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# **Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities**

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**EVIDENCE**

**Thursday, April 11, 2019**

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**Chair**

**Mr. Bryan May**



## Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities

Thursday, April 11, 2019

• (1145)

[English]

**The Chair (Mr. Bryan May (Cambridge, Lib.)):** Good morning.

Pursuant to the Centennial Flame Research Award Act, the committee is happy to welcome back the 2017 recipient of the award, Mr. Benjamin Fulton.

The Centennial Flame Research Award is granted each year by this committee to a Canadian with a disability to conduct research on the contributions of one or more persons with disabilities to the public life of Canada or the activities of Parliament.

On Tuesday, September 26, 2017, this committee selected Ben as the recipient of the 2017 edition of the award. Ben's research focuses on the contribution of David Lepofsky, who we have all met because he has appeared before this committee. He is a respected Crown counsel, professor of law and disability rights advocate.

Incidentally, Mr. Lepofsky appeared again before this committee last fall during the review of Bill C-81, and I understand he's actually speaking, I think as we speak, on Bill C-81 in the Senate, which is great.

Committee members received a copy of Ben's report three weeks ago and again this Monday.

Thank you, Mr. Fulton, for submitting your report. I've had a chance to read it. I know we're all excited to have you back here to present your report.

I will turn the floor over to you. We're going to give you roughly 15 minutes to discuss your report, sir.

**Mr. Benjamin Kane Fulton (Recipient, 2017 Centennial Flame Research Award, As an Individual):** I'd like to introduce myself to the committee, tell you a bit about my relationship with David, how I got to know him and what prompted me to submit my proposal to do this research. I want to give you a bit of the background and some of the methodology of how I conducted my research and wrote the report. Basically, I'd like to furnish the committee with a lot of things that you wouldn't necessarily get just from reading the report itself.

I met David in the summer before I started law school at Osgoode. As a blind law student, I thought it would behoove me to reach out to a blind lawyer and ask for some tips and tricks of the trade as I

started my legal education. He said that he had about 15 minutes to meet me between the meeting he had at Osgoode and a plane he had to catch. About half of that meeting took place in the halls and the elevator at Osgoode. I realized then that David was a very busy, very effective and efficient person, making use of every spare minute of time.

Throughout my time at Osgoode, I experienced many challenges. Interestingly, to the best of my knowledge, I was the first fully blind student to attend at Osgoode since David Lepofsky had graduated in 1979. They had other visually impaired students, but there are some unique challenges to being completely blind. Most notably, I use a screen reader.

The school had a recorded lecture policy available to the students, but unfortunately, it had been mounted on a platform where you needed a mouse button to click the play button. I worked with the techies at Osgoode, at York University, at Microsoft itself, for months. There was really no workaround, and the only way to do it was to change the platform that the school was using.

Ironically, about 10 years before I started my studies, Osgoode had also undergone a major renovation. It was aesthetically very pleasing. People commented on how open the floor design was and how they had made great use of natural light. Unfortunately, they had also compromised the accessibility of the law school, not just for visually impaired people, but they also sacrificed some wheelchair accessibility.

Most notably, and somewhat disturbingly, is that many of the classrooms have an intricate staircase system that goes from the back to the front. It's difficult for anyone to navigate, let alone anybody with some challenges. It presupposes that nobody in a wheelchair would need to access the front of the class to speak to a professor, but even more disturbingly, that nobody with a disability would be at the front of the class as a professor. This sort of exclusion of thinking about people in positions of power as having a disability is part of the stigma that advocates like Mr. Lepofsky and I are fighting very hard to change.

So, I started a student-run organization at Osgoode. I called it the Daredevils in Training Organization.

Although originally we focused a lot on visual impairments, we lobbied on behalf of all students with a disability. We were successful at convincing the administration to change the way that they mounted their recorded lecture policy, so I was able to make use of those lectures in second and third year. Another student who was with me at the time also appreciated that.

We also worked with them on the physical structure of the space, and that was ongoing when I left. They were putting in tactile wayfinding, and seeing what they could do about the wheelchair situation, certainly with the acknowledgement that something needed to be done.

When I was in second year going into third year and looking at internships and other opportunities available, I noticed this Centennial Flame Research Award. I couldn't think of somebody who would be more fitting to write about than David Lepofsky, so with his support and the support of Roxanne Mykitiuk, who was a professor at Osgoode who supported my application, I submitted my proposal.

• (1150)

I, of course, knew about David's work with the Constitution, the Charter, Supreme Court decisions, the Attorney General and, of course, his infamous work with regard to the TTC. What I didn't realize was the amount of work that he's actually done with this committee. It must have been a bit surprising to see his name on that application. Certainly, he met the criteria, surpassed it in so many ways and definitely deserved to have this honour.

My methodology really focused on a few interviews with David, although I'd heard him speak many times before. He's actually given more guest lectures than some of the professors whose courses I actually took. I just wanted to flesh out my understanding a little bit more with some one-on-one time with him. This was something that I approached him about before submitting my proposal. I wanted to make sure that, if I was approved, it wouldn't come as a surprise to him that I was now expecting so many hours of his very valuable time.

Following those interviews, I then read his collected works and engaged in this endeavour of noting up David Lepofsky to see how he had been referenced by other academics. I came up with an overwhelming plethora of journal articles, chapters in textbooks—both legal and sociological—Supreme Court decisions and decisions from other tribunals. In the end, I had to pick a very small handful of what was available to get the general picture of how his work was being received within the wider community.

With all of this research and knowledge in hand, I expanded my focus of interviews to the people who had worked with David Lepofsky over the years. I interviewed a number of professors at Osgoode and a few people who had worked with Barrier-Free Canada and other organizations that he'd been involved with. I also talked to Jerome Bickenbach, who was a little surprised to hear somebody asking about an article that he'd written about 30 years ago. Nonetheless, I felt it was a really important part of the process, and it gave me a really good idea of David's character and how he worked with other people.

It was really important for me to see that relationship of how David worked with other people because, in this report, what I really wanted to mostly do was furnish advocates with tools that they could use to help with their own advocacy endeavours. This piece is, in many ways, a mini biography about David Lepofsky and his work. As he's been very inspirational to me, I wanted to be very inspirational to other advocates. Beyond just providing inspiration, I wanted to provide that education and provide a model that some aspiring advocates could take if they were interested in establishing another organization or advancing their own advocacy initiatives in some way. I didn't just present the model. I also tried to break that down into its individual elements and show how these components interact so that aspiring advocates could then pick and choose which aspects of Lepofsky's work they would want to incorporate in their own initiatives.

For instance, one thing that was very important—and I'm hoping this came through clearly in the report—was having a simplified organizational structure. This is a strong part of David's philosophy, and it's something that I strongly agree with. I've been involved in a number of organizations, and I've seen many of the challenges involved with regard to the organizational structure. Keeping it simple, I think, was just the best way to go, and I'm hoping that this came across. I also tried to focus a little bit on some of the foibles to give this a little bit of a human spin and also to maintain that inspiration to advocates in their moments of failure. You're not going to win every single battle.

• (1155)

I felt it was important to look at what doesn't work, and why it didn't work and how it didn't work, to help people avoid some of their own trial and error. Also, it was to illustrate that the strategies and tactics that worked well in one situation may not work in another situation. That may not be the fault of the advocate, but just the circumstances of the situation. I wanted to really provide people with something they could take away and use to advance their own advocacy. I'm hoping that came through in the report. I'm really looking forward to the publication of this on the website. I have to get that link to my mom, because she wants to put it on Facebook.

**The Chair:** Thank you very much, Mr. Fulton.

We're going to be interrupted, I understand fairly soon, so I want to go right to questions. We don't have a formal structure for this kind of thing, but what I'm thinking is a few minutes for each side. Members, you can decide among yourselves who that is, and if there are even follow-up questions. We want to be very flexible.

I will say to the committee that once the bells begin to ring, I'm going to have to ask for permission to go in camera to do our committee business. We do have a few things that are somewhat critical to keep on track with, such as reports and budgets. Can we agree that if we get to bells, it's something we can continue with? Is there any discussion on that?

Okay, we'll come to that when we come to that.

Mr. Hogg, you can start us off.

Let's keep the questions as brief as possible. We want to give everyone an opportunity to speak.

**Mr. Gordie Hogg (South Surrey—White Rock, Lib.):** Thank you very much, Mr. Fulton. You asked whether or not it had a human spin tied to it, and it certainly did. Referencing failures and how we learn from them, certainly in the political world, we see that quite regularly and hopefully learn from them as well.

I was particularly touched by parts of the report. You talked about the courtroom, that when the power went out, the court became disabled. I think that was a wonderful metaphor. You followed up by saying that without the proper tools to work, everyone is disabled. That emphasized it. It alters the way people perceive accommodations.

Can you talk a little more about the combination of those three, and how our perception becomes subjective, in terms of those judgments around disabilities?

• (1200)

**Mr. Benjamin Kane Fulton:** Yes. A famous quote from Milton is, “Doth God exact day-labour, light denied?” I think that encapsulates the whole idea. Anybody would be required to have the tools at their disposal. In my own experience at law school, I received a lot of files in the first year that I found to be inaccessible. I had to go through the student services department to get them translated from the PDF documents over to Word documents. At the end of first year, I was able to get a grant to cover a lot of technology and training to go with that technology.

In second year, when I was serving as the secretary for student government, I was given a host of formats—JPEGs, PDFs and all sorts of things. I knew how to perform the optical character recognition. I had the software and the ability to do that. In a way, I became more able.

When we're thinking about accessibility, it's accessibility to an individual. It ends up being a very tailored process, in some cases. There's a lot of talk about the concept of universal design, and some question as to whether that's truly possible, or if the only universal design will need an inherent level of flexibility to accommodate individual differences. What I, as one blind person, may be able to access currently, with my technology and training, would be inaccessible to another person. Of course, this is just within this one focus, this one specific disability. There's a host of them.

What we really should be working towards as a society is creating consultation groups that can speak about the host of challenges—mobility challenges, mental challenges, hearing and sensory challenges. There is a host of ones that I probably can't even think of, because I'm not a specialist in that field. We need more specialists in that field, and those consultations need to happen with builders and constructors at the creation of the infrastructure. If we take this proactive approach, I think we'll be incorporating a lot more people, and giving better effect to a commitment to diversity.

**Mr. Gordie Hogg:** Thank you.

Another part I really enjoyed is where you talked about Lepofsky. One of the differences he had was that he would take the opposite side of a debate and flesh out the arguments, and he always seemed to win.

Could you take the opposite side of the argument you just gave us and see if you can still win?

**Some hon. members:** Oh, oh!

**Mr. Benjamin Kane Fulton:** I guess that would perhaps involve me defining a commitment to diversity as not a desirable goal.

**Mr. Gordie Hogg:** You're not winning.

**Mr. Benjamin Kane Fulton:** You'll have to give me some time on that.

**Mr. Gordie Hogg:** Okay, I appreciate it.

Thank you.

**The Chair:** John.

**Mr. John Barlow (Foothills, CPC):** Thanks very much.

It's a real pleasure having you here, Ben, especially on a topic like Mr. Lepofsky, who all of us has had a chance to get to know quite well over the past year or so.

I really found it interesting in your report when you talked about how successful he was at advocacy and he had a very clear plan on how that would work. Now I know what to expect as we go through the Senate with Bill C-81 and what he's going to do. Maybe he'll be upset that you gave all his secrets away in your report.

I know many of us have spoken to David over the last couple of weeks regarding Bill C-81 as it goes through the Senate.

In your report, you talked a little bit on the need to strengthen Bill C-81 and some opportunities there to add some teeth to it. When you're going through this report, with everything that you've experienced, what are your two or three top priorities as Bill C-81 goes through the Senate? What are some of the things that you'd like to see as part of that bill to strengthen it, maybe from your own experiences and from your discussions with David?

**Mr. Benjamin Kane Fulton:** One of the most important things is the enforcement mechanism. You mentioned teeth, and that needs to be in place. It needs to be spelled out very clearly how to identify the infractions. That requires appointing watchdogs and making sure that they have the resources to monitor the industry to the level that it will require to make this implementation effective.

After having the systems in place to observe and catch the infringement, then there needs to be something in place for remedies to the infringements. What do we do with companies that are not following these guidelines? That needs to be spelled out very clearly.

I think that institutional involvement will need to happen. There should be collaboration between the institution that is set up to monitor the act and the companies that are required to comply with it, so when an infringement is observed, the institution can work with the company to make effective remedies. Having as much of that spelled out beforehand will streamline the work and make that more efficient.

Following those two mechanisms, what do you do with recalcitrant companies that just don't want to comply? That's when the enforcement needs to bring out the hammer and maybe have some punitive measures that are designed to convey the message that non-compliance is not an option. Though again, I think that should be a little farther down the ladder. We should be working proactively to implement as many of these changes beforehand. If it's not beforehand, when we do catch them, we should look at more amicable ways of resolving the situation.

● (1205)

**Mr. John Barlow:** I think what you're touching on as to what's wrong—in my opinion and the opinion of many stakeholders—is there are not enough metrics in the legislation that talk about when barriers are going to be removed, what those barriers are and what the consequences are if those guidelines aren't met. I think I'm paraphrasing what you're saying.

An addition to that is that in the bill, any federal department can ask for an exemption from any of this legislation. From what you're saying, that is something that should be removed because you can't have winners and losers; you can't have some departments or businesses that are going to abide by barrier-free Canada legislation and some that don't have to.

**Mr. Benjamin Kane Fulton:** Yes, that's basically exactly it.

I think, just to prepare you for your dealings with David Lepofsky, he's probably going to say everything I just said.

**Mr. John Barlow:** Thank you.

**The Chair:** Thank you.

Cheryl.

**Ms. Cheryl Hardcastle (Windsor—Tecumseh, NDP):** Thank you very much.

I've had the pleasure of getting to know David Lepofsky as a friend as well as a valuable resource for my work. I'm the critic for people living with disabilities and worked very hard on amendments for Bill C-81 with a variety of different advocates, but nobody stands out like David Lepofsky. I'll ask you to comment on that in a minute.

I would love to see him in the Senate right now advocating the way that he tried to with this committee about the important amendments that are needed to Bill C-81. He recognizes them. He seems to have, people say, a legal mind, but I like to say it's a legal intuition. He understands how something needs to be applied. He can advance the application of a legal theory.

I read your report, Ben, which is such an entertaining read. It was so easy to get through. It was really a pleasure for me. I congratulate you on that piece of work.

When the Council of Canadians with Disabilities challenged VIA Rail in court about accessible passenger cars, that to me exemplified some of the work that he's done, the force of the advocacy that he had and how adamant he was that we could not have exemptions in Bill C-81.

That's another aspect, that some of these federal jurisdictions like VIA Rail could be exempt and that you don't have the ability to

appeal. I really hope he'll be able to come through with the Senate and that the Senate will recognize that these are absolute needs.

Maybe you could talk about how, when you want to achieve something with a decision-making body, with someone who holds the power, sometimes people hold back on their advocacy work because they don't want to seem adversarial. They want to be friends and try to get on your side to get you to change your mind. I feel that David had this good instinct about that.

Maybe you would like to comment on some of the experiences you had in putting this report together. Maybe you could talk about how you recognize some of those tightropes that people have to walk when they are advocates and are trying to help create change from within, and then seeing that it won't work that way, they have to take a harsher approach.

● (1210)

**The Chair:** Before you answer, I just want to request that you keep the answer fairly brief. We do have bells.

**Mr. Benjamin Kane Fulton:** Under two minutes?

**The Chair:** Two minutes would be perfect, thank you.

**Mr. Benjamin Kane Fulton:** I'll try to do it in two minutes.

Quickly, then, it's interesting to note that in the CN case, David was actually not a counsel in that at all. He saw a situation that he thought should be resolved in a certain way, and he basically wrote a case comment that was published. This was what was so inspiring about Lepofsky's work, the way he would take different approaches at different times. I tried to have that come through in the report to show people there is this plethora of tools that you need to choose from, and you need to know when to choose which tools.

This was something David was able to have a really strong influence on, without really getting as involved as if he were actually representing one of the parties in the case. He wasn't even amicus curiae or at any level of the court. Nonetheless, Justice Abella read the comment and cited it with approval in her decision. This shows you that the really powerful message can come through in a way that's not adversarial at all. He didn't direct this to anybody; it was just being published for anybody with a legal interest to read and it got picked up.

One thing David said that was really important was about his role. He sees himself as an educator, so he's not really trying to convince anybody of anything. He's just trying to give everybody the information and the facts and to lay them out so that they can make their decisions.

In that CN case, what he did was to explain properly how the legal test should proceed. It wasn't so much that the company was seeking an exemption as much as it was about when to look at the effects of making a decision on the cost of implementing the infrastructure. They were trying to say that what needed to happen was to look at the cost for them to change from what they had to what they were being asked to change to. But the real argument—and this was the one that was made and that won the day in court—was that they needed to look at how much extra it would have cost for them to do it right the first time. Those laws were in place when they bought the inaccessible train cars. They should have been thinking about it, and the fact that they didn't, didn't give them an excuse to later say that it would cost too much now to change it.

It really just pinpointed the very specifics of the legal test and how to perform that legal test, and that changed the whole outcome.

**The Chair:** Thank you very much, sir.

I hate to do this because I think we could talk about Mr. Lepofsky all day and still have questions and comments, but we do have to go in camera to do some committee business.

On behalf of the entire committee, I want to thank you for being here today. Thank you for applying for this grant, and thank you very much for the work you have done on this.

•(1215)

**Mr. Benjamin Kane Fulton:** Thank you for choosing me to receive the award.

**The Chair:** We'll suspend for a moment to allow Mr. Fulton to leave, and then we will go in camera to get some of the committee business done very quickly.

*[Proceedings continue in camera]*

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