is the key requirement for accessible design in the GoC. It points to an existing international standard: the Web Content Accessibility Guidelines 1.0 recommendation, from the World Wide Web Consortium (W3C).

The W3C checkpoints mentioned in the CLF standard are set out and defined in

> W3C's recommendation. That documentation explains the rationale behind each of fourteen basic guidelines for making Web sites universally accessible. Following each guideline are one or more actions that a page author must perform to meet the requirements of the guidelines. These actions are called "Checkpoints".
> This CLF standard requires GoC Web sites to comply with Priority 1 and Priority 2 checkpoints.
>
> **(NOTE: No French version was provided to the Court)**

The Federal Court Decision

[48] First, the judge carefully reviewed the considerable evidence adduced before him (Judge's Reasons, paras. 25 to 75). Then, after setting out the relevant provisions of the *Charter*, he addressed three preliminary matters, i.e. the jurisdiction of the Court to hear Ms. Jodhan's application, the Attorney General's submission that the Court could not, in the circumstances of the case, provide a remedy to Ms. Jodhan's system-wide complaint, and whether she was a public interest litigant. He first determined that the issue raised by Ms. Jodhan was a "matter" within the intendment of the *Federal Courts Act*. He then held, on the facts and pleadings before him, that Ms. Jodhan could bring a systemic complaint "which affects her and others in the same position" (Judge's Reasons, para. 86). Lastly, it was his view that Ms. Jodhan was a "public interest litigant", noting that the Attorney General "has accepted this characterization of the applicant" (Judge's Reasons, para. 87).

[49] At paragraphs 88 and following of his Reasons, the judge then turned to an assessment of the evidence. He made a number of findings, of which the following are the most pertinent for the purposes of this appeal:

1. The Government of Canada made a commitment, originally in the 1999 Speech from the Throne, to provide both information and services online to Canadians.
2. In order to give effect to its commitment, the government issued a Communications Policy, pursuant to section 7 of the Act, directing that communications by those departments and agencies subject to the Act be made in compliance with various statutes, including the *Charter*.
3. In 2000, the government issued the CLF 1.0 Standard, requiring that departments and agencies design and program their websites so as to make them accessible to the visually impaired by 2001.
4. A 2007 spot-audit of 47 departments by the CLF Office identified numerous failures by every department to meet the priority 1 and priority 2 checkpoints of the CLF 1.0 Standard.
5. Although none of the departments complied with the CLF 1.0 Standard, the CLF Office concluded that in the case of 22 departments, "serious violations" had occurred. As a result, the CLF Office directed letters to the deputy heads of these departments, requiring them to take steps to bring their departments into compliance.
6. The CLF Standard is inadequate because interactive applications are not accessible. Rich Internet applications, i.e. dynamic, interactive websites, use ePass as a security channel. These websites are used by 23 government departments to provide 83 online

applications, such as for employment insurance or passports. For these websites to function, they must use particular technologies, such as "scripts" and "applets", which, however, pose an access barrier to screen readers used by the visually impaired.

7. Although rich Internet applications are unable to function with scripts turned "off", the CLF Standard obliges government websites to be made accessible by maintaining functionality with scripts turned off. In other words, the CLF Standard prevents government Website developers from creating rich Internet applications and, as a result, the government would be prevented from offering numerous online services if the websites were made available as required by the CLF Standard. As a consequence, the CLF standard has been ignored by the departments. These findings led the judge to say, at paragraph 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".
8. With regard to those government websites which do not use ePass as a security channel – in fact, the majority of the government websites – the CLF Standard has not been properly implemented and the evidence shows that there has been a "system wide failure by government departments and agencies to comply with the CLF Standard so that these websites are not fully accessible" (Judge's Reasons, para. 101).
9. The government's Communications Policy requires it to provide its information through a variety of channels which, in the case of the visually impaired, would mean the

Internet, telephone, mail, in-person and, in respect of written material, the information would be provided in Braille.

10. Although the CLF Standard requires the departments to use their "best efforts" to make the contents of their website accessible, there was no satisfactory evidence presented to show what "best efforts" had been made. Treasury Board witnesses took the position that implementation and compliance with the CLF Standard was the responsibility of the deputy head of each of the 106 departments and agencies subject to the Act. Although 93 government departments had internal CLF sections, these had been unable to impress upon the deputy heads that their respective online services should be accessible to the visually impaired.

[50] Following these findings, the judge turned to the law and, in particular, to section 15 of the *Charter*. He first turned his attention to the Supreme Court of Canada's decision in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 ("*Kapp*"), where the Supreme Court explained that the true purpose of subsection 15(1) of the *Charter* was to ensure substantive equality, i.e. the idea that all Canadians were "recognized at law as human beings equally deserving of concern, respect and consideration" (*Kapp*, at para. 15, citing *Andrews v. Law Society* (*British Columbia),* [1989] 1 S.C.R. 143 at 171("*Andrews*")).

[51] The judge then pointed out that Ms. Jodhan was a member of a group falling within the ambit of section 15, i.e. "the physically disabled", and that this group had suffered and continued to suffer discrimination, a fact which the Attorney General was not contesting.

[52] The judge then turned to the framework for a section 15 analysis. He indicated that the Supreme Court had provided guidance on this issue though its decisions in: *Andrews*; *Eldridge v. British Columbia (Attorney General)*, [1997] 2 S.C.R. 624, 151 D.L.R. (4th) 577 ("*Eldridge*"); *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 ("*Law*"); and *Kapp*.

[53] The judge's review of the Supreme Court's decisions led him to state, at paragraph 140 of his Reasons that in *Kapp*, the Supreme Court had clearly enunciated, at paragraph 17, that the test for determining whether there had been discrimination was a two-part test:

> 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.

[54] The judge then turned to the first part of the test and began with a preliminary point, which he characterized as the first stage of the first part of the test, i.e. identifying the impugned law and the appropriate comparator group. Relying on the Supreme Court's decision in *Eldridge*, he indicated that the government's Communications Policy constituted a "law" within the meaning of section 15 of the *Charter*.

[55] After a brief review of the Communications Policy, the judge opined that he was satisfied that this policy, coupled with the CLF Standard, conferred to Canadians the benefit of access to government services online, adding that the parties were in agreement that the appropriate comparator was sighted individuals who access government services online.

[56] The judge then dealt with the first part of the test and asked himself if the law created a distinction based on an enumerated ground. The judge sought to determine whether the Communications Policy and the CLF Standard created a distinction between the visually impaired and those who were not. After stating that both the Policy and the Standard were "facially neutral" with respect to website accessibility standards, he stated his view that the visually impaired were treated differently by reason of their disability, their visual impairment. The judge indicated that he was satisfied that two systemic failures underlined the government's failure to provide online services that were accessible to the visually impaired. First, the CFL 1.0 Standard, in regard to which the government had directed that it be implemented by the departments many years ago, had not been implemented, nor had it been enforced and clearly not made a priority by the deputy heads. The CLF 1.0 Standard was the one that applied to ordinary government online information services. Second, with respect to the rich Internet applications which used ePass as a secure channel, they were not accessible to the visually impaired.

[57] These findings led the judge to conclude as follows at paragraph 152 of his Reasons:

> 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.

[58] The judge then turned to the second part of the test and asked himself if the distinction created by the impugned law created a disadvantage for Ms. Jodhan. After stating that not every difference created a disadvantage, the judge stated that the equality guaranteed by subsection 15(1) of the *Charter* was substantive equality, adding that substantive equality often required the making of a distinction between disabled and non-disabled persons. For this proposition, he relied on the Supreme Court's decision in *Eaton v. Brant (County) Board of Education*, [1997] 1 S.C.R. 241 ("*Eaton*") where, at paragraph 67, the Court expressed the view that in order to prevent discrimination against disabled persons, the government might have to "fine-tune society" or "make reasonable accommodations" so as to avoid "the relegation and banishment of disabled persons".

[59] The judge also relied on the Supreme Court's decision in *Eldridge* where, at paragraphs 77 and 78, the Court expressed the view that the government would be required, in some circumstances, to take special measures so as to allow disadvantaged groups to benefit equally from government services.

[60] With these principles in mind, the judge opined that, on the evidence before him, Ms. Jodhan and others like her were not receiving "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" (Judge's Reasons at para. 157), noting that in three examples led before him, Ms. Jodhan had not been accommodated with

written material in Braille. Consequently, the judge concluded that the distinction made by the impugned law created a disadvantage for the blind, adding at paragraph 158 of his Reasons:

> 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.

[61] The judge then discussed the idea of "reasonable accommodation", stating that there were two elements to that idea. First, there was the element that for section 15 purposes, the government was obliged to take positive steps so that disadvantaged groups could benefit equally from services offered to all Canadians. According to the judge, accommodation was, in that sense, an integral part of the section 15 inquiry.

[62] The second element of the idea of "reasonable accommodation" was that the government was only obliged to accommodate those in need of accommodation by providing accommodations that were "reasonable". Citing a passage from LaForest J.'s reasons in *Eldridge* at paragraph 79, the judge indicated that accommodation in that context meant to the point of undue hardship. I note that LaForest J., in the passage cited by the judge, does not use the expression "undue hardship", but rather that of "reasonable limits" in the context of a section 1 analysis.

[63] The judge summarized his thoughts with regard to the idea of "reasonable accommodation" at paragraph 159, where he stated:

> … 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.

[64] With regard to the first element of the idea of "reasonable accommodation", the judge turned to the case law and, in particular, to the Supreme Court's decision in *Eldridge* where the Court, citing the words of Sopinka J. in *Eaton*, held that not only did subsection 15(1) of the *Charter* seek to prevent discrimination against disadvantaged groups, but sought to ameliorate their position within Canadian society. This led the judge to assert that the implementation of the CLF Standard would ameliorate the situation of the visually impaired. Further, relying on the Supreme Court's decision in *Council of Canadians with Disabilities v. Via Rail Canada*, 2007 SCC 15, [2007] 1 S.C.R. 650 ("*Via Rail*"), the judge stated that the visually impaired who sought independent access to online services and dignity without physical limitations were entitled to this right.

[65] Finally, on this point, the judge referred to Mosley J.'s decision in *Canadian Association of the Deaf v. Canada*, 2006 FC 971, [2007] 2 F.C.R. 323 ("*CAD*"), where the Court held that the government's Sign Language Interpretation Policy, which governed the manner in which sign language interpretation was to be provided at meetings between public servants and deaf persons, was so under-inclusive as to be discriminatory.

[66] This led the judge to hold that the CLF Standard, like the Sign Language Interpretation Policy in *CAD*, was an attempt by the government to create a "reasonable accommodation" and that its failure to implement or enforce that standard has the same effect as failing to develop any accessibility standards. Thus, the CLF Standard was so under-inclusive as to be discriminatory.

[67] Finally, the judge turned to the Attorney General's submission on "reasonable accommodation", i.e. that the visually impaired could obtain information that was available online to the general public by other means, i.e. in person, by telephone and by mail. In assessing the merits of this submission, the judge turned to the Supreme Court's decisions in *Via Rail* and *Eldridge* as well as that of the Federal Court in *CAD*, and concluded that the submission did not withstand scrutiny. The judge held at paragraph 174 of his Reasons:

> 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.

[68] The judge, at paragraphs 175 to 178, emphasized the fact that the Attorney General had not taken the position that it would have been unreasonable for the government to make its online services accessible to the visually impaired, adding that although both the Communications Policy and the CLF Standard provided for the use of alternative measures where a federal institution was

unable to provide information or services online, the Attorney General had not made any attempt to argue that alternative means of communication constituted a "reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society". In other words, the judge held that the Attorney General had not raised section 1 as a defence. The judge then stated that had an argument been made that providing accessibility to the visually impaired could only be done at a prohibitive cost or that it was not technically feasible or that the government had truly done its best to make the websites accessible, the Court would have considered these arguments as part of a section 1 justification.

[69] These findings and conclusions led the judge to render the following 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 subsection 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 106 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 subsection 15(1) of the *Charter* since it discriminates against the applicant and other visually impaired persons. This declaration does not apply to stored government historical and/or archived information which is stored in a database and which the government shall retrieve and provide in an accessible format upon request;
>
> 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.

Attorney General's Submissions

[70] In seeking the reversal of the judge's decision, the Attorney General makes a number of submissions.

1. First, he says that the benefit of the law at issue is not, as found by the judge, equal online access to government information and services, but rather effective access to government information and services by means of one channel or another in the context of a multi-channel delivery system.
2. As a second error, the Attorney General says that the judge erred in finding that Ms. Jodhan had been discriminated against in the delivery of government information and services.
3. Next, he says that the judge erred in interpreting s. 15 of the *Charter* so as to create an additional, free-standing right owed to Ms. Jodhan and other visually impaired persons by the government to monitor and ensure compliance with the CLF Standard.
4. The Attorney General also submits that the judge erred in issuing a systemic declaration that applied to 106 government institutions without jurisdiction or sufficient evidence.
5. Lastly, the Attorney General says that the judge erred in retaining jurisdiction by means of a supervisory order without evidence of government delay or other unique

circumstances to justify this extraordinary measure as part of a subsection 24(1) *Charter* remedy.

The Issues

[71] Two main issues must be determined by this Court on the appeal. First, did the judge err in finding that Ms. Jodhan was denied equal benefit of the law, contrary to subsection 15(1) of the *Charter*? Second, did the judge err by providing a system-wide remedy that included retaining jurisdiction to supervise the implementation of the remedy? To resolve these issues, it is necessary to determine:

1. The applicable standard of review;
2. Whether the Federal Court erred in finding that it had jurisdiction over the systemic application and the systemic remedy declarations;
3. Whether the Federal Court erred in finding that the government discriminated against Ms. Jodhan in violation of subsection 15(1) and that the discrimination was systemic;
4. Whether the Federal Court erred in finding that the government could not justify its violation of subsection 15(1) because it had not raised a section 1 defence; and
5. Whether the Federal Court erred in exercising its discretion to retain jurisdiction over implementation of the remedy granted.

Analysis

1. What is the applicable standard of review?

[72] This is an appeal from a judgment of the Federal Court in an application for a declaration, in which the judge was the trier of fact. Hence, the standards of review enunciated by the Supreme Court in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, are applicable. Questions of law will be determined on the basis of the standard of correctness, while questions of fact and of mixed fact and law will be determined on the basis of the standard of palpable and overriding error, except where there exists an extricable question of law, in which case the standard will be that of correctness.

[73] More particularly, questions of constitutional interpretation are subject to the standard of correctness "because of the unique role of s. 96 courts as interpreters of the Constitution" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para. 58 ("*Dunsmuir*")).

[74] In *Pilette v. Canada*, 2009 FCA 367, 319 D.L.R. (4th) 369, at paragraph 17, Trudel J. said that once subsection 15(1) of the *Charter* had been interpreted, its application to the facts before a court was to be reviewed on the basis of the standard of palpable and overriding error:

> A question of constitutionality requires the standard of correctness, while the application of subsection 15(1) of the *Charter* to the facts of a case is reviewable on a standard of palpable and overriding error.

[75] Thus, if the judge incorrectly interpreted subsection 15(1), then that is a question of pure law subject to the standard of correctness. Similarly, subsection 24(1) of the *Charter* must be interpreted correctly because its interpretation is also a question of pure law. However, once interpreted correctly, the choice of remedy thereunder involves the exercise of discretion to which deference

must be afforded (*CAD*, at para. 119). This Court "should refrain from using hindsight to perfect a remedy" and "should only interfere where the trial judge has committed an error of law or principle" (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 (Iacobucci and Arbour JJ.) ("*Doucet-Boudreau*"), at para. 87).

[76] With the above in mind, I now turn to the second question for determination.

2. Whether the Federal Court erred in finding that it had jurisdiction over the systemic application and the systemic remedy.

[77] The Attorney General says that the judge erred in two ways. First, that he could not provide a remedy which went beyond the facts and issues put forward in the Notice of Application and in the form of the declarations sought. Second, that a remedy could only be given to the individual claimant, i.e. Ms. Jodhan.

[78] More particularly, the Attorney General says that by reason of the pleadings and the evidence led by him in response to those pleadings, the judge had to confine his remedy to the entities named in the Notice of Application, namely the Treasury Board, the Public Service Commission of Canada and Statistics Canada.

[79] Although the main relief sought was couched in broad terms, i.e. for the Treasury Board's failure to "develop, maintain and enforce" the proper standards of accessibility, it was sought solely against the Treasury Board and not against the 106 departments. As to the two specific reliefs

sought against the Public Service Commission of Canada and Statistics Canada, I note that the judge made no declaration in regard to those reliefs and that no appeal was taken in regard thereto. Thus, all that is before us in this appeal is the relief sought by Ms. Jodhan against Treasury Board.

[80] In my view, save in one respect, the Attorney General's arguments cannot succeed.

[81] In *Fédération Franco-Ténoise c. Canada (Attorney General),* [2008] NWTCA 6 ("*Fédération*"), where the Attorney General similarly argued that the pleading were not sufficient to justify the systemic relief granted by the judge, the Northwest Territories ("NWT") Court of Appeal held, at paragraph 72, that:

> The function of pleadings is to set out the relevant facts; if they disclose a cause of action, the cause of action can be dealt with by the court.

[82] The Court of Appeal further opined, at paragraph 73, that to raise an issue of systemic breach, the pleadings need only "describe a reasonable number of representative breaches, indicating that these are part of a pattern of conduct".

[83] I am satisfied that the pleadings in the present matter, when examined fairly, put forward a systemic violation of subsection 15(1) of the *Charter*. However, as I have already indicated, the allegations made and the declarations sought only pertained to the Treasury Board's failure to develop, maintain and enforce the proper standards of accessibility.

[84] First, in her Notice of Application, Ms. Jodhan sought a declaration that Treasury Board's failure "to develop, maintain and enforce standards which ensure that all Government of Canada websites and online services are accessible for all individuals with visual impairment" infringed her right to equal benefit of the law under sections 15(1) and that the infringement was not justified under section 1 of the *Charter*.

[85] Second, paragraphs 13 to 22 of the Notice of Application set out the factual basis upon which the sought-after declaration depends and puts in issue the steps taken by the Treasury Board to make accessible to the visually impaired the websites of the 106 departments under its authority.

[86] It cannot then be argued, in my opinion, that a new ground was put forward by Ms. Jodhan at the hearing and that the Attorney General was not given the opportunity to respond thereto by providing additional affidavits.

[87] However, none of the 106 departments under the supervision of the Treasury Board are parties to this application, except for the Public Service Commission of Canada and Statistics Canada. The Attorney General was named as a respondent in his capacity as representative of the Treasury Board, the Public Service Commission of Canada and Statistics Canada. The allegations made by Ms. Jodhan and the declarations sought are directed only at these entities.

[88] Both the Communications Policy and the CLF Standard, which are at the heart of these proceedings, are creations of the Treasury Board. Consequently, the declaration with systemic

consequences sought by Ms. Jodhan must, by reason of the pleadings, be limited to the content of the policies at issue and to the Treasury Board's actions pertaining to the enforcement and implementation of the standards.

[89] In my view, the implementation of the Treasury Board's standards by the 106 departments was not the issue raised in the pleadings and thus the remedy to which Ms. Jodhan is entitled cannot be a declaration directed at the 106 departments. Thus, to the extent that the order made by the judge is directed at those departments which were not named in the Notice of Application, it must be set aside.

[90] With regard to the second point raised by the Attorney General – that the judge could not fashion a remedy beyond the individual claimant, i.e. Ms. Jodhan – I agree entirely with the position taken by Ms. Jodhan. In my view, subsection 24(1) did not prevent the judge from making a systemic order. (See *Eldridge* and *Doucet-Boudreau* where systemic orders were upheld by the Supreme Court under subsection 24(1).)

[91] What subsection 24(1) prevents, contrary to section 52, is the commencement of a proceeding where the claimant is not directly affected by an impugned law. In other words, the matter is one of standing as subsection 24(1) requires a claimant to have been directly affected by an impugned law whereas section 52 does not (see *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at paragraph 61).

[92] In addition to his arguments regarding the jurisdiction of the Court to issue the systemic remedy, the Attorney General says that the judge lacked an evidentiary foundation to make the systemic declaration. More particularly, the Attorney General says that the various reports and audits before the judge fall short of being able to support the judge's broad ranging conclusions.

[93] Before the judge were numerous reports and/or audits pertaining to the accessibility of the government's websites. First, there were reports concerning the accessibility of ePass. Second, there were government internal and external reports concerning specific departmental websites assessing their compliance with the CLF Standard. Finally, there were international reports concerning the accessibility of various government websites.

[94] With regard to the first category of documents, the judge found that the CLF Standard "failed to address and allow 'rich Internet applications' that use ePass as a security channel" (Para. 95 of the judge's Reasons). This led the judge to find that the CLF Standard gave Website developers only one option, i.e. either to make their sites accessible to the visually impaired and thus not creating rich Internet applications or creating rich Internet applications and thus not making their sites accessible.

[95] In the judge's opinion, the solution to the above problem was for the government to update the CLF Standard in accordance with the WCAG 2.0 guidelines which would thus allow the creation of rich Internet applications accessible to the visually impaired using ePass as a security channel.

[96] The judge's findings were based on four reports prepared by the government concerning ePass. These reports which assessed, *inter alia*, the security of ePass, were to the effect that it was not accessible to the visually impaired.

[97] The second group of documents consisted of reports which assessed specific departmental websites for compliance with the CLF Standard. Included in this category are internal and external audits which demonstrate that federal government websites significantly failed to meet the CLF Standard.

[98] The third category of documents is made up of two international reports, one issued by the United Nations and the other by the European Commission, which assessed, *inter alia*, the accessibility of various Canadian government websites. The judge found that these reports were to the effect that most of the leading government websites, including those of the Government of Canada, did not meet international accessibility standards for the visually impaired.

[99] In addition to the documentary evidence, there was further evidence regarding the lack of accessibility of federal websites. That evidence consisted of the affidavit evidence of a number of witnesses called by the parties. More particularly, there was the evidence of, *inter alia*, John Rae, a past president of the Alliance for Equality of Blind Canadians, the Intervener in this case, that of Jutta Treviranus, Ms. Jodhan's expert witness, that of Ken Cochrane, the Chief Information Officer of the Government of Canada, that of Steve Buell, the Project Lead Accessibility Integration,

Accessibility Centre of Excellence within Service Canada, and finally that of Nancy Timbrell-Muckele, the Director Citizen Employment Service, Service Offering and Implementation Directorate, Citizen Service Branch, Service Canada.

[100] The judge carefully reviewed the affidavit evidence and made crucial findings of which the following are the most relevant:

1. Both Ken Cochrane and Steve Buell acknowledged that ePass was inaccessible and that it did not comply with the CLF Standard. Mr. Buell acknowledged that there were many instances of non-compliance with the CLF Standard on government websites.
2. Nancy Timbrell-Muckele testified that the "Job Bank" and the "Job Match" links on the jobs.gc.ca website were inaccessible to the visually impaired because they were not in compliance with the CLF Standard. Although there are accessibility centres within the various government departments, i.e. to provide information, education and consultation with respect to accessibility, these centres have no enforcement powers. Mr. Buell testified that because the centres are without enforcement powers, the departments can be "blissfully ignorant" of accessibility problems (Appeal Book, Vol. 22, Tab. D-49, p. 6185, Cross-examination of Steve Buell, p. 81).
3. A Treasury Board spot audit of 47 departments found that none were fully compliant with the CLF Standard. Deputy heads of 22 of those departments were found to be in serious violation of the CLF Standard and, as a result, were sent letters by the CLF Office.

4. Ms. Jodhan was denied access to information and services on both the Statistics Canada website and the Service Canada main website, in regard to which the judge found that the information sought by Ms. Jodhan was not available to her through another channel, either by telephone, in person or by mail, nor was it available to her in alternative formats, such as Braille or audio.
5. Jutta Treviranus explained in her affidavit basic accessibility problems that were frequently encountered by the visually impaired when trying to access government websites and online services, as well as the inaccessibility of the government's rich Internet applications.

[101] In my view, both the documentary evidence and the affidavit evidence support the judge's conclusion that Ms. Jodhan and the visually impaired were regularly denied access to government services and information online. This is not to say that Ms. Jodhan has led evidence demonstrating that all of the websites of the 106 departments are not accessible. However, the evidence is, as the judge concluded, sufficient to demonstrate that there are very serious problems of accessibility for the visually impaired throughout the government apparatus.

[102] Having considered the judge's Reasons and the evidence which is before us, I have not been persuaded by the Attorney General that the judge made a palpable and overriding error in his assessment of the evidence. In truth, the Attorney General disagrees with the judge's assessment of the evidence and invites us to substitute our appreciation of that evidence. I must therefore reject the

Attorney General's contention that there was no evidentiary foundation justifying the making of a systemic remedy.

[103] The Attorney General also says that there was no evidentiary basis to support the judge's supervisory order. Later on in these Reasons, I will address this submission when dealing with the Attorney General's specific arguments pertaining to the judge's supervisory order.

3. Whether the Federal Court erred in finding that the government discriminated against vision impaired persons in violation of subsection 15(1) and that the discrimination was systemic.

[104] In *Kapp*, the Supreme Court explained the test applicable to a determination under subsection 15(1) of the *Charter*. At paragraph 17, the Court said:

> The template in Andrews, as further developed in a series of cases culminating in *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 S.C.R. 497, 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.

[105] That test was recently reaffirmed by the Supreme Court in *Withler v. Canada*, 2011 SCC 12, [2011] 1 SCR 396 ("*Withler*"), at paragraphs 30 and 61. In *Withler*, the Court carefully explained the purpose of the test. It made it clear that the first step was meant to eliminate those distinctions that the *Charter* did not intend to prohibit. In other words, only distinctions that were made on the basis of either enumerated grounds or grounds analogous to enumerated grounds were to be considered for purposes of the inquiry (*Withler*, at para. 23).

[106] The Court then indicated that distinctions based on enumerated or analogous grounds did not necessarily lead to a finding that section 15 rights had been violated. The *raison d'être* of the second leg was to enable the Court to make that determination.

[107] Thus, to succeed, a claimant has to demonstrate "that the law has a discriminatory impact in terms of prejudicing or stereotyping in the sense expressed in *Andrews*" (*Withler*, at para. 34). In *Andrews*, McIntyre J., at pages 174-175 of his Reasons for the Court, explained the concept of discrimination as follows:

> ... discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

[108] The Court went on to explain that discrimination, or substantive inequality, could be demonstrated by showing that the impugned law perpetuated prejudice or disadvantage or stereotyping (*Withler*, at paras. 35 to 37).

[109] To enable the Courts to perform this exercise, the Supreme Court enumerated a number of factors which, depending of the circumstances of the case, ought to be considered in assessing the merits of a claim of discrimination namely, the claimant's historical position of disadvantage, the nature of the interest affected, correspondence between the benefit and the claimant's needs and

circumstances, the ameliorative effect of the law on others, and the multiplicity of interests which the law seeks to balance (*Withler*, para. 38).

[110] At paragraph 39 of its Reasons in *Withler,* the Court made the point that the ultimate purpose of the section 15 inquiry was to determine whether the impugned law violated the claimant's rights to substantive equality. In particular, the Court made the following point:

> The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.

[111] The Supreme Court further opined, at paragraph 40 of its Reasons in *Withler*, that formal comparison between the claimant and his or her group and a comparator group was not necessarily the best approach, adding that the better approach was one that took into account the full context which included "the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group".

[112] Discrimination under subsection 15(1) can result from a government policy that denies equal benefit despite a facially non-discriminatory law. In the present matter, the benefit at issue arises from the Communications Policy and the CLF Standard. In *CAD*, for example, the government's policy regarding sign interpretation language, put forward in response to the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, requirement that "prohibits the denial of access

to any good, service, facility, or accommodation on the basis of disability", was held to be a benefit emanating from law (*CAD* at para. 85).

[113] Consequently, the judge was correct to state, at paragraph 142 of his Reasons, that "a law within the meaning of subsection 15(1) included a government policy or activity". In his view, the Communications Policy and the CLF Standard constituted the law at issue from which a benefit could emanate.

[114] The situation that arises in this case is similar to that which arose in *Eldridge* in that it is not the impugned legislation that potentially infringes the *Charter* but rather "the actions of particular entities" or as in this case the inaction "of a delegated decision in applying the law" (*Eldridge*, at paras. 19-20-21).

[115] It was therefore proper for the judge to proceed to a review of the Communications Policy and of the CLF Standard. His review thereof led him to conclude, at paragraph 146 of his Reasons, that the benefit at issue was online access to government information and services.

Characterization of the benefit at issue

[116] The Attorney General says that the judge erred in his characterization of the benefit of the law at issue.

[117] The Attorney General argues that the benefit at issue is not, contrary to the judge's finding, online access to government information and services but effective access to government information and services. In other words, the Attorney General says that Ms. Jodhan is not entitled to government information and services by her preferred channel of delivery. At paragraphs 62 and 63 of his Memorandum of Fact and Law, the Attorney General clearly sets out his position:

> … If one channel is not available or accessible, an individual's s. 15 right to substantive equality can be met by the government institution providing the information or service by means of an alternate channel or format, provided it is effective. In this way, reasonable accommodation of the diverse needs of Canadians, including persons with disabilities, is built into the benefit.
>
> Alternate channels or formats, provided they allow for effective communications, reasonably accommodate the needs of persons with visual impairments, and constitute substantively equal treatment within the meaning of s. 15.

[118] In support of his position, the Attorney General relies both on the Communications Policy and the CLF Standard. More particularly, the Attorney General draws our attention to that part of the Communications Policy which provides that government institutions are to communicate with Canadians "through many channels" which include the telephone, mail, service centers, and the Internet, and that the information is to be available in multiple formats to ensure equal access, adding that traditional methods and new technologies are to be used to reach all Canadians.

[119] With regard to the CLF Standard, the Attorney General says that notwithstanding the fact that the CLF 1.0 Standard provides that online accessibility is the goal, visually impaired Canadians may have to use alternate versions of the information and services such as print, Braille, audio where online access is not possible.

[120] The Attorney General also relies on the Supreme Court's decision in *Eldridge* where it held that the hearing impaired were entitled to "effective communication" in accessing health care services and not necessarily to sign language interpretation, adding that the "effective communication" standard was flexible in that it took into account factors such as the context in which the communication took place, the number of people involved, and the importance of the communication.

[121] The Attorney General also relies on the Federal Court's decision in *CAD* and says that the Court accepted the *Eldridge* pronouncement and held that meaningful participation could be achieved by way of means other than visual interpretation services, such as in writing or electronic media.

[122] Thus, in the Attorney General's view, it necessarily follows that the benefit of online access is not the benefit emanating from law.

[123] The Attorney General makes the point that the Communications Policy contemplates delivery of information and services by way of multiple channels. One of the chosen channels is the Internet and to that extent, the Communications Policy requires government institutions to provide information and services online and emphasizes that the Internet and other means of electronic communications are "powerful enablers for building and sustaining effective communication within government institutions and with their clients across Canada and around the world" (*Communications Policy, Requirement no.18*).

[124] The Communications Policy also requires government institutions to maintain an active presence on the Internet so as to, *inter alia*, provide access to public programs, services and information and to improve service delivery, connecting and interacting with citizens, enhancing public access and fostering public dialogue.

[125] The Communications Policy further states that Internet communication must conform to government policies and standards, and government institutions must manage their websites in accordance with Treasury Board standards.

[126] The CLF initiative, on the other hand, is there to provide universal accessibility standards and to ensure equitable access to the content of all government websites. Further, all government websites must comply with W3C Priority 1 and Priority 2 checkpoints "to ensure that sites can be easily accessed by the widest possible audience".

[127] When read together, the Communications Policy and the CLF Standard make it clear that the goal is to provide Canadians "with timely, accurate, clear, objective, and complete information about its policies, programs, services, and initiatives" and that various ways are to be used to communicate with Canadians. More particularly, the Communications Policy recognizes that the Internet is an important tool for providing information and reviews to the public, and that it is to that end that the Policy directs the various departments subject to it to comply with the CLF Standard on accessibility of federal government websites.

[128] Thus, the Internet as a means of communication with Canadians and for Canadians to communicate and interact with government institutions is, in the eyes of the government, of great value and importance.

[129] The Attorney General says that effective access to government information and services, not online access, is the true benefit of the law. I have no difficulty going along with this proposition and thus I am prepared to agree with the Attorney General that the benefit of law is not, *per se*, online access to government information and services. However, I have great difficulty understanding how the benefit of access to government information and services can be truly enjoyed or exercised, in the present day, without access to that information by way of the Internet. In other words, depriving a person of access to government information and services by the use of one of the most important, if not the most important, tool ever designed for accessing not only government information and services, but all types of information and services, cannot constitute, in my respectful opinion, the provision of effective access to that information and those services.

[130] The thrust of the Attorney General's submission is that effective access to government information and services is attained when the information is accessed by a person irrespective of the means used to obtain the information. I understand the Attorney General to be saying that as long as the sought-after information and services are obtained, irrespective of the time lag and inconvenience encountered, there has been effective access and thus the same benefit has been received. In other words, if one person can access information online within a matter of minutes and another person can access the same information by traveling to a government office, waiting for his

or her turn and then meeting with a government employee to obtain the same information, there has been effective access in both cases and thus both persons have received the same benefit of the law. I cannot agree with the Attorney General's position. In my view, one of the above two persons has not received the same benefit. They have not been treated equally.

[131] I am therefore of the view that the benefit of the law is access to government information and services. However, access thereto necessarily includes the benefit of online access, which is not just an ancillary component of the multi channel delivery mechanism, but an integral part thereof. In other words, one cannot speak of access to government information and services without including access thereto by way of the Internet.

[132] Before turning to the subsection 15(1) test, I wish to address the Attorney General's submission that section 15 cannot be interpreted as creating an additional right owed to Ms. Jodhan and others for the government to monitor and ensure compliance.

[133] The Attorney General argues that such a right does not exist at law and that there is no authority in support of such a right, adding that the only right at issue was the section 15 right to equal benefit of the law which, the Attorney General says, is effective access to government information and services without discrimination. More particularly, the Attorney General says that that there is no separate or free-standing section 15 right for the government to "monitor" and ensure compliance with web accessibility standards owed directly to any person and that how the government ensures this goal is a matter for its own governance. In other words, the Attorney

General says that it is only the actual provision of effective access that can be subject to oversight by the Court by means of *Charter* litigation.

[134] I agree with the Attorney General that the only right at issue is the section 15 right to equal benefit of the law. The Treasury Board's failure to monitor and ensure compliance with its standards may well be the cause of the violation of Ms. Jodhan's section 15 rights, but does not constitute in and of itself a violation of her section 15 rights. Consequently, in my view, the judge's determination that the Treasury Board's failure to monitor and ensure compliance constituted a violation of Ms. Jodhan's section 15 rights must be set aside.

The first part of the subsection 15(1) test.

[135] I now turn to the first part of the test so as to determine whether the law creates a distinction based on an enumerated ground, i.e. visual impairment. In other words, do the Communications Policy and the CLF Standard create a distinction between the visually impaired and others on the basis of their physical disability?

[136] The judge dealt with this at paragraphs 148 to 153 of his Reasons. First, he expressed the view that the Communications Policy and the CLF Standard were facially neutral with regard to website accessibility in that the applicable standards were identical for all users. However, in his view, Ms. Jodhan and the visually impaired were treated differently because of their disability.

[137] In support of that proposition, the judge found that the CLF 1.0 Standard had not been properly implemented nor enforced by the deputy heads of the 106 departments thus rendering many of the websites inaccessible to the visually impaired. He also found that 83 online departmental interactive rich Internet applications, which used "ePass", were not accessible to the visually impaired. This led the judge to state that updating the current CLF Standard to meet the new international standard would make the interactive online services accessible.

[138] As a result, the judge concluded, correctly in my view, that the impugned law created a distinction based on Ms. Jodhan's physical disability. In other words, Ms. Jodhan and the visually impaired had received a different treatment because of their visual impairment.

[139] Other than arguing that the judge mischaracterized the benefit at issue, the Attorney General does not question the finding that the scheme for the provision of government information and services denies the visually impaired of a benefit that others receive, i.e. that sighted persons are able to access all of the government's websites. However, the Attorney General submits that having regard to the relevant context, the impugned law does not "perpetuate[s] disadvantage or prejudice, or stereotype[s] the claimant group" (*Withler*, at para. 70). Put another way, the distinction which the Communications Policy and the CLF Standard make does not create a disadvantage which results in discrimination under subsection 15(1). I now turn to that question.

The second part of the subsection 15(1) test.

[140] The judge dealt with this question at paragraphs 154 to 174 of his Reasons, a summary of which appears at paragraphs 57 to 66 of these Reasons. I therefore need not repeat the judge's findings and conclusions on this point.

[141] I now turn to the Attorney General's submission as to why the judge erred in concluding that the distinction made by the law created a disadvantage that amounted to discrimination under subsection 15(1) of the *Charter*.

[142] The Attorney General begins his argument by submitting that in *Withler*, the Supreme Court made it clear that the purpose of the second step of the section 15 inquiry was to determine whether, in light of the full context, the distinction made by the law created a disadvantage by perpetuating prejudice or stereotyping, adding that this analysis was to be conducted by considering the factors which the Supreme Court enunciated in *Withler*.

[143] Having taken the position that there was no basis for the issuance of a systemic remedy for jurisdictional and evidentiary reasons, the Attorney General provided for our guidance a section 15 inquiry on only those three websites which the judge found to be inaccessible: one site of Statistics Canada, one site of Service Canada and the "Job Bank" site of Service Canada.

[144] In regard to these websites, the Attorney General says that alternate channels or formats which effectively communicate government information and services sought by the visually

impaired correspond to their actual needs and circumstances. The Attorney General also says that the accessibility standards are ameliorative in purpose and effect and that they are designed to benefit many individuals in different circumstances and with different interests, with a wide variety of disabilities. The Attorney General also says that the standards are intended to balance a multiplicity of interests, including official languages obligations and the protection of users' privacy and dignity.

[145] The Attorney General further says that Ms. Jodhan's interests in this case are narrow, i.e. access to certain information and services available on three particular websites through a preferred channel of communication, the Internet, and that these narrow interests, to use the words of the Supreme Court in *Law* at paragraph 74, cannot be characterized as a denial of access to a "fundamental social institution" as affecting "a basic aspect of full membership in Canadian society" or as constituting "a complete non-recognition of a particular group".

[146] This leads the Attorney General to assert that Ms. Jodhan's alleged inability to access particular information and services online does not "operate to perpetuate prejudice or stereotyping against the claimant", adding that satisfying Ms. Jodhan's needs for government information and services by channels or formats other than the Internet corresponds to her needs, capacity and circumstances, and that alternate channels or formats "that communicate effectively the information and services sought do not constitute discriminatory treatment" (Attorney General's Memorandum of Fact and Law, paragraph 72).

[147] For the reasons that follow, I cannot agree with the Attorney General.

[148] On the record before him, the judge found that there had been a breach of subsection 15(1) by reason of inadequate web accessibility standards, as concerns the accessibility of rich Internet applications using e-Pass as a secure channel, and by the failure of the Treasury Board to ensure implementation of its accessibility standards across the various departments. Hence, in the judge's view, Ms. Jodhan and the visually impaired were systematically denied the benefit of access to government information and services online.

[149] The Attorney General's position before us is that the judge erred in his characterization of the benefit. In the Attorney General's submission, that benefit is effective access to government information and services. Consequently, the Attorney General says that the provision of its services and information by way of alternative channels and formats, i.e. by mail, telephone and in-person visits to government centres (the "alternative channels") and Braille ("alternative format") is sufficient to meet the substantive equality test of subsection 15(1). Thus, if I properly understand the Attorney General's case, even if the government failed to provide the visually impaired with any access to its websites, this would not constitute a violation of subsection 15(1), as effective access would have been made available through other means of communication.

[150] In my view, that cannot be right. In *Eldridge*, at paragraph 73, the Supreme Court held that every benefit offered by the government had to be offered in a non-discriminatory manner and that in achieving that goal, the government might be required to take positive action. Substantially for

the reasons given by the judge, I must conclude that the consequence of the Treasury Board's failure to issue adequate standards and to ensure departmental compliance with its accessibility standards is that Ms. Jodhan and the visually impaired are denied equal access to the benefit of government information and services. An easy remedy to that situation is for the Treasury Board to correct the inadequacy of its standards and to use its best efforts to ensure that the standards are implemented by the various departments under its supervision.

[151] As I indicated earlier, I have difficulty with the proposition that equal access to government information and services can be attained without access to online information and services. In the present matter, no evidence has been offered by the Attorney General to the effect that there is any impediment to moving forward and enabling the visually impaired to readily access government information and services online. Consequently, I also have difficulty with the proposition that alternative formats and channels meet the goal of substantive equal treatment. Where not possible for technological, cost, or other reasons, I readily accept that the visually impaired would have to access government information and services through alternative formats or channels. Thus, to the extent possible, the benefit of law offered to the public must be as inclusive as possible. As stated by the Supreme Court in *VIA Rail*, at paragraph 175:

> It is the rail service itself that is to be accessible, not alternative transportation services such as taxis. Persons with disabilities are entitled to ride with other passengers, not consigned to separate facilities.

[152] Thus, applying that approach to the present matter, Ms. Jodhan and the visually impaired are entitled to full access to government information and services which clearly includes online access. It should be remembered that one of the goals of the government's Communications Policy is to

allow Canadians to access its information and services at a time and place of their choosing. If the visually impaired are relegated to alternative channels and formats, they certainly will not be choosing the time and place in which to access the government's information and services.

[153] At paragraph 157 of his Reasons, the judge opines that the examples provided by Ms. Jodhan combined with the evidence of systemic problems with the CLF Standard show that the visually impaired do not have access to government information and services equally with sighted persons, adding that the visually impaired encounter difficulty "in being otherwise accommodated with the same information". In that respect, the judge pointed out that in three cases, Ms. Jodhan had not been accommodated with written material in Braille. Thus, in the judge's opinion, the distinction created a disadvantage for the visually impaired. Further, the effect of inaccessibility of the government's online information and services forces the visually impaired to, *inter alia*, rely on sighted assistance in order to access the information and services. In *VIA Rail*, Abella J., writing for the majority, made the following point at paragraph 162:

> … 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.

[154] Invoking the words of Abella J. in *VIA Rail*, Ms. Jodhan says that forcing her to rely on sighted assistance is demeaning and propagates the point of view that she and the visually impaired are less capable and less worthy that those who can see, adding that not only did this constitute an invasion, but that it required her and those like her "to go to time and trouble not required of sighted persons" (Respondent's Memorandum of Fact and Law, paragraph 99). On the basis of the Supreme

Court's rationale in *VIA Rail*, it is very difficult to disagree with Ms. Jodhan's assertion, since subsection 15(1) of the *Charter* provides that she has the right to equal benefit of the law. Thus, she is entitled to access the government information and services as effectively as those who have no visual impairment.

[155] The government's failure to ensure that Ms. Jodhan and the visually impaired be given the same access to its information and services as those given to the non visually impaired perpetuates, in Ms. Jodhan's words, "the pre-existing disadvantage of people with disabilities by exacerbating their historic exclusion and marginalization from Canadian society" (Respondent's Memorandum of Fact and Law, para.103). In making this assertion, Ms. Jodhan refers to *Withler* at paragraph 38, where the Supreme Court indicated that establishing a claimant's historical position of disadvantage or demonstrating existing prejudices against the claimant's group, as well as the nature of the interests that are affected, were relevant considerations.

[156] Ms. Jodhan points out that the Attorney General has conceded in these proceedings that Ms. Jodhan and those like her have been historically subject to pre-existing disadvantage and subject to stereotyping that they were not as capable as those with sight. This leads Ms. Jodhan to argue that denying her and those like her access to government information and services online has the effect of reinforcing "existing inaccurate understandings of the merit, capabilities and worth of vision impaired persons. It results in their further stigmatization." (Respondent's Memorandum of Fact and Law, para. 104). Again, I can find no basis to disagree with that statement.

[157] Ms. Jodhan further submits that the impact of the Treasury Board's failure to ensure equal access to government websites and online services severely impacts Ms. Jodhan and those like her, in that they are systematically denied access to information and services which are readily accessible online by the sighted population. The end result of this denial, in my view, is that Ms. Jodhan and the visually impaired are not afforded substantive equality, because they are being denied the ability to interact with government institutions on a basis equal to that of those who can see.

[158] At paragraph 179 of his Reasons, the judge summarized his conclusions and findings. In particular, I wish to make mine his sub-points 9 and 10, which I hereby adopt:

> …
>
> 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.

[159] One final comment in regard to this question. It is clear to me that the principle of accommodation which we must consider at the subsection 15(1) stage are the positive steps which the government may take so as to deliver a benefit of law equally to disadvantaged groups. As the judge points out in his Reasons, implementing the accessibility standards would ameliorate the position of Ms. Jodhan and the visually impaired and prevent discrimination. However, reasonable accommodation, in the larger sense, is, as the Supreme Court clearly held in *Eldridge* at paragraph 79, "generally equivalent to the concept of 'reasonable limits'" and is to be addressed in the course of section 1 analysis. The Supreme Court in *Eldridge* reminded us that "reasonable accommodation" was not a device to be used in restricting the ambit of subsection 15(1)". Consequently, in adopting sub-points 9 and 10 of paragraph 179 of the judge's Reasons, I am obviously not saying that reasonable accommodation, in the larger sense, as discussed in *Eldridge*, should be debated in the course of a subsection 15(1) analysis. I understand the judge's comments to be that the steps taken by the government, i.e. the positive steps which the government may take to deliver substantive equality, do not achieve the purpose intended and , therefore, that substantive equality has not been delivered to Ms. Jodhan and the visually impaired.

[160] Consequently, there is an argument to be made that the discussion concerning the alternative channels available to Ms. Jodhan and the visually impaired is a discussion which ought to have been in the confines of a section 1 analysis, to the extent that the alternative channels can be fitted in the concept of "reasonable accommodation".

[161] For these reasons, I see no basis to interfere with the judge's conclusion that the failure to ensure equal access by Ms. Jodhan and by the visually impaired to departmental websites and online services violated her rights under subsection 15(1).

4. Whether the Federal Court erred in finding that the government could not justify its violation of subsection 15(1) because it had not raised section 1 as a defence.

[162] At paragraph 175 to 178 of his Reasons, the judge indicated that the Attorney General had not raised, as a defence, section 1 of the *Charter*. Based on the pleadings and the case put forward by the Attorney General there can be no doubt that section 1 was not raised by the Attorney General.

[163] Before us, the Attorney General does not dispute that finding but says that his failure to make a section 1 defence results from the fact that most of the 106 government institutions were not named as parties in the proceedings, and thus they were not called upon to put forward evidence so as to explain or justify any alleged failures to implement the accessibility standards. I need not address that argument since I have come to the conclusion that the proper order cannot be one directed against those government institutions that are not parties to these proceedings.

[164] However, there were specific allegations made by Ms. Jodhan in her Notice of Application and a declaration was sought that the Treasury Board's failure to maintain and enforce standards to ensure that all government of Canada websites and online services are accessible to all individuals with visual impairment led to a denial of substantive equality to Ms. Jodhan and the visually impaired. In regard to that allegation, the Attorney General did not raise a section 1 defence.

5. *Whether the Federal Court erred in exercising its discretion to retain jurisdiction over implementation of the remedy granted.*

[165] The Attorney General argues that there was no justification for the judge's supervisory order, which the Attorney General characterizes as an "extraordinary and intrusive measure". In his view, the supervisory order does not respect the division of powers between the courts and the executive. Hence, the Attorney General submits that the supervisory order was not an "appropriate and just" remedy under the *Charter*.

[166] I note that in making the supervisory order, the judge gave no reasons to justify this order.

[167] In *Doucet-Boudreau*, the Supreme Court of Canada made a number of points which are relevant to the present matter. First, it said that in exercising their discretion to order remedies under subsection 24(1) of the *Charter*, courts were to remain sensitive to their role of judicial arbiter and that they were not to "fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited" (*Doucet-Boudreau*, at para. 34). At paragraph 35, the Supreme Court further stated, quoting from its decision in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paragraph 136, that:

> … In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.

[168] The Court then set out five factors which were to be considered in fashioning a remedy that was "appropriate and just in the circumstances". First, the remedy had to be one that "meaningfully vindicated the rights and freedoms of the claimants" (*Doucet-Boudreau*, at para. 55). Second, the remedy, to the extent possible, should respect the division of powers between the judiciary and the legislative and executive branches (*Doucet-Boudreau*, at para. 56). Third, the remedy ought to be a judicial remedy, i.e. a remedy which flowed from the function and powers of a court and not a remedy for which the court's design and expertise were not suited (*Doucet-Boudreau*, at para. 57). Fourth, the remedy should be one that was fair to the parties against whom it was made. In the words of the Supreme Court, "the remedy should not impose substantial hardships that are unrelated to securing the right" (*Doucet-Boudreau*, at para. 58). Lastly, the remedy-making power was one that should be "flexible and responsible to the needs of a given case" (*Doucet-Boudreau*, at para. 59).

[169] With those principles in mind, I now turn to the Attorney General's attack on the judge's order, i.e. that he would retain jurisdiction over the implementation of the declarations and that either party could apply to him in order to ensure the proper implementation thereof.

[170] In support of his argument that the judge's supervisory order constitutes an extraordinary and intrusive measure, the Attorney General relies, in part, on Professor Peter Hogg's view, as expressed in his *Constitutional Law of Canada*, Vol. 2, 5th ed. Suppl. 2007, at page 40-45, that a supervisory order is "a remedy of last resort, to be employed only against a government that has refused to carry out its constitutional responsibility". The Attorney General also relies on the view

of Jones and de Villars in *Principles of Administrative Law*, 5th ed. (Toronto: Carswell, 2009) at page 756: 'it is expected that government and other authorities will respect declaratory judgments of the courts". Hence, the Attorney General argues that declarations will suffice to achieve the intended purpose sought by the remedy.

[171] The Attorney General also argues that supervisory orders are rarely issued and will only be issued where extraordinary or unique circumstances exist, such as those found in *Doucet-Boudreau*. The Attorney General submits that in this case, there is absolutely no evidence of events or circumstances which could possibly justify a supervisory order. In my view, the judge erred in not limiting his order to the declaration sought. I agree entirely with the view expressed by Professor Hogg in *Constitutional Law of Canada*, supra, where he says at page 40-45:

> In my view, the dissenting view in *Doucet-Boudreau* is the better one. A supervisory order should be a remedy of last resort, to be employed only against governments who have refused to carry out their constitutional responsibilities. The courts exhaust their expertise when they find the facts, apply the law to those facts and order the defendant to rectify any law. After that, no legal issue remains, just the practical details of implementation, and that is a function of the executive.

[172] In *Eldridge*, the Supreme Court made it clear that there is a presumption that the government will, once a declaration to that effect is made, do the necessary to, "correct the unconstitutionality of the present scheme and comply with this Court's direction" (*Eldridge*, at para. 26).

[173] In those few cases where supervisory orders were made, the factual situation seems to have amply justified the making of the order. In *Doucet-Boudreau* where the trial judge retained

jurisdiction to supervise implementation of the remedy, parents had a *Charter* right to publicly-funded French language educational facilities for their children and, despite the Minister's authority to build secondary-level French language schools, construction of these schools never took place. There was evidence of 16 years of government delay in the construction of these schools and also a suggestion of possible bad faith on the part of government.

[174] In the present matter, while the accessibility standards were issued in 1999 and were meant to be implemented by 2001, the evidence shows that the government has attempted, although not successfully, to make the Internet accessible to the visually impaired. Although the websites do not comply with the CLF 1.0 Standard, they are now more accessible than they were in 1999. In addition, we do not have before us any evidence with regard to the accessibility of the websites following the implementation deadline of December 31, 2008, for the CLF 2.0 Standard.

[175] In *Fédération*, the government of the NWT, having passed legislation to bring its laws into compliance with Charter guaranteed language rights, utterly failed to give it force of law by delaying its implementation for almost 20 years. In other words, there appears to have been a total abdication by the NWT Government of its responsibilities in regard to the language rights at issue. No such situation is present in this case.

[176] The supervisory order is akin to a structural remedy which the NWT Court of Appeal explained at paragraph 51 of its reasons in *Fédération* as follows:

> Declaratory relief identifies a constitutional or quasi-constitutional breach and may direct that the breach be remedied. A structural remedy not only

> identifies the breach(es) and directs government to provide a remedy, but also details how government is to proceed in doing so.

[177] In my opinion such a remedy in the present matter is not a just and appropriate remedy in the circumstances.

[178] First, the evidence in this case is dated because it was closed prior to the implementation date for the CLF 2.0 Standard. It was also complete prior to the finalization of WCAG 2.0. In such a case, I believe that a declaration appropriately responds to the time lapse between gathering evidence for a hearing and the end of the appeal process because it alerts the government to its responsibilities and allows it to focus on any corrections needed that have not been made in the meantime.

[179] Second, the judge's remedy ventures into the realm of the executive. In the view of the dissent in *Doucet-Boudreau*, a contempt proceeding would have been available to the Attorney Generals and would have constituted a more appropriate way to deal with government disobedience or further inaction rather than a supervisory order because it would intrude less on executive jurisdiction.

[180] Third, unlike *Doucet-Boudreau*, this case is the first time this particular breach of *Charter* rights has been established through litigation. In such a case, the general practice is to grant a declaration rather than a structural remedy because historically the government has responded and made necessary changes (see *Fédération* at para. 90). In addition, a declaration allows the

government to remedy the situation, making its own policy decisions. As the Court said in *Fédération* at paragraph 90:

> granting of a structural remedy against government on a first litigation of a constitutional or quasi-constitutional issue requires an exceptional case.

[181] Fourth, unlike the situation in *Fédération*, I do not see "extensive evidence" that a declaration would not be appropriate due to consistent failure to follow action plans, implement recommendations made in reports or take concrete steps to implement the CLF Standard. On the contrary, the Attorney General has explained the various steps taken by the Public Service Commission, Service Canada and Statistics Canada to comply with CLF 1.0 and 2.0 and each of these departments has a Centre of Expertise on Accessibility.

[182] Fifth, the issues in *Fédération* and *Doucet-Boudreau* pertained to language rights and significant periods of delay in implementing those rights.

[183] Sixth, the nature of the rights at issue is different. For example, in *Doucet-Boudreau*, the situation was more urgent because there was evidence of a "serious rate of assimilation" of the Francophone population, which would be aggravated by further delay (see *Doucet-Boudreau* at paras. 38-40).

[184] I am therefore satisfied that in the present matter, there was no factual or legal basis to justify the supervisory order made by the judge.

Disposition

[185] I would therefore allow the appeal in part with costs in favour of Ms. Jodhan in the amount of $35,000, inclusive of disbursements and tax, and I would vary the judgment of the Federal Court to read as follows:

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 constitutes a violation of subsection 15(1) of the *Charter*;

2. [First two sentences of paragraph 2 of the judge's Judgment REMOVED]. This declaration does not apply to stored government historical and/or archived information which is stored in a database and which the government shall retrieve and provide in an accessible format upon request;
3. It is also declared that the ~~government~~ [Treasury Board] has a constitutional obligation to bring ~~itself~~ [the government departments and agencies under its control] into compliance with the *Charter* within a reasonable time period, such as 15 months;

4. [Entire paragraph 4 of the judge's Judgment REMOVED];

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

"M. Nadon"

J.A.

"I agree.
K. Sharlow J.A."

"I agree
Eleanor R. Dawson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	SHARLOW J.A. DAWSON J.A.
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