Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Bob Brown

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

National Capital Commission

- and –

Public Works and Government Services Canada

Respondents

Decision

Member: Dr. Paul Groarke
Date: June 6, 2006
Citation: 2006 CHRT 26

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*****The Appendices Are Only Available In PDF Format**

I. Introduction

[1] The complaint before me alleges that the National Capital Commission (NCC) has discriminated against Bob Brown by denying him "access to services by failing to accommodate [his] disability (wheelchair user), contrary to section 5 of the *Canadian Human Rights Act."* The alleged discrimination is "ongoing".

[2] The service referred to in the complaint is the York Street Steps, which are located at the intersection of York Street and Sussex Drive, in Ottawa. The steps were completed in 1999. Mr. Brown alleges that they are not "accessible". Mr. Brown and the Canadian Human Rights Commission (CHRC) submit that persons who cannot climb the steps have no way of going from Sussex Drive at the bottom of the stairs to Mackenzie Avenue at the top.

[3] There was a viewing of the site at the outset of the hearing. I have attached a street map and a few pictures, to give readers a better understanding of the geographical location and appearance of the steps. There is a T-intersection at Sussex: York Street ends in a steep set of stairs, which takes those people who can climb the steps to Mackenzie Avenue and Major's Hill Park. The Peace Tower and the spire of the library of Parliament are visible from York Street. A bystander can see the Rideau locks descending to the Ottawa River and look across a chasm to Parliament Hill. The heights on either side are impressive.

[4] One of the reasons why people might want to use the steps is that there is a vista from Major's Hill Park. I say this because the situation has evolved since the date of the complaint, and the case for the Complainant and the Commission now rests primarily on the use of the Park. The original particulars state that the steps provide "a main thoroughfare between the Parliament Buildings and the Byward Market". This may have changed since another set of stairs and an elevator has now been built down the street from the York Street Steps, at the Daly site. There was evidence that this provides a more convenient route between Parliament Hill and the Byward Market.

[5] I should also say something about the National Capital Commission. The NCC is a Crown Corporation, which takes its mandate from the *National Capital Act*. The *Act* gives the NCC responsibility for the development, conservation and improvement of the National Capital Region. The evidence is that the York Street Steps are on land owned by the Crown, but administered by the NCC. The NCC is responsible for their construction and maintenance.

[6] The NCC is responsible for the general area and insisted that an elevator be provided at the Daly site, some distance down Sussex. The real dispute between the parties is whether this kind of accommodation is sufficient. Mr. Brown and the CHRC say no. They are willing to accept an elevator immediately adjacent to the site; but argue that the Daly elevator is too far away. They also argue that failure to provide access at the site of the steps discriminates against Mr. Brown and persons with disabilities.

[7] The hearing in the case was delayed by an application from the CHRC to add Public Works Government Services Canada (Public Works) as a party. This arose out of the fact that Mr. Rapson, the expert called by the CHRC, testified that an elevator shaft in an office block immediately adjacent to the steps might be used to provide access. This office block is known as the Connaught Building. It is currently occupied by the Canadian Customs and Revenue Agency under "a licence to occupy" granted by Public Works, which has the "care, management and control" of the building on behalf of the Crown. The application was allowed.

[8] The case raises many legal issues pertaining to the responsibilities of the NCC and other public actors in the area of accommodation. There must be many sites where similar issues might arise. The case also raises a narrower question with respect to the duty of the Respondents like the NCC to consult with those who require accommodation. Although this leads into a discussion of some larger issues, each case must be decided on its own merits. I have accordingly restricted myself to the facts of this case.

[9] The following decision essentially deals with liability. I agreed that I would only deal with the different proposals to provide accommodation at the York Street Steps, if that became necessary.

II. Facts

A. Evidence For The Complainant and CHRC

(i) Bob Brown

[10] Mr. Brown has been a quadriplegic since 1972 who nevertheless likes to do things on his own and takes pride in his independence. Mr. Brown currently lives on Murray Street, three blocks from the York Street Steps. He testified that he likes to visit Major's Hill Park,

[11] At the outset of the hearing, Mr. Brown testified that there are many festivals in Major's Hill Park. He changed his tack, however, when the Respondent corrected this assertion.

> **Mr. Harnden**: As I recall, you emphasized the importance of accessing the park for the purpose of festivals. Are you withdrawing from that as being a priority usage?
>
> **A.** No, I am suggesting that it is not only for festivals. People do go there for festivals, but at other times, as well, from the market. It is just a nice park to go to. You go up and it overlooks the Ottawa River. It's an historic site. There are benches. People go in the evenings, and things like that, just to be in a green space.

He later testified that it is a good place to watch the sunset.

[12] The antecedents to the complaint are more political, however. Mr. Brown was the Chairperson of the City of Ottawa Disability Issues Advisory Committee in 1998, when the steps were being built. Although the NCC did not go through the municipal planning process, since it comes under federal jurisdiction, the proposal to build the steps came to the attention of the

Advisory Committee. The Committee discussed the proposal and felt that there were reasons for concern.

[13] As Chairman of the Committee, Mr. Brown wrote a letter to Mr. Jim Watson, the Mayor of the City of Ottawa at the time. The second paragraph of the letter begins: "We, on the Committee, unanimously submit that the design of the new steps is totally unacceptable since it repeats the same architectural barriers which we have been trying for decades to eliminate." The Committee asked the Mayor to arrange a meeting with Mr. Beaudry, the Chairperson of the NCC, to deal with the lack of access at the site.

[14] Mr. Brown thought that the Mayor wrote to the NCC, as suggested, and requested a meeting. It appears that the NCC did not receive this letter, however, and the evidence before me suggests that the letter was never sent. The question of the steps nevertheless became a public controversy, in part because of a letter that Mr. Brown sent to the editor of *Ottawa Citizen*.

[15] The American Embassy is immediately adjacent to the steps, on the north side of the block. The Committee also wrote a letter to someone at the American Embassy, suggesting that the proposed stairs would not be in compliance with the *Americans with Disabilities Act*. The Embassy was apparently paying for their design. The administrative officer for the American Embassy replied that the NCC had the final authority to determine what would be built at the site. Their concerns were limited to a desire for continuity in the style of the steps and the Embassy.

[16] The NCC responded to the controversy by arranging a meeting with the Access Committee of the Disabled Persons Community Resources Centre on March 17, 1999, to discuss the situation. The meeting was closed. There was a disagreement between the parties as to whether the Access Committee was the appropriate organization to consult. Mr. Brown was allowed to attend the meeting, but on the basis that he would not discuss it with the Municipal Advisory Committee. He testified that he felt "gagged".

[17] Mr. Brown said that the NCC used the meeting to explain their plans for the Daly site, which would provide access between Sussex and MacKenzie. This did not address his concerns. He felt that he was getting nowhere and filed the present complaint on August 31, 1999. This was after the steps had been constructed. There was an investigation by the CHRC, which took a considerable period of time.

[18] There were protracted discussions between the parties and the NCC eventually held another meeting, on July 23, 2002, to discuss the options. The participants included representatives from the City of Ottawa Advisory Committee. Mr. Brown was not invited. He felt that the NCC had its mind made up from the beginning and was not willing to consider anything, other than the Daly site. He described the meeting as a "sham".

[19] Despite its efforts, the CHRC was unable to resolve the matter and the complaint was referred to the Canadian Human Rights Tribunal. The position of Mr. Brown and the CHRC at the hearing was relatively simple. The York Street Steps are not accessible. There is no accommodation. A person in a wheelchair at the bottom of the steps has no way of going to the top. This is discriminatory. The Daly site provides another route through the area, but does not provide access at the steps.

[20] Mr. Brown has two basic options at the bottom of the steps. He can turn right, and take the long way around the American Embassy, which would take him to the northeast corner of the Park. Or he can turn left and go through the Daly site. The distance in both directions is a problem. The incline is particularly difficult for a person using a manually operated wheelchair.

[21] Mr. Brown's fundamental complaint is simpler, however. He objects to the use of the Daly site because it requires those people who cannot climb the steps to go elsewhere. This separates people.

> **Mr. Brown**: My primary concern is, because of the segregation, it is an unequal level of access. I have to be split up from the people I am travelling with to get to the level change at the top …

> My biggest concern is the segregation.

Mr. Brown says that he should be able to access the top of the steps from the base of the steps. There should be accommodation at the site.

[22] Mr. Brown testified that the delay in using the alternative routes was enough to lose any party that might be waiting for him at the top of the steps.

> If I am travelling, for example, with people, human nature being what it is -- travelling up, for example, York Street -- human nature being what it is, usually the other parties take the path of least resistance, or the shortest route. Their preference most times is to walk up the steps, and I have to go to another site and meet them at the top of the steps.
>
> So I am excluded from being part of my party. I am made to feel different, and I do feel different having to do that.

Anyone who accompanies Mr. Brown will be stigmatized in the same way.

[23] This raises a question of dignity.

> **Mr. Brown**: I feel that I should be afforded the same, equal opportunity to have access as other citizens at the same location -- at the same site, or something very close -- adjacent -- as a reasonable accommodation. Having to travel to a separate site is not a reasonable accommodation, in my opinion.
>
> If I am with other people, it is undignified. I am made to feel like a second-class citizen because I am not permitted to use the same facility as other citizens of Canada.
>
> This is the national capital of Canada. It is a symbolic area, as well.

Mr. Brown feels that the current situation is discriminatory. His concerns extend to elderly people, people with children in strollers, and anyone who has difficulty climbing the steps.

[24] Mr. Brown's solution is simple. He feels that there should be an elevator at the base of the steps. If that is not possible, he thinks that an elevator immediately adjacent to the site would be acceptable, as long as you can see it from the base of the steps. He was accordingly willing to consider the use of the elevator at the north end of the Connaught Building.

(ii) David Lloyd Rapson

[25] David Lloyd Rapson was called by the Commission as an expert witness in accessibility and universal design. He was originally retained in October, 2000 and asked to look at a number of options. One was the possibility of using other locations.

[26] Mr. Rapson's background is in community planning. He also studied architectural technology and was trained in accessibility assessment. He has a breadth of experience in accommodation. He has done committee work for the Canadian Standards Association and contributed to a manual on the "best practices" in universal design.

[27] Mr. Rapson served as the assistant director of the Universal Design Institute at the University of Manitoba. He chaired an access advisory committee for the City of Winnipeg and led a team of fifteen people in preparing an accessibility audit of downtown Winnipeg. I should also mention that Mr. Rapson broke his back in 1993, and has some problems with his legs. He uses a cane, so his consulting is informed by some of his own experiences.

[28] Mr. Rapson testified that there has already been considerable work in developing a set of criteria that can be used to conduct accessibility assessments. There is an emerging discipline in the field of accessibility assessment. The discipline takes in a myriad of physical, psychological, sociological and public policy considerations. Some of these factors concern the process that is employed in planning, designing and constructing accessible sites.

[29] The basic criteria employed in these assessments are found in the "principles of universal design". Mr. Rapson referred to these principles as "guidelines", though even that word seems

too strict. They are more like a statement of aspirations, which is commonly relied upon, in planning, designing and developing physical environments that are free of barriers. The word "barrier" refers to anything that may impede people who want to make use of them. I have attached Mr. Rapson's formulation of the principles of universal design in Appendix "B".

[30] In his testimony, Mr. Rapson made a distinction between "accessibility" and "universal design".

> **A.** Accessibility is a function of compliance with regulations or criteria that establish a minimum level of design necessary to accommodate people with disabilities.
>
> For example, most building codes -- the national building code, the Ontario building code, the Manitoba building code -- usually have the minimums, "This is the minimum that you can design for it." Universal design is more of an art and a practice of design to accommodate the widest variety and the number of people through their lifespans.

The principles of universal design provide the more general framework in which specific issues of accessibility can be considered.

[31] The accessibility issue has a legal and a technical side. Mr. Rapson described his task in the immediate case as follows:

> **A.** There were two basic questions: an expert opinion on how the location could be made accessible to wheelchair users; and to have sufficient information to enable the CHRC to determine whether the respondent had met its legal responsibility to accommodate wheelchair users to the point of undue hardship.

The second question is problematic. The issue behind it, at least, is whether the Respondent has met its obligation to accommodate persons with disabilities under the *Canadian Human Rights Act*. This is a question that is reserved for the Tribunal. It would be an error to accept Mr. Rapson's views as a legal opinion.

[32] Mr. Rapson was entitled, as an expert in accessibility and universal design, to speak to the technical side of the question. There is not that much that anyone can say, in this context. The Respondent did not dispute the fact that the steps, as originally constructed, are not accessible. They were not designed in accordance with the principles of universal design and do not meet current standards. The contentious question is whether the NCC has rectified the situation.

[33] Mr. Rapson is of the view that the York Street Steps do not meet the principles of universal design. They are not, in his view, accessible. The elevator at the Daly site does not rectify the situation. I have generally accepted Mr. Rapson's opinion on these issues. I found his evidence thoughtful and measured. He understood the need to make reasonable compromises.

(a) Mr. Rapson's reports

[34] Mr. Rapson made two reports. The first report was dated June 14, 2001, and was limited by the fact that he was not given any funding to visit the site. I think this was an error in judgement on the part of the CHRC, which was taking a real risk, in asking him to write a report without a physical examination of the site. I nevertheless accept that any deficiencies in the initial report had been made up by the time of the hearing.

[35] Mr. Rapson had a series of photographs taken of the site. He also asked colleagues to inspect it for him. He spoke to a variety of people and "tried to pull in as much information" as he could. This included correspondence, site plans, and other documentary material.

[36] The first report concludes that the steps contravene three of the guiding principles of universal design: equitable use; flexibility in use, and low physical effort. They did not meet the principles of universal design. The alternative routes were "excessively long". There were also problems with the "consultation process" adopted in 1994.

[37] Mr. Rapson nevertheless acknowledged that the site was challenging. The hill was too steep to permit the construction of a viable ramp, and "an exterior elevating system" was not

appropriate. He accordingly proposed his own alternative.Mr. Rapson thought that the "obvious" solution was to make use of an elevator in the Connaught Building, immediately beside the steps. He felt that the NCC did not "have a sufficiently encompassing consultation process with the adjacent building occupants in the Connaught Building." I agree with this conclusion.

[38] The second report from Mr. Rapson is essentially a response to the Universal Accessibility Assessment Study prepared for the Respondent by Robertson Martin in July 2002. It contains his final conclusions. There are some differences in the two reports, but I think it is more important to focus on his testimony, which followed the outline of the second report.

[39] Mr. Rapson made additional investigations after issuing the second report and made three or four visits to the steps. He measured the time it took to complete the various routes around the steps. He estimated that the trip to the top of the steps, via the Daly site, or around the U.S. embassy, was six to eight minutes.

[40] Mr. Rapson also observed the pedestrian traffic.

> **Mr. Rapson:** There was a steady flow of people going up and down.
>
> I did one count for the eight minutes and it worked out to somewhere around 85 people, somewhere in that range, varying in age, varying in size -- families, single people.
>
> There was one family with a carriage with a young one in it, and they were bouncing their way down.
>
> There were a number of scooters that I saw traveling at the bottom.
>
> There was a young family, as I mentioned earlier, with a baby carriage that couldn't make it up the stairs, so they had to go around. It was the same for an elderly person in a manual chair with somebody pushing them.

> **Q.** You mentioned that someone couldn't make it up the stairs. Had they attempted to --
>
> **A.** They were looking for a way to get up to the park. They were down by the Byward Market.

The point is simply that the steps present a barrier to a wide range of people.

[41] Mr. Rapson testified that it would be wrong to look at the site solely from the perspective of a person in a wheelchair. His concern was with anyone who was unable to climb the stairs. He also testified that there is no perfect solution. The best solution for one user might not meet the needs of other users.

(b) Mr. Rapson's conclusions

[42] Mr. Rapson's central conclusion was that the original design of the York Street Steps does not meet the principles of universal design. The steps are not accessible. The alternative routes were excessively long. It was therefore a matter of retro-fitting an inadequate design. This is always problematic.

[43] Some of Mr. Rapson's criticism concerned the lack of consultation. He suggested that there should have been a proper process of consultation in 1994, when the steps were designed. He agreed with a statement attributed to the architect for the American Embassy, who allegedly commented that this was a "missed opportunity." I only repeat this comment because it captures Mr. Rapson's view.

[44] Mr. Rapson was firmly of the view that the disabled community, the public and any interested parties should all have had a say in what was to be done with the site. This is a fundamental aspect of universal design and the NCC had not done enough in this regard. The participants at the meetings that ultimately took place were not given a full range of options. They were essentially forced to make a choice between the options presented by the architects.

[45] Nor was it a matter of dealing solely with persons who have "mobility" problems. The final design should accommodate persons with visual, hearing, and cognitive problems; it should accommodate persons "of various heights, widths and ages." It should accommodate parents with children in strollers. Mr. Rapson recommended "a signage strategy". There should be benches and rest stops placed in the area.

[46] The NCC bridled at the suggestion that it was not committed to the principles of universal design. Mr. Rapson relented somewhat on cross-examination, and stated that he consulted the NCC's *Barrier Free Site Design Manual* in preparing his reports. He agreed that it provided evidence of good intentions. His position nevertheless remained the same. The design of the steps did not meet the principles of universal design.

[47] Mr. Rapson acknowledged the challenges presented by the site. The hill was high and steep. The site was "tight": it was too narrow to allow for stairs and "a proper ramping system". A stair platform lift would not be appropriate. Weather was a serious concern. The "sociology" of the area must also be taken into account. There are rough elements in the neighbourhood. Those who made use of an elevator might have legitimate fears about walking down a corridor, out of public view.

[48] There were historical and cultural factors. Mr. Rapson described Ottawa as a showpiece of Canada. This must be taken into account. There is also the fact that the American Embassy is next door. The cost of any adjustments would have to be considered, as would engineering and security issues. The competing interests must be balanced.

[49] The second report goes through the options in the Robertson Report. Mr. Rapson added the Connaught Building as an option. The first option in the Robertson Report was the status quo. This was unacceptable. Option 2, a stair platform lift, was unworkable. It would be open to the air and inclement weather. It would be cumbersome, since two lifts would be necessary. The manual operation of the lift would present a problem for people with disabilities.

[50] Option 3 was the Connaught Building. The Connaught Building had level access at ground level and above, on MacKenzie Avenue. There was a ramp adjacent to the York Street Steps. The first report from Mr. Rapson suggests that the existing entrances, exits and elevator could be used. The second report suggests a new elevator. There was an elevator shaft at the ramp. This was the best option. There would have to be push button access and upgrades in the building to meet "current accessibility standards".

[51] I think the Respondents have overstated the fact that Mr. Rapson has never been in the Connaught Building. He had the floor plans, and if the matter did not go beyond that, it was because the Respondents were not willing to pursue it. Mr. Rapson was merely recommending that the building be considered. He accepted that there may be security concerns that would prevent the building from being used, and acknowledged that his proposal was a "suggestion".

[52] Option 3a was a "vertical elevating device". Mr. Rapson thought that this was a feasible option but acknowledged that it would have to be located on the property of the NCC, presumably at the back of the site, beside the steps. This meant that the current retaining wall would have to be moved, an expensive and even awkward proposition. Mr. Brown asked about the possibility of constructing an elevator at another location on the site, but Mr. Rapson warned that there would be engineering problems.

[53] Mr. Rapson was generally happy with the idea of an elevator. He was nevertheless concerned about the "canyon" effect that would be produced by locating it at the back of the site, beside a five or six metre retaining wall. The corridor leading to the elevator would be dark and aesthetically undesirable. He had additional concerns about the size and design of any elevator. He had concerns about vandalism, and general security issues.

[54] The fourth option was to make use of the proposed elevator at the Daly site. Mr. Rapson felt that this was simply too far away. It did not meet at least two of the principles of universal design, which call for an "equitable" solution that requires low physical effort. He also thought that it would stigmatize those persons who had to use the alternative route.

[55] Mr. Rapson thought the elevator at the Daly site was needed. But it did not resolve the problem at the York Street Steps, which needed on-site access. The Daly site would also stigmatize people who had to use the elevator. Mr. Rapson felt that this is a common problem with access. People with disabilities are unintentionally segregated from other people.

[56] There is real symbolism here. This kind of issue goes to the heart of the legislation and the concept of equality that is enshrined in the law of the person. Compromises must be made. The practicalities of any situation must be taken into account; but so must the needs of dignity. People who cannot climb the steps should be accommodated, as much as possible, at the site.

[57] Mr. Rapson took the position that it was not his place to substitute his views for those who had an interest in accommodation at the steps. The most appropriate solution could only be determined through the process of consultation. He was nevertheless satisfied that the Daly site did not provide access close enough to the steps. That seemed to leave an elevator, either on site or in the Connaught Building. He also felt that there might be ways of dealing with the security problem in the Connaught Building that were never explored.

(iii) Barry McMahon

[58] Barry McMahon has lived in Ottawa for 30 years. At one point, he had an audiovisual company at 61A York Street, in the ByWard Market. He is accordingly familiar with the York Street Steps and the surrounding area.

[59] Mr. McMahon has post-polio mylitis. This affects the neurons in the muscles, which restricts the amount of activity that he can undertake. He has been using a wheelchair and a scooter in an effort to delay the advance of his condition.

[60] Mr. McMahon has known the Complainant for 14 years. He nominated Mr. Brown to the Municipal Advisory Committee on Disability in 1996, while he was chairing the Committee. The Committee had an extremely broad mandate and dealt with any matters within the

municipality that raised disability issues.It is now mandatory under provincial legislation that cities in Ontario have such a committee.

[61] The selection process for the Municipal Advisory Committee is open. Members are sought through the media, through City Council, through the members of the Committee, and the City Clerk. There is another committee that recommends candidates for membership. They are appointed by the mayor, by motion in council.

[62] The process at the Committee was relatively straightforward.The planning Committee would submit individual site plans to the Advisory Committee for recommendations.There was a formal distribution sheet in the planning department. They did not deal with the interior of the building unless it was a municipal site.

[63] Mr. McMahon resigned from the position of chair in the middle of 1998. Mr. Brown was elected as the new Chair and remained in that position until the City of Ottawa was amalgamated. Mr. McMahon resigned from the Advisory Committee in 2003. He was the interim chair of the Accessibility Advisory Committee of Ontario at the time he testified.

[64] The history of the matter really goes back to 1998, when it was brought to the attention of the Municipal Advisory Committee that the York Street Steps were being redesigned. In January 1999, the Committee formed a subcommittee to deal with the project. The Committee felt that the existing steps were a barrier and did not want to see the barrier duplicated. There was a lot of anger and frustration. The Committee felt that the original design of the steps was flawed.

[65] The Committee was apparently told that the estimates put the cost of the stairs at 38 thousand dollars per step. They felt that this should have been sufficient to deal with the access issue. There were a number of letters. Mr. McMahon thought that Jim Watson, the Mayor, wrote to the Chairman of the NCC.

[66] The minutes of the Accessibility Advisory Committee from August of 2002 refer to the meeting. Giles Warren and Danielle Vincent reported to the Committee as a whole. Mr. Warren reported to the Committee that the only solution offered by the NCC was the elevator at the Daly site. The feeling of the Committee was that the NCC had already decided that access would be provided at the Daly site. This was a *fait accompli* and was not open to negotiation.

[67] Mr. McMahon felt that the Daly site was not a viable solution. It was simply too far away. The Daly site "doesn't solve the problem at all", he testified. "You might as well go around the block." Access should be provided "immediately" at the foot of the steps. The Committee felt that the Daly site was a token solution. There was a general feeling that it was futile to participate further in the process. Mr. McMahon now realizes that this may have been a mistake.

[68] Mr. McMahon testified that he sent an email to the U.S. Architects and Transportation Barriers Compliance Board in Washington D.C on March 19, 1999. He advised them of the situation, on the basis that they had provided part of the infrastructure for the American Embassy. He received a response from the Compliance Board in April, with a copy of a letter from someone in the Department of State saying that the matter was out of their jurisdiction.

[69] Mr. McMahon clearly felt that the problem lies in the design of the Steps. The elevator at the Daly building does not address this problem at all. It merely "diverts" the problem. The other side of the Daly site is "nowhere". There is a tremendous amount of congestion in the area. There are "street kids", homeless people, beggars and vagrants in the area. The corner of Sussex Drive and Rideau Street is particularly bad.

[70] Mr. McMahon feels that the existing situation is intolerable. He said it is "amazing" how much inconvenience the NCC is causing to people at the site. It is not simply people in wheelchairs. The same problems confront women with toddlers in strollers, elderly people, people who are overweight, people with visual disabilities. If there was an alternate way of negotiating the steps, he believes that it would be heavily used.

[71] Mr. McMahon thought that the main alternative would be an elevator. The transit way has had elevators for 10 years. There could also be a funicular. He testified that people should be offered an alternative at the bottom and the top. The most convenient location would be beside the Connaught Building, below the landing on the MacKenzie Street side. He stressed the importance of maintaining visual contact between people who are travelling together and felt that an elevator on the site would be the best solution.

[72] There is a question of inclusion here. Mr. McMahon stated that "splitting up" at the steps, with the intention of rejoining his party at the top of the stairs, accentuates his disability. The steps are a barrier. A person's disability comes to the fore and becomes predominant when faced with a barrier. The goal in accessibility is to remove these barriers. The purpose of universal design is to incorporate disabled persons "seamlessly" into the public and society.

(iv) Giles Warren

[73] Giles Warren testified from Hamilton. He has had polio since childhood and uses a wheelchair. He lived in Ottawa for forty years and was a member of the Municipal Advisory Committee on Disabilities from 2000 to 2003. He was vice chair by the time he left. Mr. Warren did not spend much time in the area of the York Street Steps. He was nevertheless aware of the issues surrounding the steps from his committee work.

[74] Mr. Warren was the Chair of the subcommittee on site approvals. He was asked to go to a meeting in July, 2002. The meeting was July 23 at the headquarters of the NCC. Mr. Warren did not know the other people at the meeting, other than Danielle Vincent. Mr. Warren says that he went to the meeting with an open mind. The Accessibility Study commissioned by the NCC--the Robertson report--was neutral.

[75] When Mr. Warren got to the meeting, however, he discovered that the Mr. Martin, the consulting architect, was already in favour of using the proposed elevator at the Daly site. Security had become a major concern. The overall message was simple: the preferred

alternative was to install a public elevator at the Daly Building. Mr. Warren says that the other options were never seriously addressed. "It was a window dressing exercise."

[76] The minutes of the meeting prepared by Mr. Martin demonstrate that Mr. Warren agreed that the Daly site was the best solution. Mr. Warren discounted this. He says that he only agreed because there were a limited number of options on the table. None of the options addressed the real problem, which was the original design of the steps.

[77] Mr. Warren's report to the Municipal Advisory Committee uses the same words. The minutes of the Committee describe the meeting as "window dressing" to satisfy the concerns of the CHRC. There was an informal discussion of the situation at the Committee, after which the matter was left "hanging". The Committee basically left it to the CHRC to deal with the matter.

[78] Danielle Vincent from Disabled Persons Community Resources was also at the meeting. Mr. Warren testified that she shared his view that the meeting was window dressing. Ms. Vincent did not testify so the statement is hearsay. I accordingly think it would be wrong to place any weight on it.

[79] Mr. Warren was accommodating on cross-examination. He was willing to accept that the NCC was within its rights to assume that the Municipal Advisory Committee supported the Daly-site option. He recognizes that the NCC may not have appreciated his objections. He realizes, in retrospect, that he should have gone back to the planners and architects and expressed his views to them.

[80] This does not change his view of the situation. Mr. Warren was not happy with any of the alternatives proposed in the Robertson Report. He thought the proposed location for an elevator at the steps was impractical. The alleyway between the Connaught Building and the steps was dangerous. He was concerned with vandalism and with the threat posed by vagrants in the area. This included the Daly site.

[81] Mr. Warren rejected the idea that the elevator at the Daly site would provide equal access. He felt that it was like asking disabled people to use the back door. He suggested that the use of an alternative route might be justified on the same "separate but equal" rationale that was used to justify segregation. He remembered signs directing blacks to different washrooms or rear entrances.

[82] Mr. Warren also thought the extra distance to the Daly Building was a significant obstacle. It was just as easy to walk around the block.

B. Evidence For The NCC

(i) Gérald Lajeunesse

[83] Gérald Lajeunesse is the Chief Landscape Architect for the NCC. He has been working for the NCC since 1977. He became the project director for Confederation Boulevard in 1988.

[84] Mr. Lajeunesse testified that the NCC is committed to universal access and published a *Barrier-Free Site Design Manual* in 1995. The manual provides a tool for people preparing projects under the purview of the NCC. The major part of the process however consists of consultation. The NCC introduced a Universal Access Policy in 1996, which applies to "its sites, buildings and services and to those which it leases." There is an internal committee, which performs assessments for government departments and monitors developments in the area.

[85] One of the major elements in the NCC's plans for the National Capital is Confederation Boulevard. The Boulevard runs for seven and a half kilometres and includes the "ceremonial route" to the Governor General's residence. The frontage along Sussex Drive and MacKenzie Avenue, and the York Street Steps, are considered part of the Boulevard.

[86] Confederation Boulevard is designed to accommodate large gatherings of people and allows lingering. The sidewalks are generous. The idea is to give the pedestrian priority. Mr. Lajeunesse testified that Major's Hill Park might be considered an exception to the general

plan. The NCC tries to minimize activity in the area, to protect the vegetation, which is apparently on thin soil. The primary pedestrian route is from the Parliament Buildings on Wellington Street to Rideau Street, and then along Sussex Drive to York Street, and into the Byward Market area.

[87] Mr. Lajeunesse took over the York Street Steps site in 1989. Alex Kilgour, the project manager for the York Street Steps, reported to him. There was an "insignificant" set of stairs at the site. The area was derelict. They had already decided on a grand stairway, which would provide a strong visual connector between lower and upper town.

[88] This is where history and aesthetics enter into the matter. The York Street Steps are part of a "view corridor", an uninterrupted "view-shed" between lower and upper town. They are a visual link between the town—the Byward Market—and the crown, which takes in the Chateau Laurier and the back of the Parliament Buildings. I accept the NCC's view that it is important to protect the view-shed.

[89] The NCC was aware of its obligation to provide access at the proposed steps. The architects investigated the possibility of providing ramps. The grade was too steep, however, and there would be a problem with switchbacks. They also looked into the possibility of providing an "elevating device". The problem was that an elevator adjacent to the steps would have created a "tunnel". This was the wrong feeling. The physical site was too restricted to consider other options.

[90] There were other issues. There was virtually no retail along Sussex, so there was little activity at night. This created safety concerns. There were "inappropriate activities" at the York Street Steps. There was also a new development at the Daly site. The NCC wanted to take advantage of it and eventually reached the conclusion that it was the only realistic site for an elevator.

[91] Mr. Lajeunesse testified that there was no serious discussion of the Connaught Building. The problem was security. They recognized that things could change. Jean Piggott, the previous Chair of the NCC, had recommended that public buildings on Confederation Boulevard have a "public face". There should be some public access. So ideally the Connaught Building would be open to the public in some fashion.

[92] The Daly site was more accommodating and "more inviting", if a passageway was needed. There were no dark spots. It was a controlled environment, and offered better security. Mr. Lajeunesse testified that you have to take advantage of opportunities when they arise. The NCC owned the land at the Daly site and was in a position to demand concessions from the developer. There were negotiations concerning the construction of an elevator at the site. The NCC insisted that it meet universal standards.

[93] There was a dispute about the reasons behind the position taken by the NCC when the steps were originally designed. The CHRC suggested that the NCC preferred the Daly site because the developer would bear the costs. It also suggested that aesthetics entered into the decision. Mr. Lajeunesse equivocated, and then rejected the suggestion that any of the alternatives were rejected on the basis of costs or aesthetics. The review of the matter after the complaint was filed looked at other concerns.

[94] There were two rounds of consultations before the steps were built. One included a meeting with the Federal Interdepartmental Technical Committee on Accessibility, and another with representatives of the Disabled Persons' Community Resources Group. There were discussions with the CHRC and another round of consultations, after Mr. Brown laid his complaint. This culminated in the meeting that was held in 2002.

[95] During these consultations, the CHRC sought to obtain information about the Connaught Building. A letter to Mr. Lajeunesse dated October 24, 2000 asked for "details" of the Connaught Building, including the service entrance area, the front entrance area, and floor plans.

[96] Mr. Lajeunesse made inquiries and eventually received a cursory letter from Raymond Charette, a property and facility manager for Public Works, dated September 13, 2001. The letter responds as follows:

> The high security requirements of Canada Customs and Revenue Agency's Headquarters at the Connaught Building and prohibitive cost of altering this heritage building to accommodate a public elevator precludes us from opening this building for public access between Mackenzie Avenue and Sussex Drive.

This was essentially the final word on the subject and foreclosed any further discussions.

[97] The NCC set out its position in a letter to the CHRC on October 3, 2001. The substance of the letter is as follows:

> During the initial design phase for the York Steps, the NCC did not pursue the option of providing universal access through the Connaught Building because [it was designated] as a 'high security' federal building and could not, as such, be promoted as a public building. The hours of operation for the Connaught Building are very restrictive, while the hours of operation for the building proposed at the Daly site would provide the flexibility that could accommodate a universal access between MacKenzie and Sussex.
>
> Therefore, the [National Capital] Commission has identified an equitable, alternative, contiguous route through the Daly Site, given the fact that both the Connaught Building and the US Embassy are high security buildings.
>
> The Commission strongly objects to the statement made that it does not clearly understand Universal Design and Access and that appropriate training session(s) be organized for its staff.

The NCC stands by this position.

[98] The NCC nevertheless took a second look at the situation after Mr. Brown filed his complaint. There was apparently a mediation. The NCC commissioned an Accessibility study from Robertson Martin, which was referred to in the hearing as the Robertson Report. This

report quickly disposes of any idea that the buildings adjacent to the site could be used to provide access.

> Buildings adjacent to the York Staircase are high security buildings and therefore utilization of them for elevators, etc., is impossible. Also, hours of access would be restrictive.

The report also notes that the RCMP has security arrangements in the area.

[99] It appears that Mr. Martin, the consulting architect, chaired the meeting on July 23, 2002, which Mr. Warren attended on behalf of the Municipal Advisory Committee. Mr. Lajeunesse also had a leading role. Mr. Lajeunesse took the position that there was a consensus that the Daly site was the best. I accept his sincerity, in saying this.

(ii) Jerrold Corush

[100] Jerrold Corush is a landscape architect. His firm was asked by the NCC to assist in the design of the U.S. Embassy and the York Street Steps in 1994. The Embassy was designed twice as a result of the security issues that arose as a result of the Oklahoma bombing.

[101] Mr. Corush testified that they looked into the issue of access. All of the alternatives seemed problematic. They rejected the idea of a ramp. There would be too many turns and the number of switchbacks seemed "rather onerous". The people using the ramps would run into the people going up and down the steps.

[102] The possibility of a "funicular" was investigated. A funicular is essentially a box on wheels. This would require a conductor. There were operational and safety concerns. They considered an escalator, which would have to be inside. That would require the construction of a building. There would be problems with maintenance.

[103] There was discussion of an elevator. There were two basic locations. The first was down the alley beside the steps, which was used by truck traffic to and from the Connaught Building. This was problematic. The trucks used the entire space for turning. They were "banging the walls" as it was. The area between the steps and the Connaught Building was also a 'dead' space. There would not be enough people to ensure the safety of the area.

[104] The architects also considered the possibility of an elevator tower on Sussex, with a catwalk leading to Mackenzie. This was rejected for visual concerns—it affected the "porosity" of the view—and because it raised concerns about safety. Weather was another problem. The catwalk would be exposed and yet isolated from the public. It follows that there were design and safety problems with both of the proposed locations for an elevator.

[105] There was an extensive discussion of these issues. The manner in which an elevator would be operated was also considered. Would there, for example, be key cards? This would be awkward. Mr. Corush felt that an elevator should probably be manned. Surveillance was discussed. The CHRC submitted that costs entered into the evaluation of all of these issues.

[106] I think the Respondent has intentionally underplayed the importance of aesthetics in making these decisions. Mr. Corush testified that the architects wanted to maintain the visual corridor down York Street and up the steps, leading to the library of Parliament. This provides a spatial connexion between the town and the crown. They also wanted a set of stairs that matched the embassy.

[107] In the end, none of the on-site solutions seemed satisfactory. They accordingly examined what was available off-site and concluded that the pedestrian traffic coming out of the market had two fundamental destinations. One was the Chateau Laurier and Parliament Hill; the other was Major's Hill Park. They needed a route to each. The second route was already there: if necessary, people could walk around the American Embassy, which would take them to the north east end of the park. The first could be supplied by the Daly site.

[108] That was where the matter was left. There was no real process of consultation and the architects relied on their own judgement, in recommending the final design. They were not completely happy with the situation. Mr. Corush acknowledged that the distances involved in using the alternative routes are significant, particularly for someone in a wheelchair. He recognized that disabled people would be "displaced" by the York Street Steps. I think this implicitly acknowledges that there is separate treatment.

(iii) Robert Martin

[109] Robert Martin was retained by the NCC in April 2002 to study the York Street Steps. This was in response to Mr. Brown's complaint and the CHRC's investigation of the matter. Mr. Martin's firm, Robertson Martin Architects, has a specialty in universal access. They have done building reports and accessibility audits for the NCC.

[110] Mr. Martin did an extensive site review and prepared a report entitled "Universal Accessibility Assessment Study: York Street Steps". The report is dated July 2002 and contains a number of appendices. Appendix "B" lists seven principles of universal design, which are in keeping with the principles set out in the Rapson reports. Mr. Martin testified that these principles constitute the "best practice" in the area.

[111] The consulting group that prepared the report had a wide range of materials relating to the York Street site. This included the CAD (Computer Assisted Drawing) files used in constructing the steps. They made a physical examination of the site. They did class D cost estimates for an elevator, which came in at 427,000 dollars. This class of estimates is rough, at best, with a high range of error and an expected range of plus or minus 20 percent.

[112] Mr. Martin described the purpose of the Robertson Report as follows:

> **Mr. Martin**: I think there was a real sense that the steps had been constructed and that this was a second opportunity to review all of the existing installations and to examine whether there might be new technologies or devices that hadn't

> been present when the steps were being designed and constructed that perhaps the NCC had missed and that we might identify in our report.

It is clear from the evidence that the NCC wanted to preserve the original design of the steps. I think this is probably one of the reasons why the proposed location for an elevator at the site was beside the steps. It was a matter of finding some kind of add-on, which would solve the problem of access without disrupting the original design.

[113] The NCC did not merely ask Mr. Martin to look into re-fits, however. He testified that one of the major purposes of the Robertson Report was to consult the community and the persons who needed access.

> **Mr. Martin**: The goal was not only to look at all of the existing site issues, but also to involve community and stakeholder groups in this process so that there would be both solicitation and receipt of feedback as to the options identified and whether they made sense.
>
> We approached a number of community groups and asked them to provide representatives for the study. The quite direct briefing from the NCC was to be as inclusive as possible to get this orchestration because the study would not be as useful if it wasn't done with the full participation of these groups.

The NCC was "adamant" about this aspect of the process.

[114] Mr. Martin's plan in writing the report was to determine what options were realistically available, and identify the advantages and disadvantages of each. This included various platform lifts and an elevator, both on and off site. He would then present these options to the "stakeholders" and obtain their views. The final report would take their views into account.

[115] The CHRC made much of the fact that the draft report recommended that an elevator at the steps would be the best way to provide access. There was an email memo from Danica Robertson to Sherry Berg at the NCC, dated 1:37 p.m. June 17th. It states that an elevator at the York Street Steps would be the best option. Ms. Berg responded at 4:39 p.m., the same day, with a request that the Daly site be added to the options listed in the report.

[116] Mr. Martin testified that there was a security problem. They accordingly took a look at possibilities along the entire block and discovered that there was a lease agreement with the developers of the Daly site to provide an elevator. There would be "passive security" available at the site. There would be a concierge. There would also be residents in the area.

[117] The draft report was circulated to a list of contact groups. This was followed by the rather controversial meeting on July 22, 2002. It seems to me that the meeting was rushed. The material was sent out on July 18th. Mr. Martin was apparently advised by Sherry Berg not to invite Mr. Brown, since he was a party to the proceedings before the Tribunal. Nor was he informed that the meeting was taking place.

[118] There were five representatives from the NCC at the meeting, along with two consulting architects. There was also a representative from the American Embassy. I think that this official presence had an effect on the other participants. They were outnumbered seven to four. The evidence nevertheless suggests that two of the outside participants were happy with the proposed solutions.

[119] The evidence of Mr. Martin was that the individuals at the meeting were polled. Each person at the meeting was asked to give their views. This seems to have included at least some of the representatives of the NCC. Mr. Martin felt that there was a complete consensus. This assessment leaves too much out. Mr. Warren, for his part, described the entire exercise as "window dressing". This may be too harsh, but it seems clear that the results were pre-ordained.

[120] There was a general discussion of the options identified in the draft report. The proposed elevator would require access along the side of the retaining wall, some distance from the street. This would create a 'dark alley' feel. There was a debate during the hearing as to the possible locations of the proposed elevator. There is apparently a basic rule that the entrance to an elevator should be provided at the base of the accompanying stairs. Mr. Brown was upset that this was not considered.

[121] The problem from a security perspective was the length of a walkway. It would have to be covered and heated to deal with the weather. This would attract street people, who naturally seek the comfort and protection of an enclosed space. This presents a serious concern with safety however, particularly in the case of the disabled community, which is more vulnerable than other segments of society. Mr. Martin summed up the attitude at the meeting in the phrase: 'you can put an elevator there but I wouldn't use it.'

[122] In the end, Mr. Martin thought there was "overwhelming support" for the Daly-site proposal. He prepared minutes after the meeting and circulated them. He asked for corrections. None were requested. There were apparently some further communications, but none that changed the consensus at the meeting. Mr. Martin did not feel that any further input was necessary.

[123] Mr. Martin testified that there would be many internal problems with the use of the Connaught Building. There are stairs that would have to be negotiated on both the ground and the upper floor, in order to access the elevator from the street. But he was fair about the matter. The possibilities were never really investigated.

[124] After the meeting, Mr. Martin wrote up his report. I have already gone through the options that it identifies, in reviewing the evidence of Mr. Rapson. There were some changes. The Daly site was added and was ultimately recommended as the best option. There were minor changes. The following line was added, in para. 2.2: "Mechanical options had been ruled out due to high construction and maintenance costs as well as vandalism concerns." This was added as a result of the conversation at the meeting.

[125] There was another change. There are security facilities for the American Embassy in the area. The draft report suggested that the presence of the RCMP in the general vicinity would also provide security at the steps. Mr. Martin was later advised that the police were not there to provide security for the steps. The report was accordingly changed.

[126] The parties disagreed about costs and aesthetics. Mr. Martin acknowledged that aesthetic considerations came into the matter. None of the options were discredited on that basis, however. He minimized the significance of costs. This was met on the other side with the observation that the NCC chose the cheapest alternative. Which was to do nothing at all. The York Street Steps remain exactly as they were.

[127] I am satisfied that cost was a significant factor. The report refers to the need to provide universal access without placing "an 'undue hardship' of financial burden on the NCC".

> The least imperfect, while still extremely problematic, option for providing on-site Universal Accessibility would be to reconstruct the south wall of the stair in a new location to allow a dedicated ramped access to an elevating device. This would involve considerable redesign of the stair[s] and the structure, at great cost to the NCC, and result in the introduction of elements that may conflict with site [i.e., sight] lines from the Byward Market to Parliament Hill. Considering that there will be a 24-hour accessible elevator at the near by Daly site, the overall construction cost for moving the wall and installing an elevating device, as well as the destruction of the aesthetic symmetry of the stair and site lines to Parliament Hill, could be considered extreme for the anticipated end use. The end result may be highly unappealing for users.

I think it is clear that cost and aesthetics were significant factors.

[128] Mr. Martin said that the only option that was not feasible from a cost perspective was to completely rebuild the stairs. The implications are troubling. If this is just another way of saying that access cannot be provided, it is not a satisfactory answer. The NCC cannot build the steps without access, however, and then simply argue that the design of the steps make it too expensive to provide it.

[129] Mr. Martin was not happy with the final solution but says that it was the best that could be done in the circumstances. Mr. Brown pointed out that Mr. Martin was not aware of the slope between the York Street Steps and the Daly site. The difference would only be significant to someone with a disability. He clearly felt that Mr. Martin failed to appreciate the significance of the distance between the York Street Steps and the Daly site.

(iv) Éric Hébert

[130] Éric Hébert has been an architectural assistant and an accessibility advisor, "un conseiller en accessibilité" with the NCC for 17 years. He is familiar with the principles of universal design and reviews site plans for accessibility issues. His job is to ensure that there is enough room for proper wheelchair access. He also conducts workshops on accommodations for people with various disabilities.

[131] Mr. Hébert is a member of the Inter-Ministerial Committee on Accessibility. He is also a member of an internal NCC committee, which deals with physical, hearing and visual disabilities. The internal committee deals with the accessibility issues that arise in the design and/or renovation of buildings. The NCC asked him to evaluate access at the York Street site in 1993 and 1994, and report on the possibility of a ramp. He was not involved in the original design of the stairs.

[132] This led to a meeting on November 22, 1994, between NCC and Public Works to discuss the York steps. Mr. Hébert testified that security was foremost. The minutes of the meeting suggest otherwise, however. They state that:

> … mechanical options had been ruled out due to higher initial construction costs and the expense of ongoing maintenance and operation as well as the financial implications of renovation and maintenance in the long term.

This suggests that expense was the major concern. There is a letter from the NCC in 1999 that would support this understanding. The minutes also make it clear that someone raised the possibility of using the Connaught Building. This was never followed up.

[133] Mr. Hébert then inspected the site. He had another meeting on December 13, 1994, with two persons from the Disabled Community Resource Centre and four from the NCC. Mr. Hébert advised the meeting that the slope of the hill made it very difficult to provide a ramp. The ramp

would need a slope of 8º and be approximately 150 m. in length. Both of these factors would present a challenge for anyone in a wheelchair.

[134] Mr. Hébert said that there were other problems. The ramp would have to run against the flow of pedestrian traffic up and down the steps. It was not a viable option. The problem was that this meant there was no access. Mr. Hébert wrote a memo to Mr. Kilgour, stating that alternative access would have to be provided at the steps. The memo says that the site should be "totalement accessible". "Les parcours alternatifs aux escaliers de la rue York permettra donc B toute la population de jouir de ce site."

[135] There were concerns about security, however, particularly in the alley way between the steps and the Connaught Building. Part of the problem comes from the fact that the elevator is an enclosed space. It is easy to hide things in such a space. There was a discussion of whether a transparent elevator would pose the same threat to safety. Mr. Hébert said that these concerns arose after the Oklahoma bombing. He was later corrected and thought it was another bombing that prompted these concerns. It does not matter. There was a change in thinking. The concerns were there.

[136] There were additional concerns with vandalism and with congestion in the narrow passageway between the building and the steps. There were trucks turning in the area. There would also be a problem at the top of the elevator, since it would require persons in wheelchairs to cross the flow of pedestrian traffic. The space for an elevator was very limited. But of course the CHRC says that the space was limited because of the design of the steps.

[137] Mr. Hébert testified that the decision not to provide an elevator was ultimately made on the basis of security. It was impossible to have 24-hour security at the site. Mr. Hébert felt that this was an important consideration, since persons who cannot climb the stairs are more vulnerable than other persons. Mr. Brown took issue with this in cross-examination. He is an ardent believer in self-determination, a reference to the right of the disabled to make their own

decisions in these matters. Mr. Hébert responded that the obligation of the NCC to protect the public takes precedence over the right of self-determination.

[138] Mr. Hébert said that the developer who took over the Daly site suggested that an elevator at that site could be used as an alternative means of access. There was a discussion of routes and the flow of pedestrian traffic in the area. Mr. Hébert argued that an elevator at the York Street Steps would primarily service Major's Hill Park. Traffic to the Chateau Laurier or Parliament Hill would be handled more effectively at the Daly site.

[139] Mr. Hébert was visibly uncomfortable in the witness box. He has loyalties to the NCC; but he also recognized that the York Street Steps simply do not accommodate those people who cannot climb the stairs. He agreed on cross-examination that persons with disabilities should be integrated into society. They should not be segregated. He recognized that the stairs divide people from each other.

(v) Katie Paialunga

[140] Katie Paialunga is employed as the Executive Director of the Independent Living Centre. The Centre provides support for persons with disabilities who live on their own. It has a clientele composed of persons with multiple disabilities, rather than persons with specific mobility problems. The Centre is often consulted by government and social organizations with respect to issues concerning persons with disabilities.

[141] Ms. Paialunga is paraplegic and uses a wheelchair. She has done accessibility audits and is familiar with the principles employed in the process. The NCC asked for her advice on the York Street Steps after Mr. Brown lodged his complaint with the CHRC. She attended the meeting on July 23, 2002, in her capacity as Executive Director of the Centre.

[142] There was a dispute about the appropriateness of consulting with the Independent Living Centre, and Ms. Paialunga in particular. Mr. Brown made the point that the Independent Living

Centre is not an advocacy group. Nor does it have a particular expertise in mobility restrictions. Ms. Paialunga agreed that she was not an advocate. She also agreed that she did not attend the meeting as a representative of the disabled community. She was simply offering her opinion, as an informed person, who had a good working knowledge of the needs of persons with disabilities.

[143] Ms. Paialunga felt that her participation in the meeting would come within her normal range of duties. Mr. Brown cross-examined her on this and clearly felt that she was there on her own. She did not discuss the matter with the Board of Directors until the final Accessibility Report came out and she found out that she would be testifying at the hearing.

[144] The minutes of the meeting held on July 23rd were put into evidence through Ms. Paialunga. She stated that the purpose of the meeting was to choose which of the options in the draft Accessibility Report was the best. The options were presented by Mr. Martin. All of the options were discussed and there was a consensus, after the discussion, that the Daly-site option should be recommended. Ms. Paialunga did not feel that Mr. Martin or any of the official participants favoured a particular option.

[145] The biggest concern was with safety. Everyone felt that the Daly site was the best site from this perspective. There were problems with the construction of an elevator at the steps. There were trucks. There was a dark alley way. Ms. Paialunga testified that she would not be comfortable going down the alley at night. She felt that a person could be trapped. She also had concerns about snow removal and the use of an outdoor elevator in freezing temperatures.

[146] There was an additional issue with respect to the use of the service ramp beside the Connaught Building, where the proposed elevator would be located. Ms. Paialunga felt that it was "degrading" to put the access for disabled persons in a service entrance. Mr. Brown countered that he would rather have access at the service ramp than go down the block and around the Connaught Building. He described this as a question of self-determination.

[147] Mr. Brown also cross-examined Ms. Paialunga with respect to the differences among those who have disabilities. He drew her attention to the extra effort that would be required of a quadriplegic, like himself, in negotiating his way through the Daly site and back up the other side to the top of the steps. Ms. Paialunga agreed that the level of effort required in using an alternative route was one of the major factors that should be taken into account in providing access.

[148] Mr. Vigna cross-examined Ms. Paialunga for the CHRC. He referred to the minutes of the meeting, which suggested that Mr. Martin began by summarizing the various options and advising the participants that he felt the best option was the Daly site. The discussion went on from there. Ms. Paialunga felt that the minutes were misleading. She resisted Mr. Vigna's suggestion that the Daly site was presented as the best solution.

[149] There was examination with respect to the precise order of what occurred at the meeting, which I do not propose to discuss. Elizabeth Norris, a representative from the Canadian Paraplegic Association, apparently suggested that the consultants had already concluded that the Daly site was the best option. This is backed up by the rest of the evidence. The testimony of Mr. Corush, Mr. Lajeunesse and Mr. Hébert makes it clear that the NCC and the consulting architects were already in favour of the Daly site.

[150] It was probably inevitable that the position of the NCC would find its way into the meeting. I accept the CHRC's position that the minutes and the Accessibility report make it clear that the Daly site was presented as the preferred option. There were nevertheless questions regarding the details of the various proposals. These questions were sincere and inquiring. There was an exchange of views.

[151] Ms. Paialunga acknowledged that expense was an issue. So were aesthetics. Her real concern, however, was with security. She said this was the decisive factor in recommending the Daly option. It was also the primary consideration in rejecting the installation of an elevator in the corridor between the existing steps and the Connaught Building. The participants at the

meeting discussed the possibility of using the elevator in the Connaught Building, but it was with conditions attached, since it was assumed that a security guard would have to come down and unlock the door whenever someone wanted to use the elevator.

C. Evidence For Public Works

(i) Idelle Matte

[152] Idelle Matte was called by Public Works to testify as to security issues regarding the site. She is the Corporate Security Director for Public Works and is responsible for the physical security of all leased government buildings in Canada. Ms. Matte testified that they have about 2800 buildings. They manage about two thousand of them.

[153] Ms. Matte is trained as a Security Analyst. She had a 3-week security course with the RCMP and has received training in physical security. She has a certificate from the American Society for Industrial Security and a diploma from Algonquin College. She was contacted by Raymond Charette, the property manager for the Connaught Building, after the complaint was referred to the Tribunal, and asked to do a security analysis.

[154] On April 29, 2004, Ms. Matte and Mr. Charette went through the Connaught building and did the analysis. They paid particular attention to the elevator in the north end of the building, which goes to the Minister's office. There were concerns with the security at this end of the building after the construction of the American Embassy. The building was not built to blast mitigation standards. Blast mitigation refers to the fact that a building can withstand an explosion (an external blast) without coming down. There was also a concern with the protective glazing on the windows of the building.

[155] There are four "security readiness levels" for federal government facilities. These levels were brought in after the events of Sept. 11th, 2001. Security readiness level 1, the minimal standard, would require controlled access at the entrances of the building. It would also require

identification. Level 2 would require guards at the entrances and visible identification. Visitors must be escorted. Mail must be scanned.

[156] The Connaught Building is at level 2. This is the same as the Parliament Buildings. Ms. Matte noted that the building is a "Mission critical" building. It is also a heritage building. This increases any concerns. In theory, at least, members of the public who used the elevator in the Connaught Building, would have to be signed in and escorted through the building.

[157] There are nevertheless different security zones. There may be, in ascending order, a public access zone, a reception zone, an operational zone, a security zone and perhaps a high security zone. This could conceivably have a bearing on the use of the elevator.

[158] The memo prepared by Ms. Matte contained comments on the use of the existing elevator. It does not comment on the possibility of building another elevator. She nevertheless says that her comments would be the same, if the same elevator shaft was used.

III. Law

[159] The present case raises a number of legal questions. These questions need to be answered before determining whether the case has been substantiated. They are also relevant on remedy.

A. Are the York Street Steps a "facility" or "service"?

[160] The first question concerns the wording of section 5 of the *Canadian Human Rights Act*, which reads as follows:

> 5. It is a discriminatory practice in the provision of *goods, services, facilities or accommodation* customarily available to the general public
>
> a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

> b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination. 1976-77, c. 33, s. 5.

The NCC argues that the York Street Steps are none of these things. It submits, in particular, that a set of stairs is not a "service" or "facility". The Steps accordingly fall outside the ambit of the *Act*.

[161] I do not think, for myself, that it is necessary to go into the definitions of these words. I agree with Mr. Harnden that it would be wrong to describe the physical steps as a "service" or "facility". That does not end the issue, however. Section 5 of the *Canadian Human Rights Act* refers to "the provision of goods, services, facilities or accommodation", and it is the act of providing these things that comes within the scrutiny of the *Act*.

[162] The legal issue on the wording of the *Act* is whether the NCC is providing a service in constructing and maintaining the steps. I have no doubt that it is. If the steps themselves are not a service, they provide one. This service consists of giving physical assistance to those who want to traverse the hill between Sussex Drive and MacKenzie Avenue.

[163] The NCC is accordingly providing the steps, which at least linguistically provide the service. This is a continuing act, which comes within the natural ambit of section 5. The service in question is "customarily available to the general public". It follows that the *Act* applies and the NCC is prohibited, as the custodian of the steps, from 'differentiating adversely' in relation to those who have disabilities.

B. Section 15

[164] The usual defence to an allegation that a Respondent has failed to provide accommodation arises under section 15(1)(g) and 15(2) of the *Canadian Human Rights Act*. The former provision reads:

> 15. (1) It is not a discriminatory practice if

> (g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto … and there is *bona fide* justification for that denial or differentiation.

The allegation is that the NCC has denied the Complainant access to the service provided by the York Street Steps.

[165] Section 15(2) elaborates upon the meaning of a "*bona fide* justification".

> (2) For any practice mentioned … in paragraph (1)(g) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

The practice in question is the construction of the York Street Steps without the provision of access for those who cannot climb the stairs. This practice has a *bona fide* justification if the provision of access would impose undue hardship on the Respondents, "considering health, safety and cost."

(i) Are the factors in s. 15(2) exhaustive?

[166] There are two specific questions that need to be answered in the present case. The first is whether factors other than health, safety and cost can be consulted in determining whether the provision of access would impose an undue hardship on the Respondents under s. 15(2) of the *Canadian Human Rights Act*? I think the answer is yes. The factors listed in the subsection are not exhaustive.

[167] The Superior Court of Québec dealt with the same question in *Syndicat des employées et employés professionnelles et professionnels de bureau, section locale 434 (FTQ) c. Gagnon*, [2005] J.Q. no 9368. There, the court was dealing with an employee who had been dismissed, in part because of medical absenteeism. The employee filed a grievance, relying expressly on the provisions in section 15 of the *Canadian Human Rights Act*.

[168] The facts of the case are not particularly helpful. At para. 39 of the decision, however, Justice Marcelin found that the list of factors in s. 15(2) is not exhaustive.

> Le paragraphe (2) de l'article 15 est descriptif et non limitatif. Il peut y avoir d'autres critères qui permettent une exigence professionnelle justifiée.

The decision of Justice Marcelin seems to rest on the simple observation that it is possible to conceive of legitimate employment factors—that is to say, *bona fide* occupational requirements— that do not come under the heading of health, safety and cost.

[169] A similar question arose in *Dominion Colour Corp. v. Teamsters, Local 1880 (Metcalfe Grievance)*, [1999] O.L.A.A. No. 688, 83 L.A.C. (4th) 330, where the arbitrator reviewed the equivalent provision in the *Ontario Human Rights Code*. The factual issue in the case was whether the employer was able to accommodate a pregnant employee who could not work in an area exposed to lead.

[170] The arbitrator in *Dominion* found that the statutory factors listed in the relevant provisions were not exhaustive. She relied, in this regard, on the decision of Madam Justice Wilson in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489. There, the Supreme Court of Canada expressed the view that the "anticipated reaction of the workforce and the possible impact on general employee morale" should be considered, in determining whether an accommodation would impose "undue hardship" on a Respondent. This would take a Tribunal beyond the factors in s. 15(2).

[171] In *Central Alberta Dairy Pool*, Madam Justice Wilson writes that a list of factors is not "intended to be exhaustive". I think the implication is that any attempt to list the full range of factors that might apply in determining what constitutes undue hardship is destined to fail. This is an important observation in the immediate case.

[172] The factors in s. 15(2) appear to be employment factors. Health and safety are workplace issues. The subsection does not capture the range of issues and concerns that arise in the

construction of buildings, the preservation of historical sites, and the provision of public amenities. It seems to me that the kinds of considerations that arise in the case of the York Street Steps are substantially different than the issues that arise in the case of hiring or promotion.

[173] I do not believe that the subsection excludes the possibility of other factors. Section 15(2) does not say that health, safety and costs are the only factors that may be considered, in deciding what form of accommodation is required. This is significant in the present case because some of the factors that naturally arise in the context of accommodation arise outside s. 15(2).

[174] There may be an additional point here. The *Canadian Human Rights Act* is remedial. I think it is a mistake to interpret those provisions that place responsibilities on Respondents too rigidly. The objective is to remove discrimination, not to create artificial criteria, which only impede any assessment of the rights and responsibilities that come into play in the area.

(ii) The mandate of the NCC must be respected

[175] The principal concern in the present case is that the National Capital Commission has its own mandate under the *National Capital Act*. This gives rise to legitimate concerns, which need to be consulted in determining the issues that arise under section 15 of the *Canadian Human Rights Act*. The scope of these concerns can be considered, if necessary, some other time.

[176] The *Canadian Human Rights Act* has a special status, which takes it out of the sphere reserved for ordinary legislation. Other statutes must be read in a way that conforms to both the general purpose and express provisions of the *Act*. The NCC is obliged to carry out its mandate in a manner that is consistent with the obligations of the Crown under the *Canadian Human Rights Act*.

[177] I think there is a corollary to this proposition, however. The *Canadian Human Rights Act* does not exist in isolation from other legal instruments that might have a bearing on a particular situation. I am not aware of anything in the *Canadian Human Rights Act* that would annul or

somehow diminish the responsibilities of the NCC under the *National Capital Act*. On the contrary, I believe the principle of statutory consistency requires that the *National Capital Act* and the *Canadian Human Rights Act* be read as complimentary pieces of legislation.

[178] It follows that the statutory obligations of the NCC must be taken into account, in deciding what constitutes reasonable accommodation under s. 15(2) of the *Canadian Human Rights Act*. This is significant because it became apparent in the course of the hearing that historical and aesthetic factors were important considerations in the case.

[179] The law states that the determination of what constitutes reasonable accommodation requires a balancing of factors. This can only be done after the parties have participated in a proper process of accommodation, which brings these factors to the surface. As I understand it, the NCC believes that it has a legal obligation to consider historical, cultural, and aesthetic factors in deciding how to develop the sites that come under its administration.

[180] I think the legal concept of accommodation is large enough to include the idea that access should be provided in a way that respects the architectural and aesthetic values that come into play at a particular site. I accept the evidence of the architects that it is important to protect the "view-shed". I accept the evidence that steps should match the American Embassy. These kinds of considerations come within the normal parameters of such projects.

C. The *prima facie* test

[181] The second question raised by section 15(2) concerns the *prima facie* test. I recently dealt with the test in *Sosnowski v. PWGSC*, 2005 CHRT 47 (2005/12/09) and do not propose to add much here. The present case is nevertheless distinguishable from *Sosnowski*, since it arises under section 15 of the *Canadian Human Rights Act*.

[182] *The conventional analysis in the law of human rights holds that the Complainant must establish a prima facie* case of discrimination. There must be some evidence that the

Complainant requires accommodation. Once this is established, the burden of proof in the case shifts to the Respondent, who is required to establish that this would impose an undue hardship under subsection 15(2).

[183] I have made it clear in *Sosnowski* that I think the conventional analysis is wrong. In my view, the fundamental burden of proof--sometimes called the "legal" or the "persuasive" burden—in a case of discrimination remains on the person alleging the discrimination throughout the course of the hearing. The prosecuting party must prove its case. The legal burden does not shift.

[184] The CHRC takes a different position. Mr. Dufresne referred me to *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.*, [2003] 3 S.C.R. 228, at para. 53, where the Supreme Court certainly seems to assume that the burden shifts to the Respondent. The problem is that the Court does not seriously discuss the issue. It is clear, moreover, at the end of the decision, that the Supreme Court places the legal burden on the Complainant.

[185] I prefer the position of the NCC. Mr. Harnden referred me to a passage from the loose-leaf edition of William Pentney, ed., Discrimination and the Law (Thompson Carswell), at §15.2(d)(iii). Once a *prima facie* case has been made out, Mr. Pentney states:

> ... the respondent bears the responsive onus "of coming forward with some evidence if the [respondent] is going to avoid the risk of a finding being made against him" per McDonald, J. in *BaseFort Patrol Ltd. v. Alberta Human Rights Commission* (1982), 4 CHRR D/1200. In a secondary sense, however, the "ultimate" or "legal" burden of proof never shifts from the complainant.

It is difficult to imagine a more basic rule of law, which guarantees the justice and fairness of the process.

[186] The original purpose of the *prima facie* test was to determine, at the close of the case for prosecuting party, if there was a case to meet. If a *prima facie* case was established, the court

went on to decide the case on the merits. The Respondent was required to lead evidence *or* take the risk, *per* McDonald J., of a finding against it. A Respondent who calls evidence is essentially working on the assumption that there is a *prima facie* case.

[187] I have already explained this aspect of the matter in *Sosnowski*.The *prima facie* test was historically employed at the close of the case for the prosecuting party. It was never designed to be used at the end of the case, after both sides have led evidence. The problem is that the use of the test at this stage of the process inevitably obscures the real task of the Tribunal. That is merely to determine, on all the evidence, whether the Complainant has proven his case on a balance of probabilities.

[188] It is not clear why so much of the caselaw seems to adopt the position that the burden of proof—and here I mean the legal burden—shifts to the Respondent once a *prima facie* case has been established. The only explanation I can think of is that many Tribunals have implicitly assumed that the Complainant has met some burden in meeting the *prima facie* test. This is clearly wrong.

[189] The evidence is not weighed on the *prima facie* test. There is no burden of proof. The Complainant may have a doubtful case, a poor case, dare I say a bad case, and have no difficulty establishing a *prima facie* case. The Complainant may go on and lose the case on the merits, even if the Respondent calls no evidence. Why, then, should the legal burden shift? I cannot find a satisfactory answer to this question. There is nothing in the *prima facie* test that is sufficient to displace the burden of proof and place evidentiary obligations on the Respondent.

[190] This does not change the statutory requirements under the *Canadian Human Rights Act*. Section 15(2) does not, however, place an explicit burden on the Respondent. It merely states:

> (2) For any practice mentioned … in paragraph (1)(g) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

I think this is directed as much to the Tribunal as the parties. It admonishes the members of the Tribunal not to speculate.

[191] The defence provided by s. 15(2) is merely that it would be unreasonable to expect the Respondent to accommodate the Complainant.From a practical perspective, a Respondent will probably find it difficult to establish this without leading evidence. Any onus on the Respondent is a rhetorical or explanatory onus, however, rather than a burden of proof. I say this because there must be cases where it can be established that accommodation would cause undue hardship without the Respondent calling any evidence whatsoever.

[192] Mr. Pentney prefers to use the distinction between legal and "evidentiary" burdens. This performs much the same function. It places an explanatory obligation on the Respondent, while keeping the legal burden on the Complainant. The point is the same in either case. If the Respondent fails to provide an explanation under s. 15(2), a Tribunal may draw an adverse inference against it. In law, at least, this kind of inference can be construed as positive proof of discrimination.

[193] I am not sure that there is even any reason to go this far. After all, if the sum total of the evidence before the Tribunal is that the Complainant is entitled to accommodation, and the Respondent has not provided an explanation, I cannot see why the Tribunal would dismiss a complaint. Indeed, I would have thought that section 15(2) requires that the complaint be substantiated.

[194] There may be other ways of analyzing the situation. I remain convinced, however, that the legal burden remains where it was at the beginning of the process. As Mr. Pentney writes, in the same passage:

> ... the distinctions involved in this issue, between statutory defences of exceptions and other defences, and between legal and evidentiary burdens must be scrupulously maintained if Board of Inquiry proceedings are to satisfy commonly accepted standards of fairness ...

It follows that a Tribunal should be careful not to assign evidentiary obligations to the Respondent that might have the effect of reversing the legal burden.

D. *Meiorin:* the principles of universal design

[195] Then there is an issue with respect to the general approach that should be adopted to the present case. The CHRC has asked me to apply the criteria in *British Columbia (Public Service Employee Relations Commission v. BCGSEU,* [1999] 3 S.C.R. 3, usually referred to eponymously, as "*Meiorin*". Aside from the factual differences between the two cases, I think the present case is relatively simple and does not require that kind of analysis.

[196] Some of the comments in *Meiorin* are nevertheless more general in their application. At para. 68, for example, the Supreme Court writes:

> By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible. Courts and tribunals must bear this in mind when confronted with a claim of employment-related discrimination. To the extent that a standard unnecessarily fails to reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced.

There is a point of comparison in the physical standards adopted by the NCC with respect to the developments that come under its control.

[197] All of the parties have accepted that the principles of universal design provide the framework that should be used in determining the form of accommodation that is appropriate in a particular case. The NCC regularly advises other government departments of their obligation to respect and abide these principles.

[198] There is a legal point here. The principles of universal design derive from the same notion of equality that lies at the heart of the *Canadian Human Rights Act*. It seems to me that

the principles of universal design can be seen as a natural elaboration of the notion of equality, outside the law, in the field of architecture and planning. I do not see why they cannot be given the same kind of force that custom and practice is given in other areas of the law.

[199] There is a minor issue here. It became evident during the hearing that the principles of universal design can be formulated in a number of ways. This does not seem to violate the general consensus that exists as to the basic tenets that should be included in any compilation of these principles. For the purposes of the present case, I think it is best to make use of the appendix attached to Mr. Rapson's report, which contains a convenient summary of these principles.

E. The duty to accommodate: reasonableness

[200] The caselaw dealing with accommodation has focused primarily on the "*bona fide*" exceptions. For myself, at least, I think it is better to begin with a general statement of the law. That statement is simply that the Respondent is required to provide reasonable accommodation under s. 15 of the *Canadian Human Rights Act*. It would be unreasonable to require something further.

[201] I agree with this position of the NCC on the point. The obligations in the *Act* do not go beyond the requirement that a Respondent provide reasonable accommodation. The NCC is legally obliged to provide Mr. Brown and those who cannot climb the York Street stairs with a reasonable alternative. That is all it is obliged to do.

[202] The Supreme Court of Canada has already recognized that there is only one standard of accommodation. In *Commission scolaire régionale de Chambly v. Bergevin* [1994] 2 S.C.R. 525, at p. 546. Cory J. writes, in referring to the *Charter of Human Rights and Freedoms*:

> It is important to remember that the duty to accommodate is limited by the words "reasonable" and "short of undue hardship". Those words do not constitute independent criteria. Rather they are alternate methods of expressing the same concept.

Justice Cory then refers to an equivalent passage in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, at 984.

[203] The Supreme Court has made it clear that the concept of undue hardship does not create an independent legal standard. That legal standard is reasonableness. Any interpretation of the term "undue hardship" that imposes an unreasonable burden on a Respondent cannot be supported.

[204] The difficulty seems to lie in the fact that the reasonableness of a particular form of accommodation is relative. It depends on the situation. The concept of undue hardship accordingly provides a measuring stick, which a Tribunal can use to determine when the Complainant is asking too much.

[205] I would assume that Parliament chose undue hardship as the standard arbiter because the provision of accommodation will inevitably entail some level of hardship. This is inescapable. I do not think it was the intention of Parliament, however, to do away with the standard of reasonableness.It is the standard of reasonableness that is definitive and not the concept of undue hardship. Mr. Harnden has relied on *Hutchinson v. Canada (Minister of Environment)*, [2003] 4 F.C. 580, where the Court held that the question of undue hardship does not arise if a Respondent offers a Complainant reasonable alternatives. I think this is another way of saying the same thing.

[206] The decision in *Hutchinson* nevertheless illustrates that there are at least two lines of defence. The first line of defence is that the Respondent has acted reasonably. The NCC submits in the present case that it has provided the Complainant with reasonable accommodation. The second line is that the demand for accommodation would impose undue hardship on the Respondent under s. 15(2). The legal implication is that this is unreasonable.

[207] The distinction between the two lines of defence seems to have collapsed in the caselaw, which has tended to rest everything on the statutory exception. It is true there is an overlap.

There are elements of both lines of defence in the case before me. The major argument of the NCC is that the elevator at the Daly site provides reasonable accommodation. The defence of undue hardship is nevertheless there, in the background.

[208] The only point I wish to make is that the two lines of defence are distinguishable. It follows that the first line of defence does not require any evidence of undue hardship. This may seem advantageous to a Respondent, since it keeps the burden of proof in the case squarely on the Complainant. The difference is illusory, however, if the Tribunal keeps the legal burden of proof where the law has historically said that it must be kept.

[209] The determination of what is reasonable is specific to the circumstances of each case. I have been referred to the loose-leaf edition of The Duty to Accommodate in Employment (Canada Law Book), ed. Kevin D. MacNeill, at §. 11:30, where the editor cites authority for the proposition that the determination of what constitutes undue hardship requires a balancing of factors and "a process of weighing". All of the relevant factors must be taken into account and weighed against each other, in deciding whether a particular form of accommodation is reasonable. It seems to me that there is a question of proportionality bound up in this. This requires an exercise of judgement, which is the particular responsibility of the Tribunal, and goes to the heart of the adjudicative process.

[210] These comments should not be misapplied. I was also referred to *Re Mount Sinai Hospital and Ontario Nurses' Association* (1996), 54 LAC (4^{th}) 261, where the Nurses' Association was seeking a nursing position for an injured employee. The panel of arbitrators held, at p. 273, that the cost of accommodation must be compared with the resulting benefit, to determine whether it constitutes an undue hardship. They then suggested that the hardship would be undue in cases "where the disadvantage removed by accommodating an employee would be very small in relation to the cost of eliminating it."

[211] This kind of analogy is of little assistance in the immediate case. The NCC created the disadvantage that it is now charged with removing. It would be wrong to let it rely on its own

failure to fulfill its responsibilities and argue that the disadvantage is too small to justify the cost of correcting it. It is against public policy to allow a party to raise its own failure under the *Act* as a defence to a complaint of discrimination.

F. The duty to consult

[212] The duty to accommodate includes a duty to consult. The CHRC has submitted that the NCC "must demonstrate that it followed proper process." This is probably the major issue in the case.

[213] Most of the discussion of the duty to consult in the caselaw deals with employment. In *Conte v. Rogers Cablesystems Ltd.*, (1999) T.D. 4/99, at para. 77, for example, this Tribunal held:

> It is the employer who has charge of the workplace and thus is expected to initiate the process of accommodation. At the very least, the employer is required to engage in an examination of the employee's current medical condition, the prognosis for recovery and the employee's capabilities for alternative work.

I think this provides some idea of the obligations on a Respondent in cases concerning access.

[214] The analogy between cases of employment and cases of physical access is imperfect. The obligation to accommodate an employee arises out of the legal relationship between an employer and an employee. There are responsibilities and duties on both sides. The obligations of a public agency like the NCC to provide access to a public park are free-standing and different in kind.

[215] The most relevant authority in the area appears to be the decision of the Supreme Court of Canada in *Grismer*, indexed as British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 S.C.R. 868. In *Grismer*, the Superintendent of Motor Vehicles cancelled the Complainant's driver's licence because he

suffered from a condition known as "homonymous hemianopia", which "eliminated almost all of his left-side peripheral vision". Anyone with this condition was barred from holding a licence.

[216] The issue in the case was accommodation. The B.C. Council of Human Rights ordered the Superintendent to give Mr. Grismer an individual assessment to determine whether he was entitled to a licence, and whether restrictions should be placed on any licence. The case was appealed, and eventually made its way to the Supreme Court, which applied the *Meiorin* criteria.

[217] The *ratio decidendi* of the case is much simpler, however. At para. 44, Chief Justice McLaughlin wrote:

> This case deals with no more than the right to be accommodated. It does not decide that Mr. Grismer had the right to a driver's licence. It merely [page894] establishes that he had a right to be assessed. That was all the Member [of the B.C. Council of Human Rights] found and all that we assert. The discrimination here lies not in the refusal to give Mr. Grismer a driver's licence, but in the refusal to even permit him to attempt to demonstrate that his situation could be accommodated without jeopardizing the Superintendent's goal of reasonable road safety.

The Superintendent of Motor Vehicles had not offered "so much as a gesture in the direction of accommodation".

[218] The situation before me in the present case concerns the public at large rather than an individual. There are nevertheless parallels with *Grismer*. Mr. Brown and the CHRC says that there was no real investigation of the situation. I do not accept this. I nevertheless agree that the NCC did not enter into a proper round of consultations. There was no real airing of the views of the people who needed the accommodation.

[219] The parallels with *Grismer* are real. At para. 43 of *Grismer*, the Chief Justice writes that the Superintendent of Motor Vehicles:

> ... was obliged to give Mr. Grismer the opportunity to prove whether or not he could drive safely, by assessing Mr. Grismer individually.

The failure to consult with Mr. Grismer and give him an opportunity to address the matter was itself discriminatory. "It follows that the charge of discrimination under the *Human Rights Act* was established."

[220] I take it from *Grismer* that the first obligation to accommodate is obligation to enter into a proper process of consultation. The Respondent must inquire into the matter and obtain the views of the persons who require accommodation. I would go further and say that there is an element of natural justice in this process. There must be an open exchange of views and the persons who require accommodation should be given an opportunity to reply to any concerns that might prevent the Respondent from providing the accommodation that they are seeking.

[221] The NCC has an obligation to inform itself of situations that might potentially discriminate against persons who have disabilities. There is a further duty to investigate these situations and canvass the possible solutions. This includes a duty to openly and sincerely consult the community of individuals that may be affected. The process of consultation must be meaningful: the legitimate concerns and views of the community must be taken into consideration, in deciding what accommodation is appropriate.

[222] I realize that the defence before me is that the Respondent has provided reasonable accommodation. This may or may not have a bearing on the duty to consult. I would nevertheless think that some degree of consultation is a necessary element in any process of accommodation. It seems to me that a Respondent will have to discuss the matter with the person seeking accommodation, if only to determine what form of accommodation is appropriate. In any event, the process followed in the present case was insufficient.

[223] I would make one final comment. The NCC recognized, in all fairness, that public consultation is an integral part of barrier-free design. It also cited caselaw for the proposition that the process of consultation is "collaborative". The other parties should be given an ample opportunity to participate. This is all to the good. At the end of the day, however, all of the parties need to recognize that the NCC is the custodian of the York Street Steps. It is the NCC

that has the legal responsibility to make decisions with respect to the design, control and maintenance of the site at the York Street Steps.

IV. Liability:The Case Against The NCC

[224] The law of the person and human rights starts with the recognition that everyone is equal. It follows that any analysis of the present case must start with the proposition that the NCC's obligation to maintain and develop the National Capital Region must be interpreted in a way that treats persons with disabilities the same as other persons. Everyone has the same right to access under s. 2 of the *Act*.

[225] The NCC has an obligation to accommodate those persons who cannot climb the York Street Steps. This obligation includes a duty to consult, in some manner, with individuals, associations, and groups who can voice the views and concerns of these persons. There is no rigid rule as to who should be consulted.

[226] The main issue before me in the present case is whether the process of consultation was legally adequate. It was not. I am satisfied on a balance of probabilities that the NCC failed to meet its obligations under the *Canadian Human Rights Act*. It does not seem right to say that the process of consultation was "unreasonable". It seems more accurate to say that it was insufficient.

[227] I am also satisfied, on a balance of probabilities, that the NCC is discriminating against Mr. Brown and other persons with disabilities. There are a number of observations that contribute to these findings.

A. The York Street Steps are not accessible

[228] The first observation is that the York Street Steps are not "accessible". This is a factual and legal finding.The NCC has not provided any accommodation for people who cannot climb the stairs. Mr. Brown and people with disabilities have no means of climbing the hill and

gaining entry to Major's Hill Park at the York Street Steps. The Steps accordingly discriminate against them.

[229] The NCC implied in its final submissions that it was unnecessary to provide access at the Steps. The Respondents argued that the flow of pedestrian traffic up the steps is generally towards the Chateau Laurier and Parliament Hill, rather than Major's Hill Park. The Daly site would better serve these persons. There is no issue about any of this. Even Mr. Rapson agreed that the route through the Daly-site was preferable for people who were going to Parliament Hill.

[230] The position on the other side is simply that the *Canadian Human Rights Act* prohibits the NCC from differentiating between people who can climb the steps and people who cannot climb them. The issue is parity. The NCC cannot say that persons with disabilities do not need access to Major's Hill Park at York and Sussex. If people with disabilities do not need access to Major's Hill Park, the same can be said of those who do not have disabilities. The public interest is the same in both cases.

[231] The question before me is accordingly quite simple. It is whether the NCC has discriminated against those persons with disabilities, like Mr. Brown, who want the same access to Major's Hill Park as other members of the public. The response from the NCC is that the Daly site is sufficient. The evidence does not bear this out.

[232] Mr. Rapson's evidence was that the Daly site elevator was simply too far. It is not "equitable" and therefore contravenes one of the basic principles of universal design. The distance to be traversed—by those who have the most difficulty traversing it—presents a real problem. It seems to me that any extra burden should be placed on the individuals who are best able to deal with it.

[233] Mr. Martin testified that the Daly site would require an additional travel distance of 284 metres. That is 284 metres that other people do not have to travel. The provision of an elevator a hundred metres down the road does not provide meaningful accommodation. Half that

distance would be too far. I am satisfied that the *Canadian Human Rights Act* requires accommodation within the close proximity of the steps and not a block away.

[234] Perhaps it is a matter of language. I do not understand how it can be said that the elevator at the Daly site provides a person in a wheelchair with access to Major's Hill Park at the York Street Steps. Some things are common sense. The Daly site is another location altogether. The elevator at the Daly site may provide access to Major's Hill Park from down the street, but it is stretching the facts to say that it provides accommodation at the York Street Steps. There is simply no access at the York Street Steps.

[235] The evidence is really that persons with disabilities have to make a detour that others do not have to make. They have to take another route and go another way. This is not a reasonable form of accommodation. The truth is that the NCC simply assumed from the beginning that it would be sufficient to provide access at the Daly site. This was a legal error. I do not see how it can be said that the provision of the elevator at the Daly site provides the accommodation required by the *Canadian Human Rights Act*.

[236] The facts of each case are different. It is common ground, however, that the NCC has a duty to provide reasonable accommodation. I think it follows, purely as a matter or logic, that a Respondent should provide the access required by people with disabilities as near as possible to the place where it is required. It would be unreasonable to do anything less. Any access should be equitable and proximate, and in keeping with the principles of universal access.

[237] The social issue here is separation. The *Canadian Human Rights Act* is based on the principle that people should be treated equally. The implication is that people should be treated, as much as possible, in the same way. It runs against the spirit of the *Act* to separate persons with disabilities from other people in situations where it is unnecessary to do so. This is a matter of dignity, physically and psychologically. It reminds people with disabilities that "they don't fit in".

[238] I am satisfied on the facts of the present case that any access at the York Street Steps should be provided in the immediate vicinity of the steps, and probably on site. There is some room for interpretation. It seems to me that the Connaught Building might be considered part of the same site as the York Street Steps for the purposes of the *Canadian Human Rights Act*.

[239] There was at least a suggestion in the evidence that the provision of access at the Steps themselves would impose undue hardship on the NCC.This was fragmentary and vague, however. It was not sufficient to provide a defence.

B. The process of consultation was deficient

[240] The second observation is that the process of consultation was deficient. The NCC was obliged to seek the input of groups or associations who can be legitimately said to represent persons with disabilities. The interests of the disabled community need to be considered throughout the process of design and construction.

[241] The NCC's response is that it consulted the disabled community in designing the York Street Steps. There were meetings with the identified "stakeholders". This included the City of Ottawa Accessibility Advisory Committee, the Canadian Paraplegic Association, the Disabled Persons Community Resources, and the Independent Living Centre. There was some attempt to obtain the views of the disabled community. The truth, however, is that these discussions were sparse and incomplete.

[242] The process of consultation did not proceed very far. It seems to have been designed, intentionally or not, to bring these participants on side. There was only one meeting, on July 23, 2002 that could be considered a proper consultation. The conduct of the meeting has been questioned and there was nothing like the transparent public process that one would hope to see in such a case.

[243] The meeting was essentially closed. Mr. Brown was not invited. It was suggested by the NCC that this was at the suggestion of a conciliator for the CHRC. I find this difficult to comprehend. It appears that the NCC did not want him at the meeting. He had become an adversary.

[244] There are two views of what occurred at the meeting. Ms. Paialunga testified that there was a consensus that the Daly site was the best option. I suppose it is a matter of degree. There was no compulsion, but it is clear that the views of the NCC and the consultants infiltrated the process. The process favoured the Daly site. Mr. Warren and the Municipal Advisory Committee were never really given an opportunity to express their views.

[245] The process of consultation was constrained by many factors, not the least of which was that the meeting on July 23, 2002 proceeded on a false set of assumptions. One of these assumptions was that the elevator at the Daly site would provide a reasonable form of accommodation. This was never open for discussion. Another assumption was that the Connaught Building was out of the question. Another was that the parties had to choose between the options set out in the Robertson Report.

[246] These kinds of limits are out of keeping with the kind of inquiry contemplated by the *Canadian Human Rights Act*. It was clear from Ms. Paialunga's testimony that she felt the choice was between the Daly site and the elevator beside the steps. It was one or the other, and what could she do? She was concerned about the safety of an elevator at the steps and did not want to lose the Daly option.

[247] Mr. Brown and Ms. Paialunga debated the philosophical side of the issue. Mr Brown felt that the principle of self-determination should take precedence over other considerations. If the only feasible location for an elevator at the steps was between the Steps and the Connaught Building, he was in favour of it. Access down a dark alley is better than no access at all. Persons with disabilities should be able to decide for themselves whether they want to use the access that is provided.

[248] There is a real disconnection here, however. I do not see why there had to be a choice between an elevator at the Daly site and the York Street Steps. The elevator at the Daly site was a separate matter. It may or may not have been built, whatever was done at the Steps, and it was wrong of the NCC to put this kind of choice to the disabled community. I am satisfied that this seriously undermined the veracity of the process.

[249] I am not sure that I even understand why the elevator at the Daly site would be included in a list of possible solutions to the problem of access at the York Street Steps. I know that the NCC was looking at the entire block, rather than the junction of York Street and Sussex Drive. This kind of approach is generally inappropriate in the context of access, however, which is usually specific to a particular site.

[250] I realize that it was not an easy situation for the NCC. It does not really matter at the end of the day. The NCC was obliged to consult with the relevant parties, and keep consulting, until all of the reasonable alternatives were exhausted. It is impossible to know where a collaborative, open-ended round of consultations might have led.

C. The real problem lies in the design of the York Street Steps

[251] The third observation is that the real problem lies in the design of the York Street Steps. I think this was the broader position taken by the witnesses for the Complainant and the CHRC. Mr. Rapson, for example, felt that there was an opportunity to address the accessibility issues when the new steps were designed. This was a "missed opportunity."

[252] Mr. Warren also testified that the Daly site was presented as the only "viable option" at the meeting on July 23, 2002. This was frustrating because it did not deal with the real problem, which was the failure to build an accessible set of stairs. The Daly elevator was the best option that was presented, but only "because the steps themselves were not made accessible at the time they were built as they should have been." None of the options presented at the meeting in

July 2002 dealt with the real problem, which was the original design of the steps. There was very little that the Municipal Advisory Committee or anyone else could do.

[253] I think the testimony of Mr. Hébert and Mr. Martin backs this up. The NCC, for its part, has essentially admitted that the York Street Steps were constructed without access, on the rather vague understanding that an elevator would probably be provided at the Daly site. This merely proves the point: the NCC was prepared to build the steps without access, on the basis that it could somehow remedy the situation in the future. It seems to me that this idea openly contravenes s. 5 of the *Canadian Human Rights Act*.

[254] The matter was compounded by the subsequent conduct of the NCC. Although there were consultations after the complaint was filed, Mr. Martin testified that there was no question of rebuilding the Steps. That was off the table. This merely put the real problem out of reach. The difficulty with the options presented at the meeting on July 23, 2002 were really secondary. If the proposed elevator, for example, was down a dark alleyway and potentially unsafe, that can be attributed to the design of the Steps. The problem lies in the initial construction.

[255] I want to be fair. The testimony of Jerrold Corush makes it clear that the NCC studied the problem of providing access when the stairs were built. The problem is that it did so on its own, without a proper round of consultations, and without appreciating the full extent of its obligations under the *Canadian Human Rights Act*. These obligations existed at the location of the steps: the decision to make use of the elevator at the Daly site was really a way of side-stepping them.

[256] None of the parties disputed the fact that the York Street Steps were built without any access. This is where the discrimination lies and I do not see how the provision of an alternative route through the Daly site corrects it. Even if the development of the Daly site has corrected the situation—and it has not—the NCC has discriminated against the Complainant in the years between the completion of the steps and the construction of the Daly elevator.

D. Conclusions

[257] I have reached the following conclusions. The York Street Steps are a public amenity, built in a prominent location, for the benefit of visitors and residents alike. One of the benefits that they provide is access to Major's Hill Park, which boasts a scenic view of the Rideau locks and Parliament Hill. This access has not been provided to people who are disabled.

[258] The NCC required that an elevator be installed at the Daly site. There were advantages to the use of the Daly site. The elevator would be available twenty-four hours a day. The York Street site is more exposed to the elements than the Daly site; the Daly site would be safer and probably more convenient for people who want to visit Parliament Hill. It is all beside the point. The situation at the Steps remain the same as it was before the Daly site was constructed.

[259] The Daly site provides little more than a detour. The "access" provided by the elevator at the Daly site requires people who have difficulty walking, for example, to walk around the Connaught Building. Where is the equity, fairness or logic in this? There may be an elevator in the middle of the detour, but the detour itself is unfair and does not provide a reasonable form of accommodation.

[260] The York Street Steps present a barrier to people with disabilities. It is evident that people who cannot climb the steps do not have the same access to Major's Hill Park as other people. The NCC has not provided reasonable accommodation. I accordingly find that the NCC, in building and maintaining the steps, has discriminated against Mr. Brown and people with disabilities under s. 5 of the *Canadian Human Rights Act*.

[261] Mr. Corush testified that the "project" at York and Sussex was to get people up the hill. The finished steps invite visitors and residents alike to climb the hill and investigate the park, the view it holds, and the precincts of the Parliament Buildings. It is the NCC that has invited the public to enjoy the area. Under the *Canadian Human Rights Act*, it must extend this invitation to those who cannot climb the steps.

[262] The caselaw recognizes that it is impossible to determine what form of accommodation is appropriate without a process of inquiry and consultation that explores the matter. There are engineering issues that must be considered. There are aesthetic, historical, security and safety issues. There is a point, at least, where costs have to be considered.

[263] The consultations that took place in the past were insufficient. They did not explore the matter properly. They did not give the public or the disabled community a real opportunity to contribute to the process. They did not exhibit that level of engagement that characterizes a meaningful process of consultation. The party with the responsibility to decide the issue must be willing to change its view or alter its approach to the matter.

[264] The important thing at this late stage is to rectify the situation. I think, moreover, that the solution is relatively simple. The NCC needs to return to the process of accommodation and continue its consultations. The other parties have a legal obligation to participate sincerely and honestly in the negotiations. At this stage, at least, it is not for the Tribunal to determine what form of access would constitute reasonable accommodation.

[265] This deserves emphasis. The NCC remains the effective owner of the site. It has all the prerogatives that come with that ownership. At the end of the day, it is the NCC that has the responsibility and indeed the privilege of deciding on the appropriate accommodation. This does not reduce its obligations. The process of accommodation must be collaborative.

V. Liability:The Case Against Public Works And Government Services

[266] I am also satisfied on a balance of probabilities, that the failure of Public Works and Government Services to participate properly in the process of accommodating Mr. Brown is a discriminatory form of conduct. This constitutes a contravention of s. 5 of the *Canadian Human Rights Act*. Public Works has raised a number of issues in its defence.

A. Public Works is not immune from a finding of liability

[267] The first issue is preliminary and requires explanation. Mr. Rapson testified in the early part of the hearing that the Connaught Building, which is apparently "owned" by Public Works, provided the natural means of providing access at the site. This led the CHRC to make a motion that Public Works be added as a party to the litigation. I allowed the motion.

[268] In its written argument, Public Works has now taken the position that it was not a party to the original litigation. This, it submits, prevents the Tribunal from making a finding of liability against it. Mr. Lester then goes on to argue that the Complainant and the CHRC cannot seek a remedy against Public Works without a finding of liability.

[269] I have already dealt with the first point, in adding Public Works Government Services Canada as a party to the complaint. Section 48.9(2)(b) of the *Canadian Human Rights Act* clearly contemplates the addition of parties. I would note that the hearing was adjourned and Public Works was given ample time to inform itself of the facts and particulars of the case. It can no longer complain that it was prejudiced by the fact that it was not a party to the original litigation.

[270] The emphasis in the *Canadian Human Rights Act* is on finding a remedy. If that means bringing in an agency of the Crown, in the circumstances that arise before me, I think the *Act* directs me to do so. The whole point of adding Public Works as a co-Respondent was to make sure that all of the possible solutions to the problem could be properly investigated. The Connaught Building cannot be considered for the purposes of providing access unless Public Works is a party to the hearing.

[271] I nevertheless accept the submission of Public Works on the second point. I think that Mr. Lester was right in his reading of section 53(2) of the *Canadian Human Rights Act*, which only gives the Tribunal the authority to make an order against "the person found to be engaging or to have engaged in the discriminatory practice." This only shifts the inquiry, however, and

raises the question whether the failure to assist the NCC and ultimately the CHRC in resolving the complaint is sufficient to ground liability. I think it is.

[272] The Federal Court had no difficulty with a finding of liability against a union in *Goyette v. Voyageur Colonial Ltee*, [1999] FCJ. No. 1678; 2000 CLLC 230-021, on the basis that it had negotiated agreements with the employer that were discriminatory. Pinard J. relied on the decision of the Supreme Court in *Renaud v. Central Okanagan School District No. 23*, [1999] 2 SCR 970, at page 989, where the court commented that a union "which causes or contributes to the discriminatory effect incurs liability."

[273] I think the decision in *Goyette* reflects the fact that there are situations where it is impossible to deal adequately with a complaint without bringing in a third party. I would not want to take this too far. The alternative, however, is unsatisfactory. I would not want to accept as a principle that there are cases where accommodation cannot be provided, in spite of the fact that it is easily available through some means external to the parties. Public Works can take some comfort in the fact that what can be reasonably expected of a third party may be less than what can be expected of the principal Respondent.

[274] There are two possibilities here. One is that there is a general duty to facilitate accommodation. The failure to fulfill this duty is enough to substantiate a complaint against a third party. On this reading of the *Canadian Human Rights Act*, it is enough that Public Works refused to co-operate with the other parties in determining whether it was feasible to use the Connaught Building. The liability of Public Works may be limited to the failure to co-operate; but it is nonetheless liable.

[275] There is no need to go this far in the present case, however. The other possibility is that there is enough of a nexus between Public Works and the NCC to impose a special duty on Public Works. I recognize that the two agencies, if I can use that term, are separate legal entities. They are nevertheless both emanations of the Crown and serve the public interest.

[276] There is a doctrine of law that says the Crown is indivisible. I think the idea behind this doctrine is helpful, at least by analogy, in the circumstances of the present case. The decisive factor is that the Crown is in some sense the ultimate owner of both the York Street Steps and the Connaught Building. The stewardship of the two parcels of land may be under separate hands, but the property and object of ownership is in some sense the same.

[277] The legal personalities of the NCC and Public Works Government Services derive in some sense from the same source. In all the circumstances of the case, I think the nexus between the NCC and the Department of Public Works is sufficient to require that the Department assist the NCC in its investigation of the Connaught Building as a possible location for an elevator. The choice between giving effect to the fundamental rights of the person or allowing them to be frustrated by the technical division of ownership.

[278] It seems to me that the provision of access in the present case is an obligation that attaches, in some sense, to the property in question. The Crown is in some sense the ultimate owner of both the York Street Steps and the Connaught Building, and it is the stewardship of the two properties—I must say, in the larger public interest—that has been called into question in the present case. I believe this ownership can be inferred from the evidence, though the matter was not dealt with as extensively as it should have been in the hearing.

B. It is too late to complain of a defect in the process

[279] There is a further argument from Public Works that there is a failure of natural justice. This argument is based on the failure of the CHRC to provide proper particulars.

[280] I do not see any prejudice here. The questions posed by counsel for the CHRC throughout the course of the hearing were simple and straight-forward. The allegation is that Public Works refused to participate in the efforts of the other parties to find a means of providing access at the steps. The facts are few, but that is because Public Works refused to participate in the inquiry under the *Act*.

[281] The argument from Public Works comes too late. The matter should have been raised much earlier. I find that Public Works waived any right to object, in choosing not to raise the issue until the end of the process, when it is too late to rectify the deficiency. Any defect has, in any event, been cured by the exchange of ample submissions on all sides.

[282] The one aspect of these submissions from Public Works that I would accept is that the CHRC has over-reached itself, in arguing that Public Works has discriminated against Mr. Brown by failing to provide access through the Connaught Building. This goes too far on the evidence, as well as the particulars, and it is premature to say whether Public Works has any obligation to provide the use of its premises for the purposes of access.

C. The merits of the case against Public Works

[283] I do not accept the submission of counsel that Public Works seriously considered the possibility of allowing public access through the Connaught Building. The blame for this lies squarely on Public Works. The letter from Mr. Charette, the property manager for the Building, essentially pre-empted any discussion of the issue.

[284] Public Works led evidence at the hearing with respect to its security concerns. This was new, however, and was not available to the parties until Public Works was added as a party to the complaint. The Department has nevertheless taken a consistent position. To quote from its written submissions:

> The principal concern that Public Works had in offering access through the Connaught Building was that security issues could not be adequately dealt with.

This was highlighted by the testimony of Ms. Matte.

[285] The submissions go on to suggest that members of the public would have to pass through "various security measures, including security screening, personal identification, passes and baggage checks." It would be a security risk to have employees from the Canada Revenue

Agency in the same elevator as members of the public. There was also evidence with respect to some of the architectural and physical problems that stand in the way of using the Connaught Building.

[286] These concerns must be weighed and evaluated, along with a host of other considerations, in deciding whether it would be appropriate to use the Connaught Building to provide access at the York Street Steps. The problem is that Public Works has treated these concerns as a legal bar to any discussion of the possibility of accommodation. I reject this position. The process of accommodation contemplated by the *Canadian Human Rights Act* and the caselaw cannot be circumvented so easily.

[287] The Complainant and the CHRC are entitled to a finding of liability. There is a sense, at least, in which this finding is preliminary. As Mr. Lester and Ms. Kikuchi put it, in their submissions:

> ... before the Connaught Building option could properly be considered a reasonable accommodation or an effective remedy, it is clear that a consultation process with the various stakeholders must be undertaken.

This requires further negotiations between the parties.

[288] I am satisfied that Public Works and Government Services has a legal obligation under the *Canadian Human Rights Act* to participate in the efforts of the NCC to solve the larger problem. Although I am not taking any position on the question whether the Connaught Building should be used to provide access at the York Street Steps, it remains one of the possibilities. It should be openly and properly considered, without conditions. I will let the parties decide how far that consideration should go.

[289] I will leave aside the question whether the NCC might itself be liable, in some sense, for its failure to pursue the matter further. I nevertheless do not see how, on the evidence before me, the NCC could fulfill its legal duty to investigate the possibility of accommodation without

seriously inquiring into the possible use of the Connaught Building. It seems to me that both the NCC and the CHRC should have insisted, far more vigorously, that Public Works participate in the process of accommodation.

VI. Issues On Remedy

[290] The caselaw makes it clear that the Tribunal has the authority to supervise the remedial part of its hearings. This is a normal part of its process. I will accordingly retain jurisdiction to deal with any issues arising out of the present decision and the question of remedy.

[291] As I understand it, Mr. Brown is seeking the following:

1. an order that the NCC make the existing York Street Steps accessible;

2. a written apology;

3. compensation for hurt feelings;

4. a barrier free design accessibility audit of all the property administered by the NCC;

5. training for all of the personnel of the NCC working on accessibility issues.

[292] The CHRC is seeking:

1. a letter of apology for Mr. Brown;

2. damages for pain and suffering;

3. damages for expenses incurred;

4. an order that the site be made wheelchair accessible;

5. an order that the NCC work with the CHRC in determining a policy on accessibility.

[293] There are a number of issues here. The decision in *Stevenson v. Canada (Canadian Security Intelligence Service)*, [2003] F.C.J. No. 491 holds that I cannot order an apology. As a general rule, I think the question of compensation for pain and suffering should be dealt with promptly. It is not clear to me whether the CHRC speaks for Mr. Brown on the matter of compensation and expenses.

[294] The parties are directed to advise me in writing how they wish to proceed. The request for an order that the NCC make the York Street Steps accessible is premature.I think it is sufficient to prepare a formal order, as I have suggested, requiring that the NCC return to the process of consultation, identify the possible alternatives, and propose some form of reasonable accommodation. The other parties would have the right to return to the Tribunal for direction if they feel that the NCC has refused to consider reasonable alternatives.

[295] There is a political side to these consultations. They should involve the public. One would think that the Municipal Advisory Committee, Mr. Brown, and the CHRC should all be full participants in the process. There are other parties, departments and individuals who might also be consulted, whether it is those persons responsible for security in the area, or the representatives of the American Embassy. It is ultimately for the NCC to decide who should be included in the process, subject to any objections from the other parties.

[296] There is another point. It seems to me that the process of consultations can only go forward on the basis that some form of accommodation can be provided at the steps. The only issue is what form of accommodation is reasonable. If any of the parties have difficulty with this understanding of the situation, they should apply to the Tribunal for further directions.

[297] The parties are obliged to act in good faith. They have a legal obligation to try and reach a consensus within a reasonable timeframe. If there are any questions as to the process that should be followed in resolving the matter, or the parties need direction on a specific issue, they can apply to the Tribunal for directions.

VII. Summary Of Major Findings

[298] The complexity of the case is such that it may be of assistance to summarize the principal findings and directions in this decision. They are as follows:

1. The complaint has been substantiated against the NCC.The York Street Steps are not accessible.This is a contravention of s. 5 of the *Canadian Human Rights Act*.It has not been established that making them accessible would impose an undue hardship on the NCC.

2. Public Works Government Services Canada failed to co-operate in the process of accommodation. This is a discriminatory form of conduct. The complaint has accordingly been substantiated against Public Works. The nexus between the NCC and Public Works, both of which are emanations of the Crown, is sufficient to require the co-operation of Public Works.

3. The construction of the elevator at the Daly site does not satisfy the Crown's obligation to accommodate Mr. Brown and other persons who cannot climb the stairs.

4. The NCC is legally obliged to provide accommodation to the point of undue hardship in the immediate vicinity of the steps. This area includes the north end of the Connaught Building.

5. The duty to accommodate includes an obligation to participate in a meaningful dialogue with the party that requires accommodation. There is a duty to make inquiries and consult with the other parties.

6. The NCC had an obligation to investigate the possibility of using the Connaught Building. Public Works had an obligation to co-operate in the investigation. Both Respondents failed in their obligations. I am satisfied that Public Works is independently liable for its failure to co-operate with the other parties in making the Steps accessible after the complaint was filed.

7. This takes me to the existing situation. The NCC is obliged to make the York Street Steps accessible, up to the point set out in the *Act*. In doing so, the NCC has an obligation to consult with Mr. Brown, the CHRC, and the disabled community generally. The process of consultation should be open and meaningful. Decisions should not be made until after the consultation takes place.

8. Public Works is legally obliged to participate in the process of consultation.

9. There is a duty on Mr. Brown and any other participants in the process of consultation to participate sincerely in the process, inform the Respondents of their concerns, and accept a reasonable offer of accommodation.

10. The legal mandate of the NCC must be respected. All of the participants in the process of consultation must recognize the legitimate concerns of the NCC, with respect to the symbolic, aesthetic, historical, and financial implications of any accommodation. I do not believe the factors listed in s. 15(2) of the *Canadian Human Rights Act* are exhaustive.

11. The consultation that took place in 1994 and 1999 was selective and insufficient. It was not the kind of thorough, searching process required by the law. The most obvious example of this is the failure to seriously address the possibility of using the elevator shaft at the North end of the Connaught Building. There are other issues, however, that should be investigated, such as the precise location of any proposed elevator at the site of the steps.

12. I am satisfied that the NCC sincerely believed that the provision of an elevator at the Daly site would provide reasonable accommodation. This may help to explain why the NCC did not engage in the kind of open, exploratory discussion that the law requires in 1994 and 1999. Mr. Brown, Mr. Warren and Mr. McMahon, all of whom are unable to climb the steps, found the attitude of the NCC patronizing.

13. It would be premature to comment on the kind of accommodation that would be appropriate. The expertise that is needed in architecture, planning, access and security lies in the hands of the parties, who will have to return to their discussions and determine what form of accommodation is required. The parties are directed to include a schedule for consultations in the formal order.

14. I want to be clear that the obligations on the Respondents are limited to the provision of reasonable accommodation. This is worth repeating. The standard is reasonableness. The reference to "undue hardship" in the *Canadian Human Rights Act* does not change this standard.

15. It is clear at the same time that the NCC has no obligation to accommodate the Complainant and people with disabilities if the accommodation in question would impose an undue hardship on it.

16. If the Complainant and Commission feel that the Respondents have not fulfilled their duty to consult openly and sincerely with the other parties, or acted

unreasonably, they are entitled to return to the Tribunal. All of the parties are entitled to request the assistance of the Tribunal, if issues arise that require its direction.

17. The parties are accordingly directed to return to their negotiations. Once these negotiations are completed, and the NCC has determined what accommodation it is willing to provide, it is directed to deliver a formal letter of intention or other notice of proposed action to the other parties, setting out its plans for rectifying the situation. This document shall be signed by the Chair of the NCC, the Chair's designate, or an officer of the agency, with the authority to bind the NCC.

18. The other parties will have 30 days to bring the matter formally before the Tribunal, if they feel that this process will not resolve the complaint under the *Canadian Human Rights Act*. All of the parties have the right to come back to the Tribunal at an earlier time, should that be necessary.

19. The parties are directed to advise the Tribunal within the next 30 days as to how they would like to deal with the request for compensation and any other outstanding matters.

20. There should be a written order, in the circumstances of the case. I would accordingly direct the CHRC to prepare a formal order, setting out the terms and conditions on which the matter will proceed. If the parties cannot agree on the terms of the order, I would direct them to contact the Tribunal within 45 days of the date of this decision.

[299] This has been an arduous case and I would like to thank all counsel for their able assistance. I look forward to hearing from the parties.

[300] I regret to say that Geoffrey Lester, lead counsel for Public Works, died unexpectedly before he was able to make his final submissions. I am sure that counsel and the parties would like me to recognize the work he did on the case. Mr. Lester was a passionate litigator and earned the respect of everyone in the hearing.I think his colleagues must miss his intensity, frankness and intellectual rigour.

Signed by

Dr. Paul Groarke
Tribunal Member

Ottawa, Ontario
June 6, 2006

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T760/1003

Style of Cause: Bob Brown v. National Capital Commission and Public Works and Government Services Canada

Decision of the Tribunal Dated: June 6, 2006

Date and Place of Hearing: May 18 - 21, 2004
June 23, 24, 29 & 30, 2004

Ottawa, Ontario

Appearances:

Bob Brown, for himself

Philippe Dufresne / Giacomo Vigna /, for the Canadian Human Rights Commission
Ikram Warsame,

Lynn H. Harnden / Sébastien Huard, for the Respondent, National Capital Commission

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