



DISABILITY LAW PRIMER
ARCH Disability Law Centre

Current to September 2013. Anyone intending to rely on this primer should conduct their own research for updates in the legislation and jurisprudence.

A French version of this Primer has been prepared by the Centre for Legal Translation and Documentation. The analysis is based on an English version of the law.

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Chapter 1

Introduction and Overview

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October 2013**

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Introduction and Overview

With great pleasure, I introduce the revised edition of the ARCH Disability Law Centre *Disability Law Primer*. With this *Primer*, ARCH's lawyers have produced an initial reference for advocates as they undertake to deliver legal services for persons with disabilities. The *Primer* is not a comprehensive review of the law in each area that it addresses. Rather, it is intended to provide a foundational base for further research and study in disability law.

The first edition of the *Primer* was produced in 2003 and reflected ARCH's practice at that time. It was important to update the articles in the 2003 *Primer* to ensure legal currency, but also to address those areas of disability law that are currently important to the disability community and which have formed the areas of priority in ARCH's work for the past few years.

This *Disability Law Primer* reflects an approach to disability law practice that considers the needs for legal services regarding which persons with disabilities consult ARCH. Since 2010, ARCH has focused on the following areas of disability law: services to persons with intellectual disabilities; education law; attendant services; the right to make one's own decisions; and access to justice for persons with disabilities. Based on the mandate of ARCH as one of Ontario's community legal clinics, our practice incorporates human rights and poverty reduction analyses. We hope to have captured this focus in the scope of this newest edition of the *Disability Law Primer*.

The *Primer* contains nine chapters that we have tried to cross-reference with one another whenever appropriate. Chapter Two, *Providing Legal Services for Persons with Disabilities*, is a foundational piece for the *Primer*. The contents of this article have formed the basis of many ARCH continuing legal education workshops and presentations, including modules produced in partnership with the Law Society of Upper Canada for its licensing program. This chapter

provides basic information about disabilities and how disabilities are treated in law. Because the concept of disability and relevant laws evolve over time, the chapter will always be a work in progress. ARCH welcomes comments and questions regarding the provision of legal services to clients with disabilities.

Chapter Three, entitled *Human Rights and Disability Law: A Primer*, outlines the particular importance of human rights law for persons with disabilities, whether in applications to the Human Rights Tribunal or in human rights arguments in support of other administrative law claims. This chapter focuses primarily on Ontario's provincial human rights statute but provides an important lens through which to examine and analyze other areas of law addressed in this Primer. The chapter aims to provide an introduction to Ontario human rights law and offers a starting point for legal practitioners to conduct their own research into the specific issues facing their individual clients.

Chapter Four, *Capacity to Instruct Counsel: Promoting, Respecting and Asserting Decision-Making Authority*, covers intrinsic aspects of the solicitor-client relationship. The chapter focuses on addressing the needs of clients whose capacity may be in issue, regardless of the legal issue for which they seek assistance. The chapter covers professional responsibilities, how to determine whether a client is capable to instruct counsel and includes advice on how to accommodate a client if capacity issues arise.

The law with respect to substitute decision making touches on the lives of many persons with disabilities. This is the focus of Chapter Five, *Protecting the Rights of Persons Subject to a Substitute Decision Maker*. This chapter deals with situations where capacity is at the core of the legal issues for which a client is seeking assistance. The issues include defending, protecting or restoring a client's ability to make decisions after they have been declared incapable or, resolving disputes related to the actions of a substitute decision maker. The chapter outlines the various issues persons may face and suggests options to

help deal with those issues in a manner that protects the rights of persons with capacity issues and promotes their autonomy to the greatest extent possible.

Chapter Six, entitled *Disability and Public Education in Ontario: A Primer*, provides a basic introductory primer on education law as it relates to students with disabilities within the public primary and secondary school system in Ontario. This chapter provides an introduction to a number of issues specific to students with disabilities, as well as a discussion on the persistence of barriers faced by students with disabilities. The chapter posits that human rights based examination of the education system as a whole, requires the creation of more inclusive school environments that are readily accessible and fully accommodate children of all abilities.

Obtaining Services for Persons Who Have Been Labelled with an Intellectual Disability: A Primer is the subject of Chapter Seven. The chapter covers developmental services, the term used to describe the supports and funding that are provided to adults with intellectual disabilities. A history and evolution of services and supports available to persons who have been labelled with an intellectual disability and the delivery practices of such services are described in the chapter. The primer also contains a section on the use of the Ontario *Human Rights Code* to enforce the rights of persons who have been labelled with an intellectual disability.

Chapter Eight deals with *Attendant Services*, the general term for various types of assistance provided to persons with physical disabilities to assist with activities of daily living with the goal of supporting independent living. The philosophy of independent living promotes the ideal of people with physical disabilities living with dignity in their chosen community, participating in all aspects of their life, and controlling and making decisions about their own lives. The chapter explains that attendant services are a necessary and vital accommodation that plays an important role in supporting the personal integrity, independence and dignity of

persons with physical disabilities. Enforcement of the rights of those who use attendant services is also covered in this chapter.

Accessibility legislation is covered in Chapter Nine, *Accessibility Legislation: A Primer on the Accessibility for Ontarians with Disabilities Act, Accessible Customer Service Standards, and Integrated Accessibility Standards*. The Chapter provides an overview of accessibility legislation, including regulations which set out accessibility standards. It also covers enforcement of the *Accessibility for Ontarians with Disabilities Act* and its regulations and discusses the interplay of the Act with human rights laws and other legislation.

The *Primer* ends with Chapter 10 on the UN *Convention on the Rights of Persons with Disabilities*. The development and negotiation of this historical treaty is covered in this chapter along with the salient themes and articles for the community of people with disabilities that ARCH serves. The chapter covers Canada's legal obligations under the Convention and provides assistance in the use of the treaty in interpreting Canadian and provincial laws.

The release of this *Primer* could not have been possible without the commitment and dedicated work of the authors of each of the chapters. The authors are current or recent staff lawyers at ARCH: Kerri Joffe, Ed Montigny, Tess Sheldon, Karen Spector, Robert Lattanzio, Laurie Letheren and Dianne Wintermute. They each have my sincerest gratitude for their efforts in writing the *Primer* while continuing to provide legal services that did not abate during these past several months. I extend a special note of thanks to Yedida Zalik, ARCH's Outreach Coordinator, who was instrumental in successful execution of the outreach components of the *Primer*, particularly with members of the private bar and the Francophone community. We are also greatly indebted to Legal Aid Ontario, and especially Chantal Gagnon, for the financial support that has allowed us to have this *Primer* translated into French.

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September 2013**



Chapter 2

Providing Legal Services for People with Disabilities¹

September 2013

Current to September 2013. Anyone intending to rely on this paper should conduct their own research for updates in the legislation and jurisprudence.

A French version of this paper has been prepared by the Centre for Legal Translation and Documentation. The translation is entitled: *Prestation de services juridiques aux personnes handicapées* and can be found at Chapter 2. The analysis is based on an English version of the law.

¹ This article is a revision and update of a number of previous, similar articles written by ARCH lawyers, the first written in 1988. Because the concept of disability and relevant laws evolve over time, this article will always be a work in progress. ARCH welcomes comments and questions regarding the provision of legal services to clients with disabilities.

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I. UNDERSTANDING, DEFINING, AND DESCRIBING DISABILITIES

“Disability” is a complex concept. While this paper provides basic information about disabilities and how disabilities are treated in law, the concept of disability, as well as relevant legislation and jurisprudence, are ever-evolving. A lawyer’s best assets in representing clients with disabilities are to keep an open mind and be willing to learn. When in doubt, lawyers should ask clients what living with a disability means for them.

A. Understanding Disability

Disabilities traditionally were regarded as being divisible into two categories: *physical* disabilities (e.g., paraplegia and arthritis) and *mental* disabilities (e.g. schizophrenia and depression). It has more recently been understood that many disabilities have both a “physical” and a “mental” component, and that these components are not easily separated or differentiated. Some disabilities involve multiple components, such as physiological, psychological, cognitive, sensory, neurochemical, etc. For example, acquired brain injuries may affect both mobility and emotional functioning. Multiple sclerosis may affect memory as well as mobility.

Legal recognition of disabilities is dynamic. Previously unrecognized disabilities are being identified and distinguished from others. For example chronic fatigue syndrome,² chronic pain syndrome,³ fibromyalgia and environmental sensitivities⁴ have more recently been considered disabilities in law. There are also conditions that are recognized as disabilities by health care practitioners but are not recognized as disabilities in law. Similarly, the law recognizes some disabilities which health care practitioners do not.

Some disabilities are highly visible while others may not be apparent from a person’s appearance. The Ontario Human Rights Commission refers to the latter disabilities as

² *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362, 2008 SCC 39.

³ *Nova Scotia (Workers’ Compensation Board) v. Martin; Nova Scotia (Workers’ Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504, 2003 SCC 54, at para. 1; *Jeffrey v. Dofasco Inc.*, 2004 HRTO 5 (CanLII) at paras. 186-192.

⁴ *Guibord v. Canada*, [1997] 2 F.C. 17.

“non-evident”.⁵ Examples of disabilities that may not be apparent include epilepsy, diabetes and acquired brain injuries.

It should be kept in mind that it is *individuals* who live with disabilities, and that limitations or symptoms commonly associated with a particular disability may not affect a particular person. For example, while it is possible for a person with cerebral palsy to have an intellectual limitation, this is not so for everyone who has cerebral palsy. Many, but not all, people with Down syndrome have heart conditions. An adult with cystic fibrosis may use a wheelchair and a ventilator and have a limited life expectancy, or may have only mild difficulty in breathing. Some students with autism require a service animal and one to one support in the classroom, while others may not. For this reason, the process of accommodation must be individualized, or tailored, to the particular person and his or her unique needs.

Additionally, when an individual is unable to do something in a certain way, it does not mean that he/she is unable to do the same thing in another way. A person who is blind cannot read in the same way as a sighted person but he/she may read using Braille and/or a computer with a screen reader. A person who is Deaf, deafened or hard of hearing may not communicate orally, but may be able to speak using sign language. A person who has been labelled with an intellectual/developmental disability may not understand a written training manual but may be able to learn a skill or grasp a concept through instruction, demonstration, and support.

B. Disability Models

A current understanding of the concept of “disability” has been articulated in the Preamble to the United Nations *Convention on the Rights of Persons with Disabilities* (“*Convention*”) as follows:

Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and

⁵ Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: OHRC, 2000) at 10 [*Guidelines on Disability*].

environmental barriers that hinders their full and effective participation in society on an equal basis with others.⁶

The Supreme Court of Canada has stated that disability should not be confined within a narrow definition. Rather, the Court stated that it is more appropriate to leave room for flexibility and propose a series of guidelines that will facilitate interpretation.⁷ Thus, there are some fundamental principles about disability which are generally embraced by the disability community, and which have been accepted and articulated by recent Supreme Court of Canada jurisprudence. A broad multi-dimensional understanding of disability is the currently favoured approach.⁸ This approach is often referred to as the social model of disability or the human rights model of disability. It has been accepted and articulated by Supreme Court of Canada jurisprudence⁹ and in the *Convention*.¹⁰ It describes disability as the outcome of the interaction between the person and their environment.¹¹ This “social model” recognizes that it is society’s failure to accommodate the needs of people with disabilities, not some inherent mental or physical condition, which gives rise to the ‘disabling disadvantage’ that people with disabilities encounter in their daily lives.

The currently favoured approach in law, thus, views disability not merely as being the direct result of a health problem or any physical or mental limitation.¹² The older “medical model” understood and defined disability in terms of a physical or mental defect or sickness necessitating medical intervention. However, health problems alone do not

6 *Convention on the Rights of Persons with Disabilities*, G.A. Res. 61/106, 76th plen. Mtg., U.N. Doc A/Res/61/106 [adopted by consensus at the UN on Dec. 13, 2006] [*Convention*]. The Convention came into force on May 3, 2008. Canada signed the Convention on March 30, 2007 and ratified it on March 11, 2010.

7 *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665, 2000 SCC 27 at para. 76 [Mercier].

8 Mont states that the “[m]edical model has recently been replaced by the social model of disability, which conceptualizes disability as arising from the interaction of a person’s functional status with the physical, cultural, and policy environments.” See Daniel Mont, “Measuring Disability Prevalance,” (March 2007) online: World Bank <<http://siteresources.worldbank.org/DISABILITY/Resources/Data/MontPrevalance.pdf>> at 2-3. See also Human Resources and Social Development Canada, *Advancing the Inclusion of People with Disabilities (2006)* (Ottawa: Social Development Canada, 2006) at 6 [Advancing Inclusion]; Arlene S. Kanter, “The Globalization of Disability Rights Law” (2003) 30 *Syracuse J. In’l & Com.* 241 at 247.

9 *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28 at paras. 29-30. [Granovsky].

10 *Convention*, *supra* note 6.

11 Mont, *supra* note 8 at 2-3.

12 *Advancing Inclusion*, *supra* note 8 at 6.

prevent people from participating in society. Rather, it is the obstacles in the socio-economic and built environment that do.¹³ The difference between the two models has been summarized succinctly as follows: “The medical model tries to adapt the individual to society whereas the social model tries to adapt society to the diversity of individuals that comprise it.”¹⁴

It is important to note that there is a large body of literature regarding models of disability. There are other models and theoretical constructs of disability that may not embrace the social and medical models.¹⁵

As an illustration of the social model, consider that people who use wheelchairs are able to enter buildings, but when buildings are erected with steps in front of them, they become ‘disabled’ from entering. It is the existence of steps in this example that results in a limitation, or disablement. When buildings incorporate ramps, elevators, automatic door openers, accessible washrooms, and other accessibility features, people who use wheelchairs are no longer disabled.

People tend to think of barriers as simply physical or environmental; however, barriers manifest in many different forms, such as socially-created economic, attitudinal and legal barriers. These may be based upon policies, procedures, practices, and attitudes. For example, inflexibility with respect to hours of work and job descriptions may create barriers for people with wide ranges of disabilities. There may be a stereotype that an individual is unable to perform a task satisfactorily, or that the individual will take excessive time off work due to his/her disability.

C. Prevalence of Disability in Canada: Most Lawyers will Represent Clients with Disabilities

According to Statistics Canada approximately 14% of Canadians report having some level of disability.¹⁶ Additionally, the disability rate rapidly increases as age increases.¹⁷

13 *Ibid.*

14 *Ibid.* at 74, citing Delcey, Michel. “Déficiences motrices et situation de handicaps” – ed. AFP-2002.

15 Marcia H. Rioux and Fraser Valentine, “Does Theory Matter? Exploring the Nexus between Disability, Human Rights and Public Policy,” in Dianne Pothier and Richard Devlin eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (Vancouver: UBC Press, 2004) at 57.

16 Statistics Canada, “2006 Participation and Activity Limitation Survey: Disability in Canada,” online:

This means that most lawyers, regardless of the area of law they practice, will represent at least some clients who have disabilities or otherwise encounter issues of significance to people with disabilities. For example, you may represent a client who has a disability or an individual who provides financial and other supports to a person with a disability. It is therefore incumbent on each lawyer to be aware of legislation, jurisprudence, services and programs of significance to people with disabilities.

When representing clients with disabilities it is useful, and may be necessary, to refer to the statistical profile of disability in Canada. Until recently Statistics Canada conducted the Participation and Activity Limitation Survey (“PALS”), which provided an excellent national database on disability statistics.¹⁸ However, this survey is no longer being carried out by the Federal Government.¹⁹

The Canadian Survey on Disability is a survey of disability issues in Canada, including type and severity of disability; use of aids and assistive devices; help received or required; educational attainment and accommodations; labour force status; and mobility within the community. Statistics Canada plans to release survey data in 2013, and quinquennially thereafter.²⁰

The most recent PALS was conducted in 2006. The following data have been extracted from that report and provide a general picture of disability in Canada:

- 4,417,870 Canadians reported some level of disability
- the incidence of disability increases with age, from 3.7% of children under 15 to 43.4% of those over 65, to 56.3% of those over 75

Statistics Canada <<http://www.statcan.ca/english/freepub/89-628-XIE/2007003/series5-en.htm>>.

17 Statistics Canada, *A Profile of Disability in Canada, 2001* by Lucie Cossette & Édith Duclos (Ottawa: Minister of Industry, 2002) at 7-8 [PALS]. See also Human Resources Development Canada, *Disability in Canada: A 2001 Profile* (Gatineau: Queen’s Printer, 2003).

18 PALS, *supra* note 17.

19 Tony Dolan, “CCD Chairperson’s Update: July-August 2010” (August 2010), online: Council of Canadians with Disabilities <<http://www.ccdonline.ca/en/publications/chairpersons-update/2010/july-august>>

20 For information on the Canadian Survey on Disability see: Statistics Canada, online: <http://www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvey&SDDS=3251&Item_Id=133011&lang=en>.

- the disability rate is approximately 2% higher for women than men, with the exception of the under 15 age range
- of Canadians with disabilities between the ages of 15 to 64, the three most reported disabilities were chronic pain, mobility related disabilities, and agility related disabilities.
- more than half a million adult Canadians reported living with a psychological disability
- adults with disabilities are more likely to have multiple rather than single disabilities
- people with disabilities have employment rates approaching half that of other Canadians
- people with disabilities have significantly lower incomes than people without disabilities
- women with disabilities are more adversely affected with respect to employment and income than are men with disabilities, although both groups are significantly disadvantaged
- people with disabilities are about half as likely to have a university education as people without disabilities ²¹

²¹ PALS, *supra* note 17.

D. Appropriate Language and Terms Describing Disabilities

It has been stated that words are a mirror of society's attitudes and perceptions and "[a]ttitudes can be the most difficult barrier people with disabilities face in achieving full integration, acceptance and participation in society."²² It is therefore important that lawyers strive to use appropriate language when speaking with or about people with disabilities.

There are differing views regarding the appropriate use of language to refer to disabilities. Certain types of language are considered appropriate by government and disability organizations, and useful guidance may be obtained from their publications and websites. The federal government produces a guide titled *A Way with Words and Images* and the provincial government publishes a similar guide titled *Word Choices*.²³ Despite the advice contained in the guides of organizations and governments, individual people with disabilities and their families may have their own preferences.

Outdated terms may be found in older documents and among segments of the population not familiar with current thinking about disability. There are also cultural variances as to appropriate terminology.

See Appendix "A" for examples that can illustrate language that is, and is not, considered to enhance the dignity of people with disabilities.

22 Canada, *A Way with Words and Images: Suggestions for the Portrayal of People with Disabilities* (Ottawa: Queen's Printer, 2006) at 1 [*A Way with Words and Images*].

23 *A Way with Words and Images, ibid.*; Accessibility Directorate of Ontario, *Word Choices: A lexicon of preferred terms for disability issues* (Toronto: Ministry of Citizenship, 2002).

E. Understanding of “Disability” in Jurisprudence and Legislation

There is no one legal definition in Canada either of disability in general or of specific disabilities. Indeed, the Supreme Court of Canada has stated that disability should not be confined within a narrow definition. Rather, the Court stated that it is more appropriate to leave room for flexibility and propose a series of guidelines that will facilitate interpretation.²⁴

The Supreme Court of Canada has accepted a “social model” of disability, as distinguished from a “medical model”. See section 1.3 above. In *Mercier*²⁵, Justice L’Heureux-Dubé writing for the Court made it clear that disability manifests not only as a physical limitation, but also as a social construct that must be interpreted broadly:

[b]y placing the emphasis on human dignity, respect and the right to equality rather than a simple biomedical condition, this approach recognizes that the attitudes of society and its members often contribute to the idea or perception of a ‘handicap’[the term used in the Quebec statute at issue]. In fact, a person may have no limitations in everyday activities other than those created by prejudice and stereotypes....Thus, a ‘handicap’ may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors.

The focus of the social model inquiry is on the effects of a differential treatment, rule, preference, or exclusion experienced by the person, and not on proof of physical limitations or the presence of impairment.

The Supreme Court expanded upon this model in *Granovsky*,²⁶ stating that there are three aspects to disability: physical or mental impairments; functional limitations, whether real or perceived, and the “problematic response of society to th[e individual’s] condition. A proper analysis necessitates unbundling the impairment from the reaction of society to the impairment, and a recognition that much discrimination is socially constructed.”

24 *Mercier*, *supra* note 7 at para 76.

25 *Ibid.* at paras 77 and 79.

26 *Granovsky*, *supra* note 9 at paras 29-30.

Different statutes and regulations define disability in different ways depending on their purpose and intent. The *Canadian Charter of Rights and Freedoms*²⁷ (“*Charter*”) refers to “mental disability” and “physical disability” in section 15, but these terms are not defined in the *Charter*. The *Criminal Code*²⁸ also refers to “mental or physical disability” in several sections, but once again these terms are not defined.

In some pieces of Ontario legislation, disability has been defined using a broad approach. For example, both the *Accessibility for Ontarians with Disabilities Act, 2005*²⁹ and Ontario’s *Human Rights Code*³⁰ define disability as:

- a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
- b) a condition of mental impairment or a developmental disability,
- c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- d) a mental disorder, or
- e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*; (“handicap”)

Under the *Code* and human rights jurisprudence the definition of disability includes past, present and perceived conditions.

In general, statutes and regulations tend to emphasize different aspects of disability. For example,

- human rights legislation typically defines disability very broadly, because the public policy intent is to prohibit, comprehensively, all forms of discrimination on the basis of disability, including perceived disability³¹

27 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

28 R.S.C. 1985, c. C-46.

29 S.O. 2005, c. 11, s. 2 [AODA].

30 R.S.O. 1990, c. H.19, s. 10(1) [*Human Rights Code*].

- disability income program legislation and guidelines may define disability narrowly, based on medical criteria, and/or may focus specifically on unemployability due to disability, and/or may look more broadly at a person's functional limitations in performing activities of daily living³²
- disability income and support programs may permit or may prohibit the use of social and economic factors (e.g., age, education, literacy) in determining whether someone is 'disabled enough' to qualify³³

Clients with disabilities may be surprised to learn that, for some purposes, the government does not consider them to have a disability. In each case, it is important to look closely at the statutes, regulations and guidelines, if such exist, and also at jurisprudence to determine how the legislated definition is actually applied in practice.

31 See Ontario's *Human Rights Code*, *ibid.* s. 10(1) and *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 25.

32 Under the *Canada Pension Plan*, R.S.C. 1985, c. C-8, the definition of disability in section 42(2) is based on medical criteria, duration, as well as unemployability. According to the Canada Pension Plan Guideline entitled "Severe Criterion for the Prime Indicator (Medical Condition)," a person must first have a medical condition, and second, the medical condition must result in a severe and prolonged disability. The Guideline lists examples of medical conditions, including AIDS, cancer, muscular dystrophy, and Hodgkin's Disease.

Under the Ontario Disability Support Program (ODSP) disability is defined for the purposes of receiving income support, as well as for the purposes of receiving employment support. The definition of disability for income support looks at a person's limitations in performing activities of daily living, as well as medical criteria: *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sched. B, s. 4 [ODSPA]. The definition of disability for employment support (s. 32) looks at medical criteria and unemployability due to disability; however, a person who meets the definition of disability in s. 4 of the ODSPA may also be eligible for employment support in s. 32. See also: ODSP Income Support Directive 1.2 "Disability Adjudication Process" (November 2007); and ODSP Employment Support Directive 2.1 "Program Eligibility" (September 2006).

33 Generally, the Ontario Disability Support Program permits the use of social and economic factors in determining whether someone is 'disabled enough' to qualify; whereas, the Canada Pension Plan Disability prohibits the use of social and economic factors. See: ODSP Income Support Directive 1.2, *supra*; Canada Pension Plan Guideline, "Personal Characteristics and Socio-Economic Factors"; *Canada (Minister of Human Resources Development) v. Rice*, 2002 FCA 47; and *Canada (Minister of Human Resources Development) v. Angheloni*, 2003 FCA 140.

II. PARTICULAR LAWS AND LEGAL CONCEPTS RELATING TO DISABILITY

A. The Duty to Accommodate Disability

The widespread inaccessibility of physical, social, economic, and legal systems and the failure of these systems to accommodate people with disabilities to ensure their full participation in society constitute a form of *systemic discrimination*. For people with disabilities "...the right to be free from discrimination is associated with a right to be accommodated short of undue hardship."³⁴ Facilitating the ability of people with disabilities to do things differently than others is called *accommodation*.³⁵

The duty to accommodate is a central concept in human rights jurisprudence. "Accommodation" refers to what is required in the circumstances to avoid discrimination."³⁶ The Supreme Court of Canada in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*³⁷ elaborated on the duty to accommodate people with disabilities as follows:

The concept of reasonable accommodation recognizes the right of persons with disabilities to the same access as those without disabilities, and imposes a duty on others to do whatever is reasonably possible to accommodate this right. The discriminatory barrier must be removed unless there is a bona fide justification for its retention, which is proven by establishing that accommodation imposes undue hardship on the service provider.³⁸

The principles underlying the duty to accommodate include: respect for dignity, individualized accommodation and integration and full participation.³⁹

The requirement for individualized accommodation has been articulated by the Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia*

34 Bill Holder, "Accommodation of Disability in Ontario" (July 2004) at 4, online: ARCH Disability Law Centre <http://www.archdisabilitylaw.ca/sites/all/files/02_accommodation%281%29.pdf>.

35 *Ibid.* at 1.

36 *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at para 22. [*Grismer*]

37 [2007] 1 S.C.R. 650.

38 *Ibid.*, at para 121.

39 *Guidelines on Disability*, *supra* note 5 at 12 to 14. Relevant cases include: *Grismer supra* note 36 at para. 22; *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3 at para. 54 [*Meiorin*].

*(Workers' Compensation Board) v. Laseur*⁴⁰ and in the Ontario Human Rights Commission's *Policy and Guidelines on Disability and the Duty to Accommodate*.⁴¹ The Supreme Court has recognized that accommodation is a highly individualized process that must be responsive to individual needs and must be implemented on an individualized basis:

Due sensitivity to these differences is the key to achieving substantive equality for persons with disabilities. In many cases, drawing a single line between disabled persons and others is all but meaningless, as no single accommodation or adaptation can serve the needs of all. Rather, persons with disabilities encounter additional limits when confronted with systems and social situations which assume or require a different set of abilities than the ones they possess. The equal participation of persons with disabilities will require changing these situations in many different ways, depending on the abilities of the person. The question, in each case, will not be whether the state has excluded all disabled persons or failed to respond to their needs in some general sense, but rather whether it has been sufficiently responsive to the needs and circumstances of each person with a disability.⁴²

The section below titled "General Information Regarding Disabilities and Practical Considerations for Accommodating Clients" provides examples of how people with a wide range of disabilities can and should be accommodated in the legal system. A lawyer's duty to accommodate is discussed further in the subsection below titled "Discrimination and Accommodation".

B. The United Nations *Convention on the Rights of Persons with Disabilities*

The United Nations *Convention on the Rights of Persons with Disabilities* is an international treaty that entered into force on May 3, 2008. This was a historic event in that the *Convention* is the first comprehensive international treaty to specifically protect the rights of the world's population of people with disabilities.⁴³ Its purpose is to "...promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their

40 [2003] 2 S.C.R. 504 [*Martin*].

41 *Guidelines on Disability*, supra note 5 at 13.

42 *Martin*, supra note 40 at para. 81.

43 Arlene S. Kanter, "The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities," (2006) 34 Syracuse J. In'l L & Com. 287 at 288.

inherent dignity.”⁴⁴ It prohibits all discrimination on the basis of disability and requires that all appropriate steps be taken to ensure reasonable accommodation.⁴⁵ It also provides several rights for people with disabilities, including rights relating to employment, education, health services, transportation, access to justice, accessibility to the physical environment and abuse.⁴⁶ The *Convention* calls on participating governments to change their country’s laws, as necessary, to comply with its articles.⁴⁷

Canada signed the *Convention* on March 30, 2007 and ratified it on March 11, 2010. Ratification is the act by which Canada bound itself to the *Convention* and assumed the responsibility of ensuring that it complies with the provisions therein.⁴⁸

Canada employs a “dualist” model, meaning that once a treaty has been signed and ratified by the federal executive it still requires incorporation into domestic law to be enforceable at the national level.⁴⁹ In Canada the usual method of implementing international human rights treaties is to rely on existing Canadian legislation and policies. Often Canada ratifies international human rights treaties after it has determined that existing legislation, policies and programs conform and comply with the principles and obligations set out in the international treaty. Federal government officials examine the provisions of a given treaty and determine whether existing federal laws and policies already conform to the treaty obligations. A similar review is conducted at the provincial

44 Secretary General, Final Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 1, delivered to the General Assembly, U.N. Doc. A/61/611 (Dec. 6, 2006) [Final Report].

45 *Convention*, *supra* note 6, article 5.

46 These are only some of the rights articulated in the *Convention*. Reference should be made to the text of the *Convention* regarding its scope and coverage. See 34 Syracuse J. Int'l L. & Com. 287 (2006-2007). This special issue of the Syracuse Law Journal contains articles discussing the significance of the *Convention* and its implications.

47 Kanter, *supra* note 43 at 289.

48 United Nations, “Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol: From Exclusion to Equality, Realizing the rights of persons with disabilities” Ch. 4: Becoming a Party to the Convention and the Optional Protocol, online: <<http://www.un.org/disabilities/documents/toolaction/ipuhb.pdf>>; Armand de Mestral & Evan Fox-Decent, “Rethinking the Relationship Between International and Domestic Law” (2008) 53 McGill L.J. 573 at para. 48.

49 Due to the nature of Canadian federalism, responsibility for implementing the *CRPD* falls to both the federal and provincial/ territorial governments. The federal government can legislate to implement the *CRPD* in areas that fall within federal jurisdiction, but cannot do so in areas within provincial/territorial jurisdiction.

and territorial level. Before ratifying a treaty the federal government seeks formal support from the provinces and territories. Typically, no new legislation is enacted to specifically implement the treaty into Canadian domestic law. In circumstances where new federal, provincial or territorial legislation is required, such new legislation will be passed prior to ratification.⁵⁰

To date no new legislation has been enacted to specifically implement the *Convention* into Canadian domestic law. However, several of the rights articulated in the *Convention* are already addressed in Canadian domestic laws, including the *Canadian Charter of Rights and Freedoms*, human rights legislation (such as Ontario's *Human Rights Code* and the *Canadian Human Rights Act*) and the *Accessibility for Ontarians with Disabilities Act*.

The general principle regarding the use of international law within Canadian law is that international treaties and conventions are not part of Canadian law unless they have been implemented by statute.⁵¹ This was confirmed in *Baker v. Canada (Minister of Citizenship and Immigration)*,⁵² where the Supreme Court of Canada found that the *Convention on the Rights of the Child*,⁵³ which had been ratified by Canada but not implemented through domestic legislative provisions, had no direct application in Canadian law. The Court however disagreed on the weight to be given to the *Convention*. Whereas the minority, as a consequence, would not have given the *Convention* effect, L'Heureux-Dubé J. for the majority found that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."⁵⁴

50 de Mestral, *supra* note 48 at para. 48, 49; See also Canada, Parliament, "Canada's Approach to the Treaty-Making Process" by Laura Barnett, Legal and Legislative Affairs Division, PRB 08-45E (24 November 2008).

51 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 69 [*Baker*], citing *Francis v. The Queen*, [1956] S.C.R. 618, at 621; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, at 172-73; Anne Warner La Forest, "Domestic Application of International Law in Charter Cases: Are We There Yet?" (2004) 37 U.B.C. L. Rev. 157; Jutta Brunnée and Stephen Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can. Y.B. Int'l Law 3.

52 *Baker*, *ibid.*

53 Can. T.S. 1992 No. 3.

54 *Baker*, *supra* note 51 at para. 70.

Regarding *Charter* rights in particular, international human rights law may be “relevant and persuasive sources of interpretation of the *Charter’s* provisions.”⁵⁵ In *Health Services & Support – Facilities Subsector Bargaining Assn. v. British Columbia*,⁵⁶ the Supreme Court referenced international law to assist in interpreting the scope of section 2(b) of the *Charter*. The Supreme Court relied upon three international conventions⁵⁷ which had been ratified by Canada, but not implemented through domestic legislation, to determine that the right to engage in collective bargaining is part of the guarantee under section 2(b) of the *Charter* to freedom of association.

Using provisions of the *Convention on the Rights of Persons with Disabilities* could potentially strengthen and support legal arguments advanced for clients with disabilities in Ontario. It remains to be seen how powerful a tool the *Convention* will be for lawyers to use when representing clients with disabilities.

For more information on the CRPD please refer to Chapter 10 of this Disability Law Primer, entitled, “*Convention on the Rights of Persons with Disabilities*”.

C. The Accessibility for Ontarians with Disabilities Act, 2005

In 2005, the *Accessibility for Ontarians with Disabilities Act, 2005* (“AODA”)⁵⁸ became law. It applies to “...every person or organization in the public and private sectors of the Province of Ontario, including the Legislative Assembly of Ontario”.⁵⁹ Its stated purpose is to develop, implement and enforce standards for accessibility related to goods, services, facilities, accommodation, employment, buildings, structures and premises in Ontario. According to the statute, the goal of achieving accessibility is to be met by 2025.⁶⁰

55 *Reference Re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313 at para. 57.

56 [2007] 2 S.C.R. 391

57 The three conventions referenced were: the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 and ILO Convention No. 87, 68 U.N.T.S. 17

58 AODA, *supra* note 29.

59 *Ibid.* s. 4.

60 *Ibid.*, s.1

There is a commonality between the *AODA* and Ontario's *Human Rights Code* in that they each, although using different schemes and mechanisms, promote equality and accessibility for people with disabilities. It is important to remember that the *AODA* is complementary to Ontario's *Human Rights Code* and that its existence does not remove any obligations under the *Code*. Legal rights and obligations that exist in relation to disability which are embodied in the *Code* must be complied with irrespective of compliance with the *AODA* and its standards.

The primacy of the *Code* is emphasized in the language of the *Code* itself, which states that it prevails over any other Act or regulation, unless the Act or regulation specifically provides that it is to apply despite the *Code*.⁶¹ The *AODA* further recognizes the importance of other legal obligations in relation to people with disabilities. The *AODA* states that "[i]f a provision of this Act, of an accessibility standard or of any other regulation conflicts with a provision of any other Act or regulation, the provision that provides the highest level of accessibility for persons with disabilities ... shall prevail."⁶² This is reinforced by another *AODA* provision which asserts that nothing in it or the regulations diminishes legal obligations with respect to people with disabilities that are imposed under any other Act or otherwise imposed by law.⁶³

The *AODA* applies to services provided by lawyers.⁶⁴ As well, lawyers may have to advise their clients on legal obligations relating to the *AODA*. As such, it is essential that lawyers are familiar with the Act and any standards pursuant to it.

The *AODA* requires the development of accessibility standards, which become regulations under the Act. These standards are to address the identification and removal of barriers and set out a timeframe for meeting these requirements. To date, two standards have been enacted, the *Accessibility Standards for Customer Service* and the *Integrated Accessibility Standards*. The Accessibility Directorate of Ontario is responsible for the administration of the *AODA*. For information on the *AODA* and standards view the following link: <http://www.mcass.gov.on.ca/en/mcass/programs/accessibility/>

61 *Human Rights Code*, *supra* note 30, s.47(2).

62 *AODA*, *supra* note 29, s.38.

63 *Ibid.*, s.3.

64 *Ibid.*, s.4

On January 1, 2008, the first accessibility standard under the AODA, the *Accessibility Standards for Customer Service*,⁶⁵ came into effect. The standard applies to designated public sector organizations and every other person or organization that has more than one employee and provides goods or services to members of the public in Ontario. It sets out requirements for making the provision of goods and services more accessible to people with disabilities. Public sector organizations were to have complied with the standard by January 1, 2010 and private businesses, non-profit organizations and other service providers (including law firms) were to have complied by January 1, 2012.

Under the standard, public sector organizations and businesses with more than one employee must:

- Establish policies and practices on providing services to people with disabilities⁶⁶
- Take reasonable efforts to ensure that policies are consistent with the principles of dignity, independence, integration and equality of opportunity⁶⁷
- Train staff on interacting and communicating with people with various types of disabilities⁶⁸
- Allow service animals to enter the business or organization's premises⁶⁹
- Permit support people to accompany people with disabilities into the business or organization's premises⁷⁰
- Provide documents that are required by the Regulation in accessible formats.⁷¹
For example, the Regulation requires public sector organizations and other providers of goods or services that have at least 20 employees in Ontario to prepare documents describing policies on providing services to people with disabilities.

65 O. Reg. 429/07

66 *Ibid.*, s. 3(1)

67 *Ibid.*, s. 3(2)

68 *Ibid.*, s. 6

69 *Ibid.*, ss. 4(2), 4(3)

70 *Ibid.*, s. 4(4)

71 *Ibid.*, s. 9

- Establish a process for people to provide feedback and complaints regarding the manner in which the business or organization provides goods or services to people with disabilities⁷²

These are just some of the obligations set out in the standard. There are additional requirements that public sector organizations and organizations with more than one employee must fulfill as well as requirements that apply only to public sector organizations and organizations with at least 20 employees.

The *Integrated Accessibility Standards* combines several standards into one regulation, setting out requirements in the areas of information and communications, employment, transportation, and the built environment.⁷³

The *AODA* sets out the mechanisms by which the accessibility standards will be enforced. Each person or organization to whom an accessibility standard applies is required to file an annual accessibility report with a director who is appointed under the Act. These reports must be publicly available.⁷⁴ With respect to the *Accessibility Standards for Customer Service*, Regulation 430/07 creates an exemption from reporting for some organizations. Only designated public sector organizations and other providers of goods and services that have more than 20 employees are required to file accessibility reports.⁷⁵ The *AODA* also requires the appointment of inspectors who have powers of entry and investigation. Directors appointed under the Act may order people or organizations to comply with an accessibility standard, file an accessibility report or pay an administrative penalty for contravening a standard.⁷⁶

For more information about the *AODA* refer to Chapter 9 of this Disability Law Primer, entitled, “Accessibility For Ontarians with Disabilities”.

⁷² *Ibid.*, s. 7

⁷³ *Integrated Accessibility Standards*, O Reg 191/11 s 1.

⁷⁴ *AODA*, *supra* note 29, s. 14.

⁷⁵ O. Reg. 430/07, s. 1(1).

⁷⁶ *AODA*, *supra* note 29, s. 21(3).

III. THE RULES OF PROFESSIONAL CONDUCT AND CLIENTS WITH DISABILITIES

A. General

The Law Society of Upper Canada's *Rules of Professional Conduct* ("Rules") contain two important references to disability. These are the Rule relating to clients under a disability (Rule 2.02(6)) and the Rules relating to discrimination (Rule 5.04 and Rule 1.03(1)(b)). It is essential to be aware of and follow these rules when serving clients with disabilities or clients who have a family member with a disability.

B. "Client Under a Disability" and Capacity to Instruct Counsel

The Rule of Professional Conduct that relates most specifically to clients who have disabilities is Rule 2.02(6), "Client Under a Disability." It should be read in conjunction with Rule 5.04 relating to discrimination and Rule 3.01 relating to making legal services available.

When representing clients with disabilities, lawyers must follow three main requirements that arise from these rules. Firstly, when a client has a disability, or their ability to make decisions is impaired, the lawyer must maintain a normal lawyer and client relationship as far as reasonably possible.⁷⁷ Secondly, a lawyer and client relationship requires that a client have legal capacity to give instructions.⁷⁸ This requirement also arises because the relationship of a lawyer to his/her client is one of agent to principal.⁷⁹ A valid relationship of agency requires that the principal have the requisite mental capacity to engage in the relationship.⁸⁰ Thirdly, when a client does not have legal capacity to manage his/her legal affairs, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.⁸¹

Most clients, including those who have disabilities, have the mental ability to instruct counsel. However, many lawyers agonize over those infrequent situations when a

77 Rule 2.02(6).

78 Commentary to Rule 2.02(6).

79 *Scherer v. Paletta* (1966), 57 D.L.R. (2d) 532 at 534 (Ont. C.A.).

80 *Godelie v. Pauli (Committee of)*, [1990] O.J. No. 1207 at 5 (Dist. Ct.).

81 Commentary to Rule 2.02(6).

client's mental ability is such that they are not sure if the client has the requisite legal capacity to instruct. As lawyers are precluded from acting on behalf of an incapable client, they are necessarily under an obligation to assess their client's capacity to instruct. In this context, legal capacity is a legal determination, not a clinical assessment.⁸² However, lawyers are not trained to undertake this task, and the Rules do not specify how this is to be done.

In sorting out these situations it is important to remember that the lawyer and client relationship is founded on the principle of autonomy. The lawyer's obligation is to respect the client's right to make decisions wherever possible. Clients are entitled to make decisions that we believe may be foolish, unwise or risky, as long as they are competently made.⁸³

Further, one should never presume that because someone has a disability he/she is necessarily incapable to instruct. There is no reason to believe that a person who is unable to speak, for example, is not mentally capable.

Lawyers are required to look at the capacity of the client to "make decisions about his or her legal affairs".⁸⁴ Thus the requisite level of capacity depends on the specific situation. Courts have recognized varying levels of mental capacity. A person may be mentally capable of making a basic decision and not capable of making a complex decision.⁸⁵ For example, a client who has been labelled with an intellectual disability may have the mental ability to instruct you to find a remedy relating to poor treatment she receives in a group home but may not understand the information necessary to instruct you to make a will.

Lawyers should ensure that clients are given the opportunity to use the supports they need to enhance their ability to make their own decisions. Thus, a client who initially

82 Judith Wahl "Capacity and Capacity Assessment in Ontario" (Paper prepared for the CBA Elderlaw Programme, March 2006) at page 5, online: <http://practicepro.ca/practice/PDF/Backup_Capacity.pdf>.

83 *Starson v. Swayze*, [2003] S.C.R. 722, 2003 SCC 32, at para 76.

84 Commentary to Rule 2.02(6).

85 *Calvert (Litigation guardian of) v. Calvert* (1997), 32 O.R. (3d) 281 (Gen. Div.), and *Torok v. Toronto Transit Commission*, [2007] O.J. No. 1773 (Ont. Sup. Ct. J.).

appears to be incapable may be able to make his/her own decisions with the help of others, such as family members and friends. These people may assist the client by communicating using words that he/she is familiar with, explaining information and helping him/her understand the consequences of making a decision.

If a client's legal capacity is an issue, a lawyer should document how any decision regarding his/her legal capacity was made, and on what basis it was made.

Lawyers should not decline to represent a client only because they are unsure if he/she is mentally capable. While lawyers do have a general right to decline a particular representation, the Commentary to Rule 3.01 states that this right must be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation.

For more guidance on the issue of capacity to instruct counsel, reference may be made to Chapter 4 of the ARCH Primers, "Capacity to Instruct Counsel".⁸⁶

C. Discrimination and Accommodation

Discrimination is addressed in Rule 5.04, which states that "[a] lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the ground of ... disability with respect to professional dealings with other members of the profession or any other person." The Commentary to the Rule states that it is to be interpreted according to the provisions of Ontario's *Human Rights Code* and related case law.

Rule 1.03(1)(b) reinforces this requirement stating that "a lawyer has special responsibilities ... including a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario."

Ontario's *Human Rights Code* provides that people with disabilities have a right to be free from discrimination because of their disabilities with respect to services.⁸⁷ Like all other

⁸⁶ Phyllis Gordon, "Notes on Capacity to Instruct Counsel" (November 2003), online: ARCH Disability Law Centre < <http://www.archdisabilitylaw.ca/?q=notes-capacity-instruct-counsel>>.

services in Ontario, legal services are subject to the provisions of the *Human Rights Code*. Lawyers and law firms have a legal obligation to ensure that services are offered that are accessible to people with disabilities and do not discriminate. The obligation to not discriminate includes an obligation to accommodate people with disabilities, up to the point of undue hardship.

The Ontario Human Rights Commission's *Policy and Guidelines on Disability and the Duty to Accommodate*⁸⁸ sets out in detail the views of the Commission regarding accommodation for people with disabilities. While not legislation, the Guidelines are an essential starting point for understanding the duty to make appropriate accommodations, short of undue hardship, for people with disabilities. The Guidelines do not contain a formula for determining which accommodations must be provided. Accommodation is an individualized process, and will require different solutions in different cases depending upon the specific client and his/her disability-related needs.

It is important to emphasize that since lawyers are obligated to provide accommodations, the costs of accommodations must be borne by lawyers. Expenditures on accommodations (e.g. sign language interpreters) are not disbursements that may be charged back to clients.

Some accommodation measures entail no costs and are accomplished by changes to law firm policies. For instance, broad policies prohibiting all animals from offices have the effect of preventing access to people with guide dogs or other service animals. An amendment to such a policy to exempt disability-related service animals would cost nothing at all.

87 *Code*, *supra* note 30 at s. 1.

88 *Guidelines on Disability*, *supra* note 5.

IV. GENERAL INFORMATION REGARDING DISABILITIES AND PRACTICAL CONSIDERATIONS FOR ACCOMMODATING CLIENTS

A. General

Too often, people with disabilities report that lawyers refuse to consider representing them because of their unfamiliarity with the person's particular disability. For example, someone who has a speech-related disability may find his/her call to a law office inappropriately 'screened out' by the receptionist. It is hoped that this section of the paper will provide information that will increase a lawyer's comfort level with representing clients with disabilities. In this regard, recall that lawyers are obliged to respect the requirements of human rights laws, including Ontario's *Human Rights Code*.⁸⁹ The Rules further state that "[A] lawyer shall ensure that no one is denied services or receives inferior service on the basis of the grounds set out in this rule."⁹⁰ Lawyers must therefore not deny services on the ground that an individual has a disability.

It is important to remember that each person who has a disability is a unique individual. While disabilities are often categorized into types, each person with a disability experiences it differently. Individuals with the same disability may require different accommodations. There is no single way to accommodate a particular disability. Additionally, some people have more than one disability.

We have included the information in this section to provide lawyers with guidance that might assist them in representing their clients with disabilities and ensuring that they receive the accommodations they need. However, the best source of information about your client's disability and accommodation needs is from him/her directly. It is often helpful to ask your clients about how disability affects them. Disability organizations can also provide useful information about accommodating specific disabilities.

Some clients with disabilities may require certain accommodations. Ask clients what, if any, accommodations are required or would be helpful. Clients with accommodation needs will appreciate such a question at the start of an interview or when the interview is scheduled. They can address, for instance, whether the seating arrangements and

⁸⁹ Rule 5.04(1).

⁹⁰ Rule 5.04(2).

environment will permit effective communication with the lawyer, when would be an appropriate time to take a break, and so on. If it is anticipated that there may be a number of accommodation needs, then the lawyer may canvass and address these in advance of the meeting. Lawyers may want to develop a checklist for this purpose.

Time considerations are important for many clients with disabilities. Care must be taken to develop a realistic time-line for case preparation. A very tight timetable can cause problems. Clients with disabilities may use accessible transit services that, because of limited availability, require pre-booking before the date of a meeting. Clients with disabilities may need longer or more frequent breaks than usual to go to the washroom or take medication. A client with a cognitive or emotional disability may require more time to consider options and make a decision. An interview conducted using a sign language interpreter can be time consuming and must be arranged well in advance.

As with other clients, the lawyer should discuss all aspects of cases fully and frankly with clients who have disabilities. It is essential that clients be questioned about all relevant aspects of their cases, even if the questions may be difficult for the clients.

It is also essential to make sure that clients whose disability affects their legal capacity to understand the lawyer's advice. Some techniques that may be useful to assist with communication are as follows:

- use plain and clear language, not legal terminology or jargon
- ask clients to explain their understanding of what the lawyer has said using their own words or their own alternative means of communication
- encourage clients to ask questions of the lawyer
- encourage clients to tell the lawyer everything that may be relevant, while suggesting what information would be of most use to the lawyer

Ask clients what meeting place is best for them. Some clients with disabilities may require home visits because their disability makes it difficult for them to leave their homes. For example, clients with chronic pain may find that travel exacerbates their pain, and clients with Multiple Chemical Sensitivity may react adversely to a number of substances in a

lawyer's office environment. Visiting clients in their homes will afford them with the accommodation they need. However, some clients with disabilities prefer the confidential setting of the lawyer's office for a meeting. Some people with disabilities live in places that do not afford complete privacy, such as group homes, hospitals and supportive housing. Meeting in their place of residence may raise suspicions of other residents, family members or staff and unintentionally divulge confidences.

As has been indicated, there is no one formula for providing accommodation. Lawyers are advised to ensure that their offices are barrier-free and to ask clients what accommodations, if any, are needed. Lawyers are further advised to educate themselves with respect to specific disabilities and common accommodations associated with such disabilities. Lawyers can do this, for example, by accessing information provided by organizations that provide services for people with particular disabilities. Lawyers can also learn by visiting the websites of disability organizations and government agencies, some addresses for which are listed in the section below titled "Web Resources",.

What follows is a brief description of some accommodation issues and measures that pertain to some generally-classed disabilities. The information is provided to illustrate generally what accommodation can entail in some, selected, circumstances.

B. Deaf People and People with Hearing Loss

For Deaf⁹¹ people and people with hearing loss, it will be necessary for lawyers to consider accommodation measures that pertain to facilitating communication between themselves and their clients. Deaf people and people with hearing loss interact with hearing people all the time, and most are comfortable telling you what works for them. No two people who are Deaf or have hearing loss communicate in exactly the same way. Each individual uses an individual combination of communication strategies. The best way to learn how to communicate is to ask what methods of communication the person with the disability prefers.

Some individuals who are Deaf may have a first language that is gestural (the most commonly-used gestural language in Ontario is American Sign Language). Therefore, for many Deaf people, English or French is not their first language. Sign languages do not have written forms so the written skills of a person whose first language is a sign language may appear stilted. Their written language should not be perceived as an indicator of education or intelligence.

For many Deaf people and people with hearing loss, the most important accommodation measure for lawyers to provide will be sign language interpretation. A professional sign language interpreter, knowledgeable in the language and culture of both Deaf and hearing people, is the bridge between ASL and English to a common understanding. Ontario Interpreter Services (OIS) is a provincial organization that books qualified interpreters. It is provincially co-ordinated by the Canadian Hearing Society and the Ontario Association for the Deaf. Both groups are part of the OIS Advisory Council. The Council establishes the fees charged for interpreting services and maintains a registry of qualified interpreters throughout Ontario. An ethical code as well as a code of confidentiality binds qualified interpreters to act solely as a communication channel.

91 The term “deaf” is generally used to describe individuals with a severe to profound hearing loss, with little or no residual hearing. Some deaf people use sign language to communicate. Others use speech to communicate, using their residual hearing and hearing aids, technical devices or cochlear implants, and lipreading or speechreading. The term “Culturally Deaf” refers to individuals who identify with and participate in the language, culture and community of Deaf people, based on sign language. Deaf culture, indicated by a capital ‘D’, does not perceive hearing loss and deafness as a disability, but as the basis of a distinct cultural group.

To arrange for an interpreter, a law firm must call their local Canadian Hearing Society office and ask to speak with the OIS staff person. Advance notice of at least two to three weeks is usually required to ensure that a request can be met, although it is possible that an interpreter may be made available on shorter notice. There is a chronic shortage of interpreters in Ontario. Few work full time and those who do are usually booked weeks, if not months, in advance.

For some people with hearing loss, the preferred accommodation is through assistive listening systems. Such technology can render oral spoken communication at meetings, courts, and tribunals accessible through wireless sound transmission. With this technology, people with hearing loss wear wireless receivers while speakers use microphones. A transmitter converts the sound into infrared or FM signals which are beamed to those wearing receivers, whereupon the signals are converted back into sound.

Another accommodation measure for Deaf people and people with hearing loss is written captioning. Meetings, for instance, can be made accessible to people with hearing disabilities (who have sufficient written language skills) by providing real-time captioning, a word-for-word transcription of oral communications projected onto a screen by a specially-trained stenographer. An advantageous by-product of this form of accommodation is a written record of the event for which the captioning was provided. To locate companies that offer captioning services, look in the Yellow Pages under Captioning or contact the local branch of the Canadian Hearing Society. While captioning is a useful communication tool, it should not be used as a substitute for interpreter services between sign language and English.

E-mail is often used by Deaf people and people with hearing loss, who have computers and sufficient written language skills in English, to communicate just as it is used by hearing individuals. Chat on the internet is also used. Lawyers must be aware that communication over e-mail and chat may not be secure or confidential.

For people who are deaf-blind, intervenors may be used. Intervenors facilitate the interaction of a person who is deaf-blind with other people and the environment.⁹²

Intervenors can assist people who are deaf-blind to communicate, for example, using a tactile and/or visual form of language or any combination of them. A deaf-blind person, for reasons of comfort and the protection of privacy, may wish to use or not use a particular intervenor that he/she knows.

It is important to be aware of potential conflicts of interest if the interpreter or intervenor is a family member or care giver and the possibility that the interpreter or intervenor may try to influence the client. Lawyers must ensure that they are ascertaining the wishes of their client.

For appearances before courts or tribunals, lawyers should contact the relevant registrar to make requests for the accommodation of their clients. For the purposes of a client who is Deaf or has hearing loss, and is a witness in a proceeding, for example, it may be necessary for both a sign language interpreter and a real-time captioner to be present. A sign language interpreter can communicate most of the dialogue that occurs in a legal proceeding, but a person who is Deaf or has hearing loss may require real-time captioning in addition to sign language interpretation. Through reference to real-time captioning, a person who is Deaf or who has hearing loss can access oral concepts that were not translated by their interpreter and, they can check to ensure that their interpreter is correctly rendering, orally, their evidence given through sign language.

Lawyers must remember Rule 4.06(8) of the Ontario *Rules of Civil Procedure*⁹³ when commissioning an affidavit for a client who is Deaf or has hearing loss and who has limited proficiency in written English or French. The Rule requires the lawyer to certify that the affidavit was interpreted to the client by an interpreter who swore or affirmed to interpret the contents correctly.

A teletypewriter (TTY), also known as a text telephone, is an important aid for communication, in written format, over telephone lines. This machine has a typewriter

92 Online: Rotary Cheshire Homes <<http://www.rotarycheshirehomes.org/definitions.htm>>.

93 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 [*Rules of Civil Procedure*].

keyboard, an electronic display, and an attached roll of print-out tape. Users place standard telephone headsets into cradles on the machine and type messages to receiving parties. The message is transmitted to a TTY on the other end, which also has a real-time electronic display, and may also generate a printed copy of the conversation. The other party sees the message on their own screen (and on a print-out) and types back. Using a TTY is similar to using chat technology over the internet.

Communicating via a TTY can, unfortunately, be time-consuming (depending upon the typing skills of interlocutors). However, one benefit for lawyers is that exact records of conversations, including instructions, are created by the resultant print-outs.

Some clients, whose first language is sign language, may find it difficult to communicate problems, concepts, and even basic questions through a TTY. In such circumstances, it is preferable to meet in person in the presence of a qualified interpreter.

Bell Canada offers a service known as the Bell Relay Service, in which an operator will relay messages between people using regular telephones and people using TTY machines. For lawyers who have not yet purchased TTY machines, this is a useful service.

The Bell Relay Service is accessed by calling the following special national access numbers:

TTY	711
Voice	1 800 855-0511

Additional information about terminology, communication and accommodation in relation to people who are Deaf and have hearing loss can be accessed from “Breaking the Sound Barriers: Employing People who are Deaf, Deafened or Hard of Hearing” at <http://www.chs.ca/en/documents-and-publications/employment/index.php>. While the manual covers workplace issues, it contains much relevant, general information on the above topics.

C. Vision Disabilities

For clients with vision disabilities, lawyers must ensure that written communications are provided in an accessible format. Each client defines accessibility for himself/herself. Therefore, the lawyer must ask the client which format is best for them.

For clients who have access to and are familiar with computers with specialized software, documents can be transmitted in electronic text format. The advantage of communicating electronically is that it permits individuals with different levels of vision to be able to convert documents into the specific formats that they prefer. For clients who have access to e-mail, this form of communication may be easiest.

Some clients who are blind may prefer documents (and business cards) in Braille. Braille is a system that permits people to read by running their fingers over a series of configurations of raised dots. For offices equipped with Braille printers, documents may be converted into Braille before being sent to clients who require documents in this format.

Some people who are blind prefer written materials to be read onto audio tapes as their main conduit to the “printed word.” Even for those fluent in Braille, tapes can be important because they are often easier and cheaper to prepare and transport than Braille materials.

Lawyers who receive written correspondence on behalf of clients who are blind can use scanning technology to convert such documents into text formats, ready for electronic transmission to their clients. For lawyers who lack scanning technology, it is important to orally or electronically (*i.e.*, through e-mail) advise clients of the contents of such correspondence, once received.

For appearances before courts or tribunals, lawyers should contact the relevant registrar and other parties to ask that certain accommodations be provided. For instance, a request can be made for evidence to be converted, in advance of a hearing, into an accessible format so that a client will be able to understand the evidence and instruct his/her lawyer accordingly during a hearing.

Lawyers should consider the applicability of Rule 4.06(7) of the *Rules of Civil Procedure* when commissioning an affidavit for a client who is blind.

D. Communication Disabilities

A communication disability describes a restriction in a person’s ability to speak in a manner that can be readily understood, which is associated with a physical or mental impairment. For people with communication disabilities, communication through electronic means may be advantageous for relaying day-to-day information.

Communicating with people who have communication disabilities can be time consuming. At in-person meetings, lawyers can accommodate people with communication disabilities by cooperatively using systems designed to augment or serve as alternatives to speech. People who have limited verbal skills may use one or more augmentative communication devices or systems. Augmentative communication systems make use of objects, pictures, graphic symbols (such as those depicted on communication boards), manual signs, finger spelling, or artificial voice outputs. The latter may be controlled by push-

buttons, puffs of air, eyebrow wrinkles, or other means. People who have significant speech or language impairments often rely on gestures and facial expressions and body movements.

There are a number of augmentative communication systems available to people who are non-verbal. Blissymbolics, one example, is a graphic language often printed and presented on the surface of a tray, but sometimes in books and increasingly frequently on personal computers. Symbols accompanied by the equivalent word are written within squares. Symbols may have to be presented one at a time. Each can be pointed to and the client asked if it is the desired one, or a light can scan the symbols and be stopped at the desired one. Some people who use Blissymbolics have mastered a few thousand symbols and can express virtually any idea using them. In addition to Blissymbolics, other codes such as numbers, letters, or shapes can also represent phrases. Many people with communication disabilities may use an electronic device for communication such as an ipad, iphone or other tablet.

For people who use symbolic languages, a communication assistant who is familiar with the person's particular method of communication may be very important, especially when it comes to interpreting symbols that are newly generated from existing vocabulary. However, because communication assistants often are family members of, or provide care to, the client, lawyers must be aware of potential conflicts of interest between the client and the assistant, and the possibility that the assistant may try to influence the client. It may be necessary to bring in a neutral communication assistant to ascertain the client's wishes.

Resources for the legal community in relation to accommodating the communication needs of people who use Augmentative and Alternative Communication are available at <http://www.accpc.ca/ej-resources.htm>.

E. Disabilities that Affect Mobility

For people with mobility disabilities, the primary form of accommodation that will be required of lawyers is the removal of physical and architectural barriers in law offices.

Ontario's *Human Rights Code* provides that facilities must not discriminate against people with disabilities. The *Code* does not set out specific standards to be followed, however the Ontario Human Rights Commission has stated that service providers (including lawyers) should conduct an accessibility review of their facilities in order to identify existing barriers and remove them.⁹⁴ Similarly, while the *AODA*⁹⁵ provides for the establishment of accessibility standards for buildings, no such standards currently exist. There are accessibility standards in the Ontario *Building Code Act, 1992* and its associated regulations,⁹⁶ but these apply only to new or renovated buildings. These standards are quite minimal in some respects. There are more comprehensive standards available from the Canadian Standards Association but the use of these is voluntary.⁹⁷

Accessibility related to structural elements within a building is only part of the broader issue of access. There are potential barriers that are created by badly placed furniture, unsuitable floor coverings, and poor lighting. There are also potential barriers in the environment outside of buildings, including inaccessible sidewalks, inaccessible parking spaces, and uncleared snow and ice. If a lawyer's office is inaccessible, the lawyer should consider another meeting space that would meet the disability-related needs of the client.

Transportation can be a major barrier to people who use mobility aids. It is important to check transportation arrangements carefully with clients who use specialized public transportation services such as Wheel-Trans (Toronto), Para Transpo (Ottawa) or accessible public transit services in other municipalities. For example, some services require notice for ride bookings, and this has to be taken into account when planning

94 Online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/issues/disability>>.

95 *AODA*, *supra* note 29.

96 *Building Code Act, 1992*, S.O. 1992, c. 23, and O. Reg. 350/06.

97 The Canadian Standards Association (CSA) is an independent, non-profit, membership-based organization that develops standards in a number of areas, including construction. Further information on the CSA and standards relating to accessible design can be found online at <<http://www.csa.ca/Default.asp?language=english>>.

client meetings. Unexpected emergency legal meetings may have to take place in the homes of people with mobility disabilities who rely upon public transit services.

It is important to ensure that appropriate (*i.e.*, accessible) parking spaces are available for clients who arrive in their own vehicle and that the entrance to the building is accessible. If someone else drives the client, then a safe and accessible drop-off area for the client, and a parking area for the person who drove them, is also required.

For appearances before courts or tribunals, lawyers should contact the relevant registrar to ensure that accessible rooms are booked for proceedings involving clients with mobility disabilities. Unfortunately, there are still many court houses with inaccessible rooms⁹⁸

F. Mental Health/Psychiatric Disabilities⁹⁹

The mental health and psychiatric disability community represents diversely situated people with a range of perspectives. Mental health is usually understood through a broad range of diagnostic categories found in the Diagnostic and Statistical Manual (DSM) for example schizophrenia, depression, mood disorders and phobias. While some clients find these clinical categories helpful, other clients do not find them useful and will not recount their experiences via psychiatric language.¹⁰⁰ Accommodation for clients should encompass sensitivity to how a particular client chooses to narrate their experience. It is therefore important to avoid imposing stereotypical perceptions on

98 Report of the Disability Issues Committee, "Making Ontario's Courts Fully Accessible to Persons with Disabilities" (December 2006), online: Court of Appeal of Ontario <http://www.ontariocourts.on.ca/accessible_courts/en/report_courts_disabilities.htm>.

99 There are several terms used to describe people with mental health issues and there has been long standing debate and no consensus on appropriate terminology. Other terms in use include: consumer/survivors, psychiatric survivors, psychiatric disability, mental health disability, people with mental health issues, people with mental illness, and madness. However, it should be noted that "[m]any psychiatric system survivors are unwilling to see themselves as disabled" cited in Peter Beresford, "What have madness and psychiatric system survivors have to do with disability and disability studies?" (2000) 15.1 *Disability and Society* 167 at 169.

100 For example, persons with psychiatric disabilities have pushed for the language and principles of "recovery" in the last number of years which moves away from clinical language and lens. In Ontario "Mental Health Recovery" has become central in the way many services and professional practice is organised. For more information please see: Anthony WA. "Recovery from mental illness: the guiding vision of the mental health system in the 1990s". *Innovations and Research* 1993; 2:17-24.

clients who have mental health/psychiatric disabilities (e.g. do not ask are you “psychotic”?). The focus should be on interacting with the person as an individual and not a label or a number. The intensity or effect of any given mental health disability varies from person to person, can be episodic in that there may be times when the person is not affected at all by his/her mental health disabilities. Trauma can also impact people in a variety of ways that is not always visible but will impact a client’s ability to follow through on tasks.

Some actions of a person with a mental health/psychiatric disability may seem different from what is perceived of as “normal” among people who have no such experiences. Do not be overly concerned by a sudden change in mood, speech pattern or volume, a burst of energy or anger, or a communication that is not understood.

People with mental health/psychiatric disabilities may occasionally have difficulty concentrating. If this is the case, consider breaking down tasks into manageable steps and arranging shorter meeting periods. Written instructions, reminders and clear communication can facilitate interactions and address memory loss and concentration concerns. Use accessible language and explain the implications of certain legal decisions.

Lawyers should inquire of clients as to any side-effects of medication, so that accommodation can be provided, both in a law office and in court.

It is important to be respectful, patient, flexible, understanding and positive when interacting with people with mental health/psychiatric disabilities. Resist the tendency to focus on the person’s behaviour and instead focus on the overall goal of the conversation.

G. Intellectual/Developmental Disabilities

There is some controversy about appropriate terminology in the context of intellectual/developmental disabilities. However, in current practice the two terms, “intellectual disability” and “developmental disability” are frequently used interchangeably.

At ARCH we prefer, “people who have been labeled with an intellectual disability”.

Generally, intellectual/developmental disabilities are present from childhood, and can affect a person’s intellectual development and functional capacity in areas such as language, mobility, learning and self care.

In the past the terms “mental retardation,” “dumb” and “slow” were used to describe these disabilities, but are now avoided because they carry such pejorative, discriminatory connotations. Lawyers can accommodate their clients with intellectual/developmental disabilities by ensuring that appropriate, dignity-enhancing language is used to describe the disabilities.

It is often assumed that individuals who have been labelled with intellectual disabilities are incapable to instruct counsel by virtue of their disability. This assumption is not necessarily true. It is important that a lawyer assess each client’s capacity individually. See the discussion regarding capacity to instruct in the section above titled “Client under a Disability’ and Capacity to Instruct Counsel”.

Some people who have been labelled with an intellectual disability are shy and easily intimidated, and they may not be aware of things in the common experience of others. Because of vulnerability and dependence on others they may be afraid to express their own ideas without support. This can result from the environment in which they have spent their lives. Many people with intellectual/developmental disabilities have led sheltered lives, either with their parents, in a group home, or increasingly rarely, in an institution. They may have been denied educational opportunities. They almost certainly have been denied social and employment opportunities.

Clients who have been labelled with an intellectual disability should be treated like others unless there is a compelling reason not to do so. Do not underestimate the capacities and potential of clients who have been labelled with an intellectual disability. When talking with clients, lawyers should use clear and concise concepts and avoid complex sentences. Repetition and careful explanation are important. When something is *really important*, lawyers should say so explicitly to clients. Be alert to the possibility that clients may misinterpret jargon or technical terminology, while seeming to use it appropriately.

When interacting with clients who have been labelled with an intellectual disability, lawyers should clearly explain the purpose of the meeting. The lawyer should also explain to the client that it is their decision whether they wish to take the lawyer's advice. Due to socialization in group homes, institutions or the family home, direction from authority figures can be seen as non-optional to people with intellectual/developmental disabilities.

A client who have been labelled with an intellectual disability may benefit from the support of a person who they know and trust (e.g., a family member, friend, or an advocate) when they meet with lawyers. However, lawyers must be aware of the potential conflicts of interest between the client and the family member, friend or advocate. As with other clients with disabilities, it is important to find out from a client with an intellectual/developmental disability what accommodations are required.

H. Learning Disabilities

A learning disability is defined as a neurological dysfunction that interferes with the brain's capacity to accurately store, process, or produce information, either spoken or written or tactile. It is *not caused* by visual, hearing, or motor impairments, or by intellectual or psychiatric disabilities. Learning disabilities are frequently found in association with a variety of other medical conditions (e.g., Fetal Alcohol Syndrome and Fragile X Syndrome).

Generally, individuals with learning disabilities have few obvious problems collecting information, but they may experience difficulties screening, interpreting, recalling, processing, or translating that information. Some specific learning disabilities are: dyslexia (severe problems reading); dysgraphia (severe problems writing); dysphasia (severe problems developing spoken language); and dyscalculia (severe problems doing mathematics). While learning disabilities do not disappear, individuals living with them can learn strategies to compensate for their disabilities.

Because learning disabilities are largely invisible, they are often not taken seriously. Lawyers can demonstrate that they accept and respect their clients' disabilities and

accommodation needs by inquiring as to whether accommodation is needed and in what form.

Clients with learning disabilities may take more time than others to reason through a situation or set of facts. Lawyers may need to provide accommodation in the form of longer meetings with clients with learning disabilities. Other forms of accommodation may include the provision, in advance, of a written schedule for a meeting, a written summary of meeting minutes, reminders for meetings, or a written list of tasks to be completed. Lawyers must discuss with their clients what forms of accommodation are desired when the working relationship first begins. Accommodation measures can be assessed, periodically, to determine whether they are working.

V. WEB RESOURCES

For further information, the following websites may be consulted:

- **ARCH Disability Law Centre:** www.archdisabilitylaw.ca

ARCH is a community legal aid clinic dedicated to defending and advancing the equality rights of people with disabilities in Ontario. Its website provides a description of the services it offers as well as information on disability law and initiatives in litigation and law reform.

- **Canadian Council on Rehabilitation and Work:** www.ccrw.org

CCRW is a network of organizations and individuals that provides leadership in programs and services for job seekers with disabilities and businesses committed to equity and inclusion. The site provides information on programs and services for job seekers and businesses interested in providing accommodation for employees with disabilities.

- **Council of Canadians with Disabilities:** www.ccdonline.ca

CCD is a consumer-controlled organization that advocates for the equality rights of people with disabilities. This site describes the philosophy and membership of the CCD

and includes information on their advocacy work in a number of areas including technology, human rights, international development, social policy and transportation.

- **Disability-Related Policy in Canada:** www.disabilitypolicy.ca

This website presents policy discussions on the funding, supply and availability of a range of products and services for disability-related needs, including personal supports and technical aids and equipment.

- **Disability Research Information Page:** www.ccsd.ca/drip

This website provides centralized access to information about disability research on a wide range of topics including employment, education, health care, and supports and services available for people with disabilities.

- **EnableLink:** www.abilities.ca

Enablelink provides links to Canadian and international resources on a wide variety of disability-related topics including links to directories, articles, organizations, advocacy and support groups, services and products.

- **Legal Aid Ontario:** www.legalaid.on.ca

Legal Aid is available to low income individuals and disadvantaged communities for a variety of legal problems, including criminal matters, family disputes, immigration and refugee hearings and poverty law issues such as landlord/tenant disputes, disability support payments and other income security.

- **Ministry of Community and Social Service:**
www.mcscs.gov.on.ca/en/mcscs/programs/accessibility

This link provides information about the *Accessibility for Ontarians with Disabilities Act*, the *Ontarians with Disabilities Act* and detailed information about accessibility for people with disabilities.

- **Ontario Human Rights Commission:** www.ohrc.on.ca/en

The Commission administers the Ontario *Human Rights Code*, which protects people in Ontario against discrimination in employment, accommodation, goods, services and facilities, and membership in vocational associations and trade unions. The site provides information about the investigation of complaints under the Code and provides other educational materials about human rights in Ontario, such as a guide to the duty to accommodate.

- ***Persons with Disabilities Online:*** www.pwd-online.ca

This site is sponsored by the Federal Government and provides links to both national and provincial information sources for a wide range of programs and services available to people with disabilities including housing, employment, assistive technology, tax benefits and transportation.

- ***United Nations Convention on the Rights of Persons with Disabilities:***
www.un.org/disabilities/

This site gives information on the history and development of the *Convention*, the background behind the provisions and the current work taking place on the *Convention*.

Appendix A

Language that is, and is not, Considered to Enhance the Dignity of People with Disabilities¹⁰¹

- putting the person first by saying, for example, “people with disabilities” or “women with disabilities” is now generally considered more appropriate than saying “disabled persons” or (especially) “the disabled”
- people with disabilities are often referred to as “consumers” of disability-related services
- people with a strong commitment to Deaf culture capitalize the word “Deaf”
- some people prefer to be known as “autistic” rather than as a “person with autism”
- “disability” is a more appropriate term than “handicap”
- “non-disabled” is considered more appropriate than “able-bodied”
- refer to a “wheelchair user” rather than to someone “confined” or “bound” to a wheelchair
- usage (in Canada, especially) strongly favours “intellectual disability” or “developmental disability” as opposed to “mental retardation”
- people with a lengthy history of psychiatric treatment or hospitalization often refer to themselves as “survivors” or “consumer/survivors”. There are several other terms used to describe people with mental health issues and there has been long standing debate and no consensus on appropriate terminology. Other terms in use include: psychiatric survivors, psychiatric disability, mental disabilities, people with mental illness, people with mental health issues, and madness.
- it is not appropriate to speak of someone as “suffering” from a disability or as “afflicted” with it, or as a “victim of it,” except in some particular circumstances. For example, people who were affected by Thalidomide refer to themselves as “Thalidomide victims”
- it is appropriate to use words like “see” as you would normally when speaking to a person who is blind
- it is preferable to use the terms “partial vision” or “low vision” rather than “legal blindness”
- the terms “physically challenged” and “mentally challenged” are not in general use in Canada

101 This Appendix provides general information only. Individual persons with disabilities and/or groups of people with disabilities may prefer the use of specific words or terminology.



Chapter 3

HUMAN RIGHTS AND DISABILITY LAW: A PRIMER

September 2013

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September 2013

Current to September 2013. Anyone intending to rely on this paper should conduct their own research for updates in the legislation and jurisprudence.

A French version of this paper has been prepared by the Centre for Legal Translation and Documentation. The translation is entitled: *LES DROITS DE LA PERSONNE ET LE DROIT DES PERSONNES HANDICAPÉES: GUIDE D'INTRODUCTION* and can be found at Chapter 3. The analysis is based on an English version of the law.

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I. SCOPE OF CHAPTER

This chapter aims to provide an introduction to Ontario human rights law for lawyers, paralegals and other advocates who represent or provide advice to persons with disabilities in Ontario.¹ Human rights is a complex and rapidly evolving area of law. This chapter highlights some of the key issues to consider, and offers a starting point for legal practitioners to conduct their own research into the specific issues facing their individual clients.

Ontario's *Human Rights Code* ("Code") is of particular importance for persons with disabilities. "Disability" continues to be the leading ground of discrimination cited in human rights applications in Ontario. According to statistics published by the Human Rights Tribunal of Ontario, 54.4% of the human rights applications filed in 2011-2012 raised the ground of disability.²

An understanding of human rights law as it relates to disability is important even for lawyers and advocates who do not appear before the Human Rights Tribunal. In *Tranchemontagne v. Ontario (Director, Disability Support Program)* the Supreme Court of Canada confirmed that unless there is a statutory requirement to the contrary, administrative tribunals and adjudicators must consider and apply human rights law where an issue is properly before the tribunal and a litigant is advancing human rights arguments.³ People with disabilities often appear before administrative tribunals such as the Social Benefits Tribunal, Landlord and Tenant Board, Workplace Safety and Insurance Appeals Tribunal, Ontario Labour Relations Board, and other decision-makers who must adjudicate human rights issues that arise in the context of matters that are properly before them. Legal practitioners who advise and represent people with

¹ A similar paper was prepared by Bill Holder for the 2003 Disability Law Primer, and was presented on November 27, 2003 as part of a Continuing Legal Education Program entitled "A Disability Law Primer", sponsored by ARCH, Pro Bono Law Ontario, and the Law Society of Upper Canada.

² The Human Rights Tribunal of Ontario, "Fiscal Year 2011-2012 – New Applications", online: Human Rights Tribunal of Ontario <<http://www.hrto.ca/hrto/?q=en/node/152>>.

³ *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14 (CanLII).

disabilities must, therefore, consider whether to make human rights arguments in support of their client's administrative law claims.

This chapter focuses primarily on Ontario's provincial human rights statute.⁴ The Code applies within provincial jurisdiction; it prohibits discrimination and harassment on the basis of enumerated grounds, including disability, race, sexual orientation, age, family status and others; and in enumerated social areas, including employment, housing, goods, services, contracts, and others.⁵

The *Canadian Human Rights Act* applies within federal jurisdiction and protects against discrimination by federally regulated employers or service providers, including federal government departments, chartered banks, airlines, television and radio stations, and others.⁶ More information about the *Canadian Human Rights Act* can be found at: http://www.chrc-ccdp.ca/about/human_rights_act-eng.aspx. More information about the Canadian Human Rights Tribunal can be found at: <http://www.chrt-tcdp.gc.ca/NS/index-eng.asp>.

This chapter deals with substantive legal issues that arise in the practice of human rights law in Ontario. It does not address procedural issues. There is a substantial body of jurisprudence regarding practice and procedure before the Human Rights Tribunal of Ontario ("Tribunal"). Proceedings before the Human Rights Tribunal are governed by this body of jurisprudence, the Tribunal's Rules of Procedure⁷ and the *Statutory Powers Procedure Act*⁸. In many cases issues that arise are procedural in nature but have substantive and substantial impact on a client's case. Procedural issues may include choice of forum⁹, whether a party has standing before the Tribunal,

⁴ *Human Rights Code*, RSO 1990, c H.19 ["Code"].

⁵ *Ibid* at ss. 1-7, 9.

⁶ *Canadian Human Rights Act*, RSC 1985, c H-6 at ss. 3-14.

⁷ Human Rights Tribunal of Ontario, *Rules of Procedure Applications Under the Human Rights Code Part IV R.S.O. 1990, c.H.19 as amended*, online: Human Rights Tribunal of Ontario <<http://www.hrto.ca/hrto/index.php?q=en/node/28>>.

⁸ RSO 1990, c S.22.

⁹ There is a body of jurisprudence regarding choice of forum and its impact on litigation before the Human Rights Tribunal. Section 45.1 of the Code provides that, "(t)he Tribunal may dismiss an application, in

limitation periods, appointment of litigation guardians, requests for interim remedies, requests to expedite applications, requests for anonymity, requests for accommodation during Tribunal hearings, summary hearing procedures, mediation, applications to enforce settlements, and requests for reconsideration. Choice of forum is particularly important to consider when evaluating whether to file a human rights application or, alternatively, to raise human rights arguments in the context of another administrative law claim.

Lawyers, paralegals and others who represent persons making human rights applications should be aware that section 34(1) of the Code provides that human rights applications must be made within one year of the alleged incident of discrimination or the last incident in a series.¹⁰ Section 34(2) provides that applications may be submitted after the expiry of this limitation period if the applicant can demonstrate that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.¹¹

A variety of CLE materials that address substantive and procedural issues in Ontario human rights law is available. The Law Society of Upper Canada and the Ontario Bar Association may be able to provide access to relevant CLE. The Ontario Human Rights

whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application.” This provision was most recently interpreted by the Tribunal in *Claybourn v. Toronto Police Services Board*, 2013 HRTO 1298 (CanLII). In *Claybourn* the Tribunal considered the Supreme Court of Canada’s decisions in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 (CanLII), *British Columbia (Workers’ Compensation Board) v. Figliola*, 2011 SCC 52 (CanLII), and *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (CanLII). The Tribunal found that the appropriate interpretation of s. 45.1 does not permit the dismissal of a human rights application when this would lead to unfairness, given the nature of the other proceeding and difference in the issues at stake in that process.

¹⁰ There is a body of jurisprudence regarding what constitutes a “series of incidents” for the purposes of s. 34(1). See, for example, *Garrie v. Janus Joan Inc.*, 2012 HRTO 1955 (CanLII); *Labao v. Toronto Police Services Board*, 2012 HRTO 1529 (CanLII); *AlSaigh v. University of Ottawa*, 2012 HRTO 2 (CanLII); *Pakarian v. Chen*, 2010 HRTO 457 (CanLII); *Savage v. Toronto Transit Commission*, 2010 HRTO 1360 (CanLII); *Plihronakos v. Mississauga (City)*, 2010 HRTO 1433 (CanLII).

¹¹ There is a body of jurisprudence regarding which circumstances the Tribunal will permit an application to be filed beyond the one year limitation period. See, for example: *Miller v. Prudential Lifestyles Real Estate*, 2009 HRTO 1241 (CanLII); *Klein and Dionne v. Toronto (City)*, 2011 HRTO 317 (CanLII).

Commission has produced several policy documents on disability and the Code.¹² The Human Rights Legal Support Centre offers a clear language information sheet, which may be of assistance to individuals with disabilities.¹³

II. INTRODUCTION

Courts have characterized human rights legislation as "fundamental" and "quasi-constitutional" and have directed that the provisions of such legislation be interpreted broadly and purposefully.¹⁴

A powerful process of disability disadvantage is exclusion, which is fuelled by stereotypes and stigma. For example, exclusion from opportunities and privileges reinforces the perception of persons with mental health issues as the "other/outsider" and perpetuates the cycle of marginalization.¹⁵ The historical oppression experienced by persons with disabilities manifests in overlapping processes of stereotype, stigma, devaluation and exclusion.¹⁶ Bill Holder offered the following commentary:

¹² See, for example: Ontario Human Rights Commission, *Policy and guidelines on disability and the duty to accommodate*, (November 23, 2000), online: Ontario Human Rights Commission <http://www.ohrc.on.ca/sites/default/files/attachments/Policy_and_guidelines_on_disability_and_the_duty_to_accommodate.pdf>; Ontario Human Rights Commission, *Guidelines on accessible education*, (September 29, 2004), online: Ontario Human Rights Commission <http://www.ohrc.on.ca/sites/default/files/attachments/Guidelines_on_accessible_education.pdf>.

¹³ Human Rights Legal Support Centre, *Your Right to Accommodation under Ontario's Human Rights Code*, online: Human Rights Legal Support Centre <<http://www.hrlsc.on.ca/en/DutyOfAccommodation.aspx>>.

¹⁴ *Ontario Human Rights Commission v. Simpson-Sears Limited*, [1985] 2 S.C.R.536 [O'Malley]. At para. 12, Justice McIntyre stated for the Court: "(t)he accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment (see Lamer J. in *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, at 157ff), and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect."

¹⁵ Ena Chadha & C. Tess Sheldon, "Promoting Equality: Economic and Social Rights for Persons with Disabilities Under Section 15" (2004) 16 NJCL 27.

¹⁶ David Lepofsky, "A Report Card on the Charter's Guarantee of Equality to Persons with Disabilities After Ten Years – What Progress? What Prospects?" (1997) 7 NJCL 263. Lepofsky describes various physical, social and attitudinal barriers experienced by persons with disabilities. At para. 268 the author added: "(p)ersons with disabilities in Canada often and disproportionately experience serious socio-economic disadvantage.... They are under-represented in society's mainstream, where upward mobility is most likely."

The consequence of not being provided with accommodation will be for persons with disabilities, some form of social exclusion, which is a condition of inequality....When respondents allege undue hardship they are, concomitantly, also alleging that the *social exclusion* of a person with a disability is warranted in the circumstances.¹⁷

Substantive equality promises the full inclusion of persons with disabilities in social, work and community life.¹⁸ It can help shape new positive social attitudes about persons with disabilities. Pentney argues, “(e)quality law seeks to protect and promote belonging; to allow others in to the fold, and to encourage and cement our bounds of community.”¹⁹ The core value of inclusion should guide the interpretation of equality protections for persons with disabilities. Inclusion is a primary goal of equality protections and is central to the pursuit of equality, independence and full participation in social, work and community life. Equality rights must protect against the multifarious effects of exclusion and facilitate a sense of belonging. Equality protections must be forward thinking, fostering a sense of belonging in the universal community.²⁰

III. OVERVIEW OF CANADIAN HUMAN RIGHTS SYSTEM

¹⁷Bill Holder, “Accommodation of Disability in Ontario” (Toronto: ARCH Disability Law Centre, 2003), online: ARCH <http://www.archdisabilitylaw.ca/publications/CLE_DisabilityLawPrimer.asp> at 25 [emphasis added].

¹⁸Lepofsky, *supra* note 16. Lepofsky maintained that the goal of equality to people with disabilities “...is to ensure persons with disabilities *full participation and inclusion* in all rights, benefits, burdens and obligations available in society.” [emphasis added].

¹⁹W. Pentney, “Belonging: The Promise of Community -- Continuity and Change in Equality Law 1995-96” (1996), 25 C.H.R.R. C/6.

²⁰Isabel Grant & Judith Mosoff, “Disability and Performance Standards Under the Ontario Human Rights Code” (2002) 1 JL & Equality 205. At para. 7, Grant and Mosoff claimed that equality theory “focuses on enhancing the participation of persons with disabilities....”.W. Pentney, “Belonging: The Promise of Community -- Continuity and Change in Equality Law 1995-96” (1996), 25 C.H.R.R. C/6.Pentney stated: “Yet we know that communities are built in two ways: by welcoming and by keeping out. ... The core value of “inclusion” should guide the interpretation of equality protections for persons with disabilities.”Errol Mendes, “Taking Equality into the 21st Century: Establishing the Concept of Equal Human Dignity” (2000) 12 NJCL 3 at 20. Mendes quoted Immanuel Kant in ascertaining that inherent human dignity “signifies a kind of intrinsic worth that belongs equally to all human being as such, constituted by certain intrinsically valuable aspects of being human”. David Lepofsky, “The Charter’s Guarantee of Equality to People with Disabilities – How Well is it Working?” (1998) 16 Windsor YB Access Just 155.Lepofsky stated that the “intrinsic” value of persons with disabilities is often overlooked.Their identity is viewed as “defective.”At 172 Lepofsky submitted that the aim of equality theory is to have people “fairly and accurately judged on their individual ability, based on what they can do in a barrier free context, and not on what they cannot do or on what others think they cannot do”.

The purpose of the *Canadian Human Rights Act* is as follows:

to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on ... disability.²¹

The *Canadian Human Rights Act* must be interpreted in a way that ensures that the purpose, as set out, is given effect. Notably, the purpose of the *Act* includes reference to accommodation.

Disability is defined broadly in the *Act* to mean, “any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug”²². The *Act* provides persons with disabilities the right to be free from discriminatory practices, on the basis of disability, with respect to the following areas of social interaction: goods, services, facilities or accommodation customarily available to the public²³; commercial premises or residential accommodation²⁴; employment²⁵; and employee organizations²⁶. The *Act* further provides that a person found to have engaged in a discriminatory practice may be made subject to a remedial order.

As in the *Human Rights Code*, the *Canadian Human Rights Act* sets out a duty to accommodate in section 15 which legislates exceptions to discriminatory practices. The section allows a respondent to defend itself by establishing that, with respect to the differential treatment of a person with a disability, there was a *bona fide* occupational requirement or justification. In proving the merits of such a requirement or justification, the respondent must establish that the needs of the person with the disability could not

²¹ *Canadian Human Rights Act*, RSC 1985, c H-6, s 2.

²² *Ibid* at s 25.

²³ *Ibid* at s 5.

²⁴ *Ibid* at s 6.

²⁵ *Ibid* at ss 7, 8, 10 and 11. The *Act* protects against pre-employment and existing employment discrimination.

²⁶ *Ibid* at s 9.

have been accommodated, short of undue hardship. The *Act* outlines the three factors to be considered when assessing undue hardship: “health, safety and cost.”

While the language in the *Human Rights Code* and the *Canadian Human Rights Act* is different, the protections afforded by the two statutes with respect to accommodation are very similar.

Anyone who works for or receives services from a business or organization that is regulated by the federal government, and believes that they have been discriminated against can make a complaint to the Canadian Human Rights Commission. The Commission maintains a gatekeeping function with respect to complaints that are dealt with by the Commission or heard by the Canadian Human Rights Tribunal.

The Commission may decide not to deal with a complaint if it appears to the Commission that²⁷:

- the complainant ought to exhaust grievance or review procedures that are otherwise reasonably available;
- the complaint is one that could more appropriately be dealt with according to a procedure provided for under another Act;
- the complaint is beyond the jurisdiction of the Commission;
- the complaint is trivial, frivolous, vexatious or made in bad faith;
- the complaint is based on acts the last of which occurred more than one year before the receipt of the complaint. The Commission has discretion to extend this time if it considers it appropriate in the circumstances.

At ARCH, we receive many calls from persons with disabilities who wish to make complaints to the Canadian Human Rights Commission. Many callers are current or past employees of federally regulated agencies or of the federal government. In practice, the exercise of the Commission’s discretion contained in section 41 serves to

²⁷ *Ibid* at s 41(1).

reduce substantially the number of complaints that are referred for mediation or adjudication by the tribunal.

IV. OVERVIEW OF ONTARIO'S HUMAN RIGHTS SYSTEM

Since June 30, 2008 Ontario's human rights system has included three pillars: the Human Rights Tribunal of Ontario, the Human Rights Legal Support Centre, and the Ontario Human Rights Commission. Included here is an overview of the roles of each of these agencies, and the consideration that should be given to each when representing a client in a human rights application.

A. Human Rights Tribunal of Ontario

Before 2008, people who had experienced discrimination could file a human rights complaint with the Ontario Human Rights Commission ("Commission"). Like a "gatekeeper", the Commission investigated the complaint and decided whether to forward the complaint for adjudication to the Human Rights Tribunal (or Board of Inquiry as it was known until 2002).

The *Human Rights Code Amendment Act, 2006*, now requires complaints of discrimination to be filed directly with the Human Rights Tribunal of Ontario rather than the Commission.²⁸ The Commission no longer performs a gate keeping function. Instead, the Tribunal receives human rights applications and makes its own determinations as to how applications will proceed. This is sometimes described as a "direct access model" where applicants have direct access to a hearing of their complaint.²⁹

²⁸*Human Rights Code Amendment Act*, SO 2006, c. 30.

²⁹Andrew Pinto was appointed by the Government to conduct an external review of the reformed human rights system. His report and recommendations were submitted to the Attorney General in November 2012. Andrew Pinto, *Report of the Human Rights Review 2012*, (Toronto: Queen's Printer for Ontario, 2012), online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/ohrc/>>.

The Tribunal's mandate is to resolve claims of discrimination and harassment that fall within the jurisdiction of the Code, in a manner that is fair, just and expeditious.³⁰ The Tribunal conducts hearings and mediates human rights applications.

B. Human Rights Legal Support Centre

The Human Rights Legal Support Centre ("Centre") is an independent agency funded by the Ontario Government to provide human rights legal services to individuals who have experienced discrimination contrary to the Code.

The Centre provides a range of free legal services, including representation for settlement negotiations, mediation, and hearings, as well as legal advice regarding filing human rights applications. The Centre's services are generally provided on a limited retainer or stage-by-stage basis, depending on the needs of the applicant, merits of the claim and complexity of the evidentiary and legal issues. Services are provided to people throughout Ontario.³¹

C. Ontario Human Rights Commission

Under the Code, the role of Ontario's Human Rights Commission is to promote and advance respect for human rights in Ontario, protect the public interest, and identify and promote the elimination of discriminatory practices.³² The Commission works on effecting systemic change. It develops public policy on human rights, engages in public education and research, and has the power to monitor and report on anything related to the state of human rights in Ontario.

³⁰Human Rights Tribunal of Ontario, online: About HRTO
<<http://www.hrto.ca/hrto/index.php?q=en/node/1>>.

³¹Human Rights Legal Support Centre, online: What Services Does the Centre Provide?
<<http://www.hrlsc.on.ca/en/ServiceStages.aspx>>.

³²Code, *supra* note 4 at s. 29.

The provisions of the Code empower the Commission to advance claims of systemic discrimination in several ways, including:

- initiating applications as set out in section 35 of the Code;
- conducting an inquiry as set out in section 31 of the Code;
- intervening in cases before the Tribunal, where the party consents, as set out in section 37 of the Code; and
- applying to the Tribunal to state a case to the Divisional Court where it feels that a Tribunal decision is not consistent with Commission policies, as set out in section 45.6.

Pursuant to section 30 of the Code, Commission policies are to be used as guidance when interpreting and applying the Code. Counsel may, therefore, find the Commission's policies useful during settlement negotiations, mediations and hearings of applications. With respect to disability, the Commission has published several policies, including *Policy and guidelines on disability and the duty to accommodate*, *Guidelines on accessible education*, and others. These can be found on the Commission's website.³³

Section 45.4(1) of the Code provides that the Tribunal has the authority to refer a matter to the Commission and may ask the Commission to conduct an inquiry. Counsel may consider making a Request for Order that the Tribunal rely on its authority pursuant to Section 45.4(1).

While the Commission has the power to monitor and track applications (including those that raise claims of systemic discrimination), counsel for applicants seeking to raise systemic claims should consider proactively contacting the Commission to direct its attention to the case. Counsel may request support and intervention from the Commission.

³³ See *Policy and guidelines on disability and the duty to accommodate* and *Guidelines on accessible education*, both *supra* note 12.

V. WHAT CONSTITUTES “DISABILITY” UNDER THE CODE?

A prerequisite for a claim of discrimination is that the applicant must establish on a balance of probabilities that s/he had a disability at the time of the alleged discriminatory treatment.

Disability is defined at section 10(1) of the Code as:

- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
- (b) a condition of mental impairment or a developmental disability,
- (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- (d) a mental disorder, or
- (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997.

A disability can be either permanent (e.g., a visual or mobility disability), or temporary (e.g., a treatable illness or temporary disability which is the result of an accident).

The landmark Supreme Court of Canada decision in *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)* (known as *Mercier*) broadened the definition of “disability.”³⁴ In that case the three complainants were denied employment after pre-employment screening revealed medical conditions. All three complainants were at the time asymptomatic. The employers decided that since there was no medical evidence of a functional limitation, the complainants were not

³⁴ *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)* [2000] 1 S.C.R. 665 [*Mercier*].

entitled to seek protection on the ground of “disability.” Writing for a unanimous Court, Madame Justice L’Heureux-Dubé supported a broad interpretation of the word “handicap” which includes conditions that do not cause functional limitations. The Court found that the emphasis is on obstacles to full participation in society rather than on the conditions or state of the individual. The Court explained that disability should be understood as a multi-dimensional concept, including biomedical, social and functional components.³⁵

The Code and rights protecting instruments in other jurisdictions protect against discrimination on the basis of “perceived disability”.³⁶ In *Mellon v. Human Resources Development Canada*, the Canadian Human Rights Tribunal applied a broad test to determine whether the complainant had a disability for the purposes of the *Canadian Human Rights Act*.³⁷ The Tribunal offered the following comments on the nature of disability:

The *Act* does not contain a list of acceptable and unacceptable mental disabilities. It is not just the most serious or most severe mental disabilities that are entitled to the protection of the *Act*. Additionally, it is not solely those that constitute a permanent impairment that must be considered. Where appropriate, *even mental disabilities described as minor with no permanent manifestation could be entitled to the protection under the Act*. However, sufficient evidence still needs to be presented to support the existence of the disability.³⁸

The emphasis, then, is on the *effect* of the distinction or differential treatment and not on proving the alleged disability.

The Code’s protection of presumed and perceived disabilities, coupled with the *Mercier* holding, focuses the analysis upon society’s response to real or perceived limitations. It is sensitive to the phenomenon of “social handicapping” and the social models of

³⁵*Ibid.* at paras. 72-84. This idea is referred to as the social model of disability.

³⁶Code, *supra* note 4 at s. 10(3). See also *Mercier*, *ibid.* at para. 38.

³⁷*Mary Mellon v. Human Resources Development Canada* (2006), C.H.R.T. 3. At para. 81, the Tribunal stated that “... [a] disability may exist even without proof of physical limitations or the presence of an ailment”.

³⁸*Ibid.* at para. 88 [emphasis added].

disability in that a person may have no functional limitations other than those created by prejudice, stigma and stereotype.³⁹ It recognizes that social attitudes alone can constitute disability and, in doing so, advances the goal of inclusion.⁴⁰

A recent Tribunal decision in *J.L. v. York Region District School Board* is illustrative.⁴¹ At issue in the decision was whether *pes planus* (flat feet) could constitute a disability under the Code. The Tribunal cited *Mercier* and focused its analysis on whether *pes planus* created an obstacle to full participation in society. The Tribunal found that according to the medical literature in the majority of cases *pes planus* causes no functional limitations and presents no obstacles to participation in society. However in limited cases it could become very painful and require surgery, causing functional limitations for the affected person. In these limited cases *pes planus* could, therefore, constitute a disability pursuant to the Code.

In many cases, respondents will not challenge the fact that the applicant has a disability. However, in some cases it will be important to present evidence demonstrating the presence of a disability. In *J.L.*, once the Tribunal had determined that *pes planus* could, as a general matter, constitute a disability under the Code, it then proceeded to analyze whether the applicants could establish that in their individual circumstances the condition was a disability. The Tribunal concluded that they could not since there was no evidence that the applicants could not walk to school or would experience pain because of their condition. The applicants had not produced medical evidence to support their claim that the respondent school board should have bussed them to school.⁴² Medical evidence will also, likely, be necessary when pleading a new or emerging disability that is controversial or not well known.

³⁹See generally Jerome E. Bickenbach, *Physical Disability and Social Policy* (Toronto: University of Toronto Press, 1993).

⁴⁰Ena Chadha, "The Social Phenomenon of Handicapping" in Elizabeth Sheehy, ed, *Adding Feminism to Law: The Contributions of Justice Claire L'Heureux-Dubé* (Toronto: Irwin Law, 2004) 209-227.

⁴¹*J.L. v. York Region District School Board*, 2013 HRTO 948 (CanLII).

⁴²*Ibid.*, at paras. 17-20.

Medical evidence is, however, not the only way to establish that an applicant has a disability. Many people with disabilities do not have a specific or official medical diagnosis, and this is not a requirement under the Code. Evidence from persons who provide services and supports to the applicant or family members may suffice to demonstrate that the person has a disability for the purposes of the Code. Legal practitioners should ensure that human rights applications clearly set out facts relevant to establishing the existence of a disability.

VI. WHAT CONSTITUTES “SERVICES” UNDER THE CODE?

The Code prohibits discrimination and harassment in five enumerated social areas, including:

- services, goods and facilities;⁴³
- housing;⁴⁴
- contracts;⁴⁵
- employment;⁴⁶ and
- membership in trade unions, trade or occupational associations or self-governing professions.⁴⁷

Human rights protection is limited to the social areas set out in the Code.

Discriminatory acts between neighbours, for example, are not prohibited by the Code because interaction between neighbours is not an enumerated social area.

The provision of goods, services and facilities is a social area that may be of particular importance for people with disabilities. According to the Tribunal’s statistics, since 2009 a majority of claims filed with the Tribunal have raised the ground of disability.⁴⁸ In

⁴³ Code, *supra* note 4 at s. 1.

⁴⁴ *Ibid.* at ss. 2, 4.

⁴⁵ *Ibid.* at s. 3.

⁴⁶ *Ibid.* at s. 5.

⁴⁷ *Ibid.* at s. 6.

⁴⁸ In 2009/2010 52.2% of applications raised the ground of disability. In 2010/2011 this number was 53%, in 2011/2012 it rose to 54/4%, and in 2012/2013 57% of applications raised the ground of disability. See

2012/13, 21% of applications were filed based on the social area of goods, services and facilities.⁴⁹ This was second only to the social area of employment, which represented 77% of applications.

The Code does not define the word “services”. The Tribunal and the Divisional Court have found that services must mean something which is of benefit that is provided by one person to another or to the public.⁵⁰ In *Cooper* the Tribunal held that services “suggest(s) the necessity for some sort of service relationship, as opposed to a mere interaction, between the parties.”⁵¹

The word “services” has been interpreted broadly, and includes, for example, retail services⁵², hotel services, restaurant services⁵³, medical services⁵⁴, police services⁵⁵, public transportation services⁵⁶, coroner’s inquests⁵⁷, participation in volunteer organizations, organized sports, leisure leagues⁵⁸, social clubs,⁵⁹ voting⁶⁰, and driver’s licensing processes⁶¹.

Human Rights Tribunal of Ontario, online: HRTO Statistics
<<http://www.hrto.ca/hrto/index.php?q=en/node/128>>.

⁴⁹Human Rights Tribunal of Ontario, online: Fiscal Year 2012-2013 – New Applications
<<http://www.hrto.ca/hrto/index.php?q=en/node/197>>.

⁵⁰*Braithwaite v. Ontario (Attorney General)*, 2005 HRTO 31 (CanLII), rev’d on other grounds *Ontario (Attorney General) v. Ontario Human Rights Commission*, 2007 CanLII 56481 (ON SCDC). The Canadian Human Rights Tribunal took a similar view in *Dreaver v. Pankiw*, 2009 CHRT 8 (CanLII) at para 23; application for Judicial Review dismissed: *Canada (Canadian Human Rights Commission) v. Pankiw*, 2010 FC 555 (CanLII). The Federal Court of Appeal has also taken a similar approach in *Watkin v. Attorney General of Canada*, 2008 FCA 170 (CanLII) at para. 31.

⁵¹*Cooper v. Pinkofskys*, 2008 HRTO 390 (CanLII) at paras. 9-10.

⁵² See, for example: *Wozenilek v. 7-Eleven Canada*, 2010 HRTO 407 (CanLII).

⁵³ See, for example: *Schussler v. 1709043 Ontario*, 2009 HRTO 2194 (CanLII).

⁵⁴ See, for example: *Sinopoli v. Walling*, 2009 HRTO 50 (CanLII).

⁵⁵ See, for example: *McKay v. Toronto Police Services Board*, 2011 HRTO 499 (CanLII) at para. 120.

⁵⁶ See, for example: *Lepofsky v. TTC*, 2007 HRTO 23 (CanLII).

⁵⁷ *Braithwaite*, *supra* note 50; see also: *Marsden v. Ontario (Community Safety and Correctional Services)*, 2011 HRTO 30 (CanLII).

⁵⁸ See, for example: *Co.K. v. Ontario Hockey Federation*, 2012 HRTO 76 (CanLII).

⁵⁹ See, for example: *Huang v. 1233065 Ontario*, 2011 HRTO 825 (CanLII).

⁶⁰ *Hughes v. Election Canada*, 2010 CHRT 4 (CanLII) at paras. 53-54. *Hughes* was a decision of the Canadian Human Rights Tribunal applying the federal human rights legislation to voting within a federal context. On the issue of whether voting is a service pursuant to statutory human rights legislation, similar reasoning would almost certainly be applied by the Human Rights Tribunal of Ontario.

⁶¹ *Mortillaro v. Ontario (Transportation)*, 2011 HRTO 310 (CanLII).

“Services” has been found to include education services.⁶² This includes primary and secondary education services, as well as post-secondary education services including those provided by universities, colleges, vocational schools, and other educational institutions. For a detailed discussion of the application of human rights law in the context of education services, please see the chapter on Disability and Public Education in Ontario in this Disability Law Primer as well as the Ontario Human Rights Commission’s *Guidelines on accessible education*.⁶³

The Tribunal has found that statutory decision-making processes, such as administrative tribunal proceedings and decision processes of government actors, are “services” for the purposes of the Code. However, the content, reasons and result contained in the decision of a statutory decision-maker is not part of the service, and consequently, is not subject to human rights review. However, the manner in which the decision is made may be found to be discriminatory.⁶⁴

Picketing by unionized workers has been found to fall outside the scope of “services”. *Kacan v. Ontario Public Service Employees Union* involved a legal strike by support workers who worked in group homes in which two applicants with intellectual disabilities resided. The applicants alleged that during the strike the support workers engaged in discriminatory picketing of the group homes. The Tribunal found that picketing does not fall within the social area of “services”, and the Code was not intended to regulate this type of conduct. The Tribunal reasoned that when picketing and on strike, the union members were not acting as service providers, rather they had expressly withdrawn their services. Although they could act to affect the applicants’ services and living requirements, this was not sufficient to engage the Code.⁶⁵

⁶²See, for example: *Moore v. British Columbia (Education)*, 2012 SCC 61 [Moore]; *Peel Board of Education v. Ontario (Human Rights Commission)* (1990), 12 C.H.R.R. D/91 (ONSC).

⁶³*Guidelines on accessible education*, supra note 12.

⁶⁴*Zaki v. Ontario (Community and Social Services)*, 2009 HRTO 1595 (CanLII).

⁶⁵*Kacan v. Ontario Public Service Employees Union*, 2012 HRTO 1388 (CanLII). See paras. 23-34 of *Kacan* for an analysis of “services”.

The provision of publicly funded benefit programs, services and supports to people with disabilities has also been found to constitute “services” pursuant to s.1 of the Code.⁶⁶ This includes, for example, attendant care services provided to people with physical disabilities by Community Care Access Centres (CCACs) and other community organizations; developmental services, supports and funding provided to people with intellectual disabilities; income support benefits such as Ontario Disability Support Program (ODSP)⁶⁷; and others.

Generally, such services, supports and benefits are provided pursuant to statutory schemes that include eligibility criteria, definitions of disability that are different than the one set out in the Code, and mechanisms for appealing decisions to administrative tribunals or other adjudicative bodies. For example, the provision of attendant services is governed by the *Home Care and Community Services Act*, which sets out eligibility criteria for receipt of services. The Health Services Appeal and Review Board has jurisdiction to adjudicate matters such as the amount of attendant services a person receives or the termination of a service. Given the availability of such appeal mechanisms and the Human Rights Tribunal’s jurisdiction to adjudicate only human rights claims, the Tribunal has been careful in its analysis of applications dealing with benefits, services and supports. The Tribunal will allow only those applications that allege discriminatory action or inaction. Applications that allege that the services or benefits were of poor quality or were not appropriate for the individual will, generally, not be found to fall within the jurisdiction of the Tribunal. For example, in *Barber v. South East Community Care Access Centre*, the allegations included, *inter alia*, a failure by the CCAC to conduct an individualized assessment of the applicant to determine the applicant’s need for services; failure by the CCAC to implement a suitable funding and service delivery arrangement; failure by the CCAC to adhere to medical orders and directives; failure by the CCAC to carry through with appropriate discharge plans and safety protocols; failure by the CCAC to consult with the applicant and her doctors; and

⁶⁶ *Zaki*, *supra* note 64 at paras.11, 13.

⁶⁷ *Ball v. Ontario (Community and Social Services)*, 2010 HRTO 360 (CanLII) at para 61.

termination of services due to the applicant's disability. With the exception of the latter, the Tribunal dismissed all these allegations, finding that:

The *Code* is not a mechanism to challenge, in general, the quality of health care that a person has received or a disagreement over the nature or extent of the care that was provided. ... there must be something more than an assertion that the applicant's particular disability was not dealt with properly in a particular case to establish discrimination, such as systemic problems, policies, or considerations unrelated to the implementation of the program that differentiate based on *Code* grounds.⁶⁸

Another example is *K.M. v. North Simcoe Muskoka Community Care Access Centre*. In that case the applicant alleged, *inter alia*, that the CCAC discriminated against her by denying her speech therapy services. She alleged that the CCAC's assessment found that she required augmentative communication therapy rather than speech and language therapy because the CCAC did not believe she would gain anything from the speech and language service due to the severity of her autism. The basis for the applicant's claim was that the CCAC undervalued her as a person with autism. The Tribunal accepted this characterization as an allegation of discrimination, which the Tribunal had jurisdiction to adjudicate. The Tribunal noted that had the applicant alleged that the CCAC's assessment was wrong, this would not have been an appropriate basis for a human rights claim, but could have been heard by the Health Services Appeal and Review Board.⁶⁹

Counsel must ensure that human rights applications frame the events as allegations of discrimination, not as complaints about improper or poor quality services. On this point, particular attention should be paid to cases involving government funded benefit programs, services and supports. See section "VI. What Discrimination Does the Code Prohibit?" below, for a more detailed discussion of what constitutes discrimination under the Code.

⁶⁸*Barber v. South East Community Care Access Centre*, 2013 HRTO 60 (CanLII) at para 26; on this point see also *Zakiv. Ontario (Community and Social Services)*, 2011 HRTO 1797 (CanLII).

⁶⁹*K.M. v. North Simcoe Muskoka Community Care Access Centre*, 2011 HRTO 175 at paras 25, 26, 30.

VII. WHAT DISCRIMINATION DOES THE CODE PROHIBIT?

A. Direct and Adverse Effect Discrimination

The Code provides that all “persons” (including private and corporate actors) are prohibited from infringing upon the rights of people with disabilities, either directly or indirectly.⁷⁰ Direct discrimination occurs when the actions of another prevent a person from having equal access to or deny the person services, goods, facilities, benefits, employment, housing, or other social areas enumerated in the Code, because of his/her disability. Direct discrimination can also result from the application of a standard or policy that is discriminatory on its face. Human rights law is concerned not with formal equality, but with substantive equality, the actual distribution of resources, opportunities and choices within a society.⁷¹

Some examples of direct discrimination include:

- a landlord may refuse to rent an apartment to a person because of a policy not to rent to people with mental health issues;
- an employer may refuse a job interview to someone with a communication disability;
- a restaurant owner may ask a person to leave a restaurant due to the presence of his or her service animal;
- a person who uses a power wheelchair may be unable to attend a public meeting due to the venue being inaccessible;

⁷⁰ Code, *supra* note 4 at s. 9.

⁷¹ Anne Bayefsky, "Defining Equality Rights" in A. Bayefsky & M. Eberts eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 1 at 1. Bayefsky described equality of results as "a principle requiring action, which will achieve more equality in resources and rights. Equality of results will sometime require inequality of opportunity." In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, Justice McIntyre expressly recognized that "the accommodation of differences....is the essence of true equality." Justice McIntyre adopted the observation from Justice Dickson (as he then was) in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 that, "the interests of true equality may well require differentiation in treatment."

- a principal of an elementary school may refuse appropriate accommodations to a student with autism; and
- an administrative tribunal denies a Deaf person's request to provide an American Sign Language interpreter at her hearing.

Indirect discrimination has been interpreted to mean using an intermediary to discriminate.⁷² For example, an employer that authorizes an employment agency to discriminate on its behalf can be found liable for discrimination.⁷³

In addition, the Code provides that people with disabilities have a right to be free from adverse effect (also called constructive) discrimination.⁷⁴ Adverse effect discrimination occurs where a rule, standard, policy, procedure, process, requirement, qualification, or eligibility criterion appears neutral, but has the effect of discriminating against a person with a disability. For example, a workplace may have a zero-tolerance policy in relation to attendance. Such a policy may have a disproportionate impact on workers with disabilities who need to attend regular medical appointments. The Supreme Court of Canada has described adverse effect discrimination as the manifestation of discrimination most often experienced by persons with disabilities.⁷⁵

The traditional approach to the discrimination analysis required that tribunals characterize the issue as either direct or adverse effect discrimination. However, the Supreme Court in *Meiorin*, developed a unified approach to applying the tests for direct and adverse effect discrimination.⁷⁶ In *Grismer*, the Supreme Court of Canada held that the *Meiorin* approach applies to all claims for discrimination.⁷⁷ In *Entrop v. Imperial Oil*, the Court of

⁷²“Accommodation of Disability in Ontario”, *supra* note 17 at 7.

⁷³Ontario Human Rights Commission, *Guidelines on developing human rights policies and procedures* (January 30, 2008), online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/guidelines-developing-human-rights-policies-and-procedures>> at 5-6.

⁷⁴ Code, *supra* note 4 at s. 11.

⁷⁵ See, for example: *Eldridge v. British Columbia (Attorney General)*, [1997] 2 S.C.R. 624; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R.868 [*Grismer*].

⁷⁶*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3 [*Meiorin*] at para. 41.

⁷⁷*Grismer*, *supra* note 75 at para. 42.

Appeal for Ontario confirmed that the unified test applies in Ontario.⁷⁸ See the section entitled “Proving *Prima Facie* Discrimination” later in this chapter for an overview of the test.

B. Duty to Accommodate Disability

Accommodating a person with a disability involves facilitating the ability of the person to do something in a manner that is different than a person without a disability thus ensuring equal access for the person with a disability. Accommodation can involve making changes to the built environment, for example providing an accessible washroom for a person who uses a mobility device; making changes to the provision of services such as providing a student who has a learning disability with one-to-one instruction or providing an American Sign Language interpreter during an interview with a Deaf person; providing alternate, accessible forms of materials such as large font for a person with a vision disability or clear language for a person who has been labeled with an intellectual disability; or ensuring that rules, policies and procedures do not have a disproportionately negative impact on people with disabilities, for example providing flexible working hours for a worker who has a mental health issue. Accommodation is essential for people with disabilities, since without it people with disabilities would be prevented from having equal access to services, facilities, employment, leisure and information. The law recognizes the relationship of accommodation to equality for people with disabilities, and therefore imposes upon service providers, employers, landlords and others a duty to accommodate a person’s disability-related needs.

The duty to accommodate includes both procedural and substantive obligations.⁷⁹ The procedural aspect of the duty to accommodate requires an individualized assessment of the person’s disability-related needs and an investigation into accommodation measures. The substantive aspect of the duty to accommodate involves an analysis of

⁷⁸*Entrop v. Imperial Oil*, (2000), 50 O.R. (3d) 18 (OCA).

⁷⁹*Meiorin*, *supra* note 76 at paras. 66-69; see also: *Adga Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON SCDC) at paras. 95,96.

whether the accommodation is appropriate and whether it would result in undue hardship to the person responsible for providing it.

In *Adga Group Consultants Inc. v. Lane*, the Divisional Court described the procedural and substantive components of the duty to accommodate as follows:

The procedural duty to accommodate involves obtaining all relevant information about the employee's disability, at least where it is readily available. It could include information about the employee's current medical condition, prognosis for recovery, ability to perform job duties, and capabilities for alternate work. The term undue hardship requires respondents in human rights cases to seriously consider how complainants could be accommodated. A failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the "procedural" duty to accommodate.

...

The substantive duty to accommodate requires the employer to show that it could not have accommodated the employee's disability short of undue hardship. "Accommodation" refers to what is required in the circumstances to avoid discrimination. The factors causing "undue hardship" will depend on the particular circumstances of the every case. For example, undue hardship could arise due to excessive cost or safety concerns.⁸⁰

In *Machado*, the Tribunal found that:

To fulfill the procedural obligations of the duty to accommodate an employer must take active steps to inquire into the duty to accommodate, including how duties could be altered to accommodate the employee's needs or what alternative positions might be available that would meet the employee's needs.⁸¹

In order to meet their procedural duty to accommodate, respondents must be able to demonstrate that they inquired into the applicant's need for accommodation and considered whether the accommodation requested could be provided.

⁸⁰ *Ibid.*, at paras. 106, 112, and 117.

⁸¹ *Machado v. Terrace Ford Lincoln Sales*, 2011 HRTO 544 (CanLII) at para. 32.

The Tribunal has ruled that short of undue hardship, the highest point in the continuum of accommodation should be provided.⁸² If the accommodation could not have been provided, the respondent must be able to demonstrate that it considered alternate accommodations.⁸³

Timeliness of the provision of accommodation is another consideration with respect to the procedural duty to accommodate. Accommodations should be provided in a timely manner. This is especially relevant in certain cases, such as the provision of accommodation to students with disabilities. Several weeks or months without accommodation will have a significant impact on a student's ability to access education services.

Accommodation is a collaborative process. It requires the person requesting accommodation to share information about the nature, but not the specifics, of his/her disability. S/he must also be willing to explore accommodation options with her employer or service provider. In *Renaud*, the Supreme Court of Canada raised the obligation of employees to bring to the attention of the employer the facts relating to the discrimination as well as their role in securing appropriate accommodation.⁸⁴ The inclusion of the complainant in the search for accommodation was also recognized in *O'Malley*.⁸⁵ In *Gardiner v. Ministry of Attorney General*, the British Columbia Human

⁸² *Quesnel v. London Educational Health Centre*, (1995) 28 C.H.R.R. D/474 (Ont. Bd. of Inq.) at para. 16.

⁸³ *Grismer*, *supra* note 75. In *Grismer*, at para. 42, the Supreme Court of Canada held that an employer must demonstrate that it considered and reasonably rejected all viable forms of accommodation.

⁸⁴ *Central Okanagan v. Renaud*, [1992] 2 S.C.R. 970 [*Renaud*]. At para. 43ff. Justice Sopinka stated for the Court: "Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation... This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business... The other aspect of this duty is the obligation to accept reasonable accommodation."

⁸⁵ *O'Malley*, *supra* note 14. At para. 23. Justice McIntyre stated for the Court, "Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment."

Rights Tribunal found that, “(w)here the Respondent is not aware of the disabilities, and no accommodation is requested, the duty to accommodate is not triggered.”⁸⁶

While it is typically up to the person with the disability to request accommodation, there are instances where a claimant may not be required to do so. For example, the claimant may not have been diagnosed or may not have been aware of his/her disability. S/he may be unwilling to reveal the disability, anticipating discriminatory reactions by her employer, coworkers or others. In *Lane v. ADGA Group Consultants Inc*, Lane did not reveal that he had been diagnosed with bipolar disorder before he was hired. Four days after starting work, he advised his immediate supervisor of his diagnosis. He requested that the supervisor alert his wife or doctor of symptoms of an impending manic or depressive episode. Very shortly after that meeting, Lane was dismissed. The Tribunal found that ADGA discriminated against Lane by summarily terminating his employment shortly after discovering that he had a mental health issue. Had Lane revealed this information, it would likely have triggered a stereotypical reaction about his ability to do the job, leading to a decision not to hire him and reluctance to explore accommodation options.⁸⁷ The Tribunal found that ADGA could not rely on Lane keeping his disability secret as a justification for dismissing him.⁸⁸ The Ontario Divisional Court upheld the Tribunal’s findings on this point.⁸⁹

However, even where an employee does not alert the employer to her disability-related needs, the employer may, in some cases, be presumed to have knowledge of the

⁸⁶ *Gardiner v. Ministry of Attorney General*, [2003] BCHRT 41, available online: BC Human Rights Tribunal <http://www.bchrt.gov.bc.ca/decisions/2003/pdf/gardiner_v_ministry_of_attorney_general_2003_bchrt_41.pdf> at para. 167.

⁸⁷ *Lane v. ADGA Group Consultants* (2007), C.H.R.R. Doc. 07-586 (HRTO), 2007 HRTO 34 (CanLII), aff’d 2008 CanLII 39605, [2008] O.J. No. 3076 (SCJ). The Tribunal found at paras. 144-5, that “[t]he procedural dimensions of the duty to accommodate required those responsible to engage in a fuller exploration of the nature of bipolar disorder, Lane’s own situation as a victim of bipolar disorder, and to form a better informed prognosis of the likely impact of his condition in the workplace.”

⁸⁸ *Ibid.* The Tribunal found that the failure to fulfill the procedural dimension of the duty to accommodate is a form of discrimination in its own right. This means that discrimination can occur when an employer fails to conduct an appropriate assessment to determine whether it can accommodate an employee’s disability and when such a failure has adverse consequences to the employee.

⁸⁹ *Ibid.* The Superior Court found at para. 126ff: “(t)he Tribunal thus found as a fact that ADGA failed to take any of the steps it could have taken in order to assess and pursue the question of accommodation. It held there was a “rush to judgment” by ADGA.”

disability. The employer may be considered to have received constructive notice of the need for accommodation, and will be under a duty to inquire as to the whether there is a need for disability accommodation.^{90 91}

With respect to the substantive duty to accommodate, the Commission has stated that, “(t)he essence of accommodation is individualization.⁹² In *McGill*, the Supreme Court of Canada confirmed the need to take an individualized approach to the accommodation of persons with disabilities.⁹³ There are a “virtually infinite variety” of disability related needs.⁹⁴ Employers, service providers, landlords and others must tailor accommodations to a person’s particular needs and abilities. Indeed, Day and Brodsky have argued that complainants with disabilities have an increased claim for individualization.⁹⁵

Another principle is that appropriate accommodation must be provided. An appropriate accommodation is one that is most consistent with the dignity of the person being accommodated, meets the person’s individual needs, best promotes interaction and full participation, and ensures confidentiality. The Commission has described the concept as:

⁹⁰ *Accommodation of disability in Ontario*, *supra* note 17 at 23. Holder wrote that “...[w]hen an employer terminates an employee with an apparent but undisclosed mental health disability due to unusual behaviours exhibited by the employee, the employer runs the risk of having constructive knowledge of the employee’s mental health disabilities imputed to it”.

⁹¹ *Sylvester v. British Columbia Society of Male Survivors of Sexual Abuse* (2002), 43 C.H.R.R.D/55 (British Columbia Human Rights Tribunal).

⁹² *Policy and guidelines on disability and the duty to accommodate*, *supra* note 12 at 13.

⁹³ *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employes de l’Hopital general de Montreal*, 2007 SCC 4 (CanLII). At para. 22 the Court stated, “The importance of the individualized nature of the accommodation process cannot be minimized. The scope of the duty to accommodate varies according to the characteristics of each enterprise, the specific needs of each employee and the specific circumstances in which the decision is to be made.” See also *Nova Scotia (Workers’ Compensation Board) v. Martin; Nova Scotia (Workers’ Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504 at para. 81. The Court set out that “[t]he question, in each case, will not be whether the state has excluded all disabled persons or failed to their needs in some general sense, but rather whether it has been sufficiently responsive to the needs and circumstances of each person with a disability.”

⁹⁴ *Ibid.* In *Nova Scotia (Workers’ Compensation Board) v. Martin; Nova Scotia (Workers’ Compensation Board) v. Laseur* the Court continued at para. 81, “[d]ue sensitivity to these differences is the key to achieving substantive equality for persons with disabilities.”

⁹⁵ Shelagh Day & Gwen Brodsky, “The Duty to Accommodate: Who Will Benefit?” (1996) 75 Can Bar Rev 33 at 462. The authors stated: “Because of the wide range of abilities...and the particularity of (dis)ability, individual accommodation, such as customizing a work site to suit the capacities of a person with a particular manifestation of a particular (dis)ability, is vital to the equality project.”

The duty to accommodate persons with disabilities means accommodation must be provided in a manner that most respects the dignity of the person, if to do so does not create undue hardship. Dignity includes consideration of how accommodation is provided and the individual's own participation in the process.

Human dignity encompasses individual self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. It is harmed when people are marginalized, stigmatized, ignored or devalued. Privacy, confidentiality, comfort, autonomy, individuality and self-esteem are important factors as well to show whether an accommodation maximizes integration and promotes full participation in society.

Different ways of accommodating the needs of persons with disabilities should be considered along a continuum from those ways that are most respectful of privacy, autonomy, integration and other human values, to those that are least respectful of those values.

Perhaps the most common example of an accommodation that demonstrates little respect for the dignity of a person with a disability is a wheelchair entrance over a loading dock or through a service area or garbage room. Persons with disabilities should have the same opportunity as others to enter a building in a manner that is as convenient and pleasant for them as it is for others.⁹⁶

C. Harassment and Poisoned Environment

The Code prohibits harassment, which is defined as engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.

⁹⁷ Harassment is a form of discrimination that includes behaviour or comments that insult or offend another person based on a ground set out in the Code.⁹⁸ It can be overt, taking the form of jokes, rudeness, physical intimidation, or threats. It can also be subtle, involving social ostracism and exclusion.

⁹⁶ *Policy and guidelines on disability and the duty to accommodate*, *supra* note 12 at 10.

⁹⁷ Code, *supra* note 4 at ss. 2(2), 5(2) and 10.

⁹⁸ *Ibid.* at s. 5.2.

For an action to be found to constitute harassment there must be some disparaging or belittling element. In *Cohen v. Manufacturer's Life Insurance Company*, the Tribunal found that the employer's repeated attempts to communicate with a worker who was off work on a short-term sick leave did not amount to harassment. The applicant alleged that the employer's attempts to illicit information about her recovery and return to work put pressure on her and impeded her recovery. However, the Tribunal held that it was reasonable for the employer to communicate and to monitor the applicant's treatment in order to determine whether she could return to work.⁹⁹

The creation of a poisoned environment is not expressly prohibited in the Code, but has been widely accepted as a form of discrimination in human rights jurisprudence. According to the Ontario Human Rights Commission, a poisoned environment can arise from a single incident or a series of discriminatory comments, actions or incidents. The comments or actions do not have to be directed at a particular individual with a disability. Ongoing derogatory jokes or comments about people with disabilities in general may create a poisoned environment by making a person with a disability feel uncomfortable, unwelcome or threatened. It can be created by the comments or actions of any person, regardless of his or her status within a workplace, service or organization. Failure by an employer or service provider to take seriously complaints of harassment or discriminatory comments can contribute to the creation of a poisoned environment.¹⁰⁰

D. Reprisal

Section 8 of the Code provides that:

Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this

⁹⁹ *Cohen v. Manufacturer's Life Insurance Company*, 2011 HRTO 272 (CanLII).

¹⁰⁰ Ontario Human Rights Commission, *Policy on discrimination against older people because of age* (February 1, 2007) online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/policy-discrimination-against-older-people-because-age>> at 26-27.

Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

The Tribunal and the Ontario Superior Court have held that the prohibition against reprisal is important because without it, the purpose and effectiveness of the Code would be diluted. The purpose of the prohibition is to ensure that persons may claim and enforce the fundamental rights set out in the Code without fear or intimidation.¹⁰¹

To prove reprisal an applicant must establish that the respondent engaged in an action or threat that was intended as retaliation for claiming or enforcing a right under the Code.¹⁰² An actual or threatened retaliatory act is required; it is not sufficient for the respondent to have been angry or upset as a result of the applicant having filed a human rights claim.¹⁰³ The requirement to prove intent differentiates reprisal from discrimination more generally.

There is no requirement for the applicant to have actually filed a human rights claim, and there is no requirement for the Tribunal to have found that the respondent discriminated against the applicant in other ways.

E. Systemic Discrimination

Persons with disabilities experience discrimination in complex ways. Many aspects of our society are constructed on the basis of able-bodied norms and assumptions, leading to the creation of barriers that exclude people with disabilities from full participation. These norms and assumptions are part of our everyday interactions with institutions, bureaucracies, services, organizations and each other. In *PSAC v. Canada (Treasury Board)*, the Canadian Human Rights Tribunal recognized that, “long-standing social and

¹⁰¹ *Noble v. York University*, 2010 HRTO 878 (CanLII) at para 30; *Jones v. Amway of Canada Ltd.* (2002), C.H.R.R. Doc. 02-177 (Ontario Superior Court) at para. 4.

¹⁰² *Jones v. Amway of Canada Ltd.*, 2001 CanLII 26217 (ON HRT).

¹⁰³ *Entrop v. Imperial Oil*, *supra* note 78; *Noble v. York University*, *supra* note 101 at paras. 30-31.

cultural mores carry within them value assumptions that contribute to discrimination in ways that are substantially or entirely hidden and unconscious.”¹⁰⁴

In *Carasco v. University of Windsor* the Tribunal found that individual applicants may raise issues of systemic discrimination, noting that, “a person may feel that his or her rights are infringed by operation of a policy or a long-standing pattern of practices rather than an idiosyncratic set of actions or circumstances.”¹⁰⁵ One example of this kind of systemic discrimination claim based on disability is *Lepofsky v. Toronto Transit Commission*, a case in which the complainant alleged that the TTC had failed to accommodate his vision disability. The Tribunal held that the TTC had a duty to accommodate the complainant and, “similarly situated TTC patrons with disabilities.”¹⁰⁶ The Tribunal granted systemic remedies aimed at ensuring that the TTC would, in the future, be more accessible to all people with vision disabilities.¹⁰⁷

Human rights claims alleging widespread, systemic discrimination within a particular organization, government department, benefit program or employer play a significant role in advancing the rights of people with disabilities. Such claims seek to subject socially-constructed able-bodied barriers to human rights scrutiny.

Generally, it will be necessary to offer evidence that there is a pattern of discrimination against a group of people with disabilities. The British Columbia Court of Appeal has held that:

Establishing systemic discrimination depends on showing that practices, attitudes, policies or procedures impact disproportionately on certain statutorily protected groups... Whereas a systemic claim will require proof of patterns, showing trends of discrimination against a group, an individual claim will require proof of an instance or instances of discriminatory conduct.¹⁰⁸

¹⁰⁴ *PSAC v. Canada (Treasury Board)* (1991), 14 C.H.R.R. D/341 at paras. 36-38.

¹⁰⁵ *Carasco v. University of Windsor*, 2012 HRTO 195 (CanLII) at para.5.

¹⁰⁶ *Lepofsky v. Toronto Transit Commission*, 2005 HRTO 20 at para. 4.

¹⁰⁷ *Lepofsky v. Toronto Transit Commission*, 2007 HRTO 41 at para.12.

¹⁰⁸ *British Columbia v. Crockford*, 2006 BCCA 360 (CanLII) at para. 49.

Social context evidence or expert evidence may also be helpful in order to establish the systemic nature of the discrimination.

For an in-depth analysis and practice tips on bringing forward claims of systemic discrimination in the context of disability, see: “Barriers to the Claims of Systemic Discrimination Brought by People with Disabilities”, Karen R. Spector, Laurie Letheren and Tess Sheldon, 2012 Ontario Bar Association Human Rights Review.

According to the Ontario Human Rights Commission:

A systemic barrier is not just a single rule or policy but a combination of policies and/ or guidelines that result in the exclusion of people identified by a Code ground such as disability. Organizations should understand and be aware of the possibility that systemic barriers may exist within their organization, and actively seek to identify and remove them.¹⁰⁹

The Commission emphasizes the need for employers, service providers and organizations to address systemic discrimination by proactively removing barriers to substantive equality for people with disabilities.¹¹⁰ The need to address systemic discrimination has also been recognized at the international level. The *Convention on the Rights of Persons with Disabilities* expressly incorporates universal design, and defines this concept as:

...the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. “Universal design” shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.¹¹¹

Universal design is a proactive approach towards ensuring that services, products and environments are accessible and usable by the broadest possible community without the need for specialized adaptations, additional modifications or after-the-fact redesign.

¹⁰⁹ *Policy and guidelines on disability and the duty to accommodate*, supra note 12 at 12.

¹¹⁰ *Ibid.*

¹¹¹ UN GAOR, 61st Sess., 76th Mtg., UN Doc. GA/10554 (2006), online: United Nations Enable <<http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>>[CRPD] at Art. 2.

Universal design reflects a focus on ensuring that the environment is equally available, appealing and useful to a diverse population by providing the same means of use to all users and avoiding the segregation or stigmatization of any users.¹¹² Initially developed in the context of architecture and the built environment, universal design and its principles have been applied in contexts far removed from architecture.¹¹³ Universal design can be applied to social planning in order to proactively redress barriers, prevent future barriers and create more inclusive social environments. Universal design does not eliminate the need for individual accommodation, although the need for individual accommodations will be reduced if the environment is inclusive.¹¹⁴

The existing legal framework for adjudicating human rights applications has been criticized for failing to adequately develop the legal concept and application of universal design to disability discrimination claims.¹¹⁵

VIII. DISCRIMINATION ANALYSIS

¹¹² Universal design, as conceived by the Centre for Universal Design at North Carolina State University, espouses seven principles that are aimed at ensuring the most number of users are considered when designing new spaces. The seven principles are:

1. Equitable use: the design is useful and marketable to people with diverse abilities;
2. Flexibility in use: the design accommodates a wide range of individual preferences and abilities;
3. Simple and intuitive use: use of the design is easy to understand, regardless of the user's experience, knowledge, language skills, or current concentration level;
4. Perceptible information: the design communicates necessary information effectively to the user, regardless of ambient conditions or the user's sensory abilities;
5. Tolerance for error: the design minimizes hazards and the adverse consequences of accidental or unintended actions;
6. Low physical effort: the design can be used effectively and comfortably and with a minimum of fatigue; and
7. Size and space for approach and use: appropriate size and space is provided for approach, reach, manipulation, and use regardless of user's body size, posture, or mobility.

The Centre for Universal Design (1997). *The Principles of Universal Design*, Version 2.0. Raleigh, NC: North Carolina State University. Copyright © 1997 NC State University, The Centre for Universal Design. Also see Molly Follette Story, "Principles of Universal Design" in Wolfgang F.E. Preiser *et al.* eds., *Universal Design Handbook*, (New York: McGraw-Hill, 2001) at 10.3.

¹¹³ For examples of a variety of contexts that universal design can be applied to, see online: University of Washington <<http://www.washington.edu/doit/Brochures/Programs/ud.html>>.

¹¹⁴ Wendy Bailey, *Disability and Universal Design*, online: SNOW: Special Needs Ontario Window <http://snow.utoronto.ca/index.php?option=com_content&task=view&id=409&Itemid=380>.

¹¹⁵ See Dianne Pothier, "Tackling Disability Discrimination At Work: Toward A Systemic Approach" (2010) *McGill Journal of Law and Health* vol 4, No 1 at 17.

If a human rights application is not dismissed, settled through mediation, or otherwise resolved, the application will proceed to a hearing before the Human Rights Tribunal of Ontario. During a hearing, generally the applicant must first prove a *prima facie* case of discrimination.¹¹⁶ The respondent then has an opportunity to rebut the *prima facie* case by proving that it did not discriminate, that it could not have accommodated the applicant due to undue hardship, or that the impugned action is not subject to liability under the Code.¹¹⁷

A. Proving *Prima Facie* Discrimination

The Supreme Court of Canada's 1985 decision in *Ontario Human Rights Commission v. Simpsons-Sears* outlines the analysis that must be undertaken to determine whether discrimination has occurred pursuant to a statutory human rights regime. Known as the "O'Malley test", the claimant must identify with a protected personal characteristic or ground, and must demonstrate a distinction causing disadvantage based on that protected ground.

In O'Malley the Supreme Court held that a *prima facie* case is, "...one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer."¹¹⁸ The Human Rights Tribunal has described a *prima facie* case as whether, assuming the allegations to be true, there is discrimination.¹¹⁹

A *prima facie* case must be proven in accordance with the civil standard of proof, on a balance of probabilities.¹²⁰ The threshold for establishing a *prima facie* case is not high. The Tribunal has recognized that discrimination is often covert and that respondents

¹¹⁶ Note that the Tribunal has questioned whether the legal principle of *prima facie* case should be employed in the context of summary hearing procedures. See *Pellerin v. Conseil scolaire de district catholique Centre-Sud*, 2011 HRTO 1777 (CanLII).

¹¹⁷ *O'Malley*, *supra* note 14 at para 23; *Ontario (Human Rights Comm.) v. Etobicoke (Borough)* (1982), 3 C.H.R.R. D/781 (SCC) at 207-209; *Entrop v. Imperial Oil Ltd.*, *supra* note 78 at paras. 75-81.

¹¹⁸ *O'Malley*, *supra* note 14 at paras. 27-28.

¹¹⁹ *Arias v. Centre for Spanish Speaking Peoples*, 2009 HRTO 1025 (CanLII) at para 7.

¹²⁰ *O'Malley*, *supra* note 14 at para 27.

may have knowledge of facts or possess evidence of discrimination that is not accessible to applicants.¹²¹ The applicant need not make out an “air tight case” and need not prove that the actions of the respondent “lead to no other conclusion but that discrimination occurred.”¹²²

It is well established that respondents need not have intended to discriminate in order for a finding of liability under the Code. A finding of discrimination may be made if the effect of an action taken by a respondent was discriminatory, regardless of intent.¹²³ An exception to this is discrimination in the form of reprisal, where intent is required.

Also well-established is the principle that discrimination may be found as a result of an incorrect perception that a person has a disability, or as a result of imputing to a person without a disability negative attributes or stereotypes as if the person had a disability. If the result of these actions is reducing the person’s dignity and respect based on a perceived disability, discrimination will be found.¹²⁴

Discriminatory treatment does not have to be the sole reason for the impugned treatment. Code liability will be found even if discriminatory treatment is one of several reasons underlying the actions complained of.¹²⁵

The legal doctrine of vicarious liability applies in the human rights context. Corporations and employers will be found liable for discriminatory actions or omissions done by an employee, officer, agent, etc. acting in the course of his/ her employment.¹²⁶

¹²¹ *Touseant v. Thunder Bay (City)*, 2009 HRTO 2066 (CanLII) at para 11.

¹²² *Holden v. Canadian National Railway* (1990), 14 C.H.R.R. D/12 (FCA) at D/14.

¹²³ *O'Malley*, *supra* note 14. At 331 the Supreme Court stated that “(t)he proof of intent, a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination.” At 329 the Court stated that “(i)t is the result or the effect of the action complained of which is significant.”

¹²⁴ *School District No. 44 (North Vancouver) v. Jubran*, 2005 BCCA 201 (CanLII) at paras. 41-45.

¹²⁵ *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Communauté urbaine)*, [2004] 1 S.C.R. 789; *Dominion Management v. Velenosi* (1997), 148 D.L.R. (4th) 575 (OCA) at 576.

¹²⁶ Code, *supra* note 4 at s. 46.3(1).

Anti-discrimination jurisprudence, pursuant to statutory human rights regimes, and equality jurisprudence, pursuant to s.15 of the *Charter*, have long informed one another. Recently, Tribunal and court jurisprudence revealed a trend of divergence away from the *O'Malley* test and towards importing elements of a *Charter* analysis for adjudicating statutory human rights claims. In several cases before the Tribunal, litigants and adjudicators sought to import a *Charter*-like comparator group analysis in order to frame and adjudicate duty to accommodate disability claims.¹²⁷

The Supreme Court, in its 2012 decision in *Moore v. British Columbia (Ministry of Education)*, provided much needed direction regarding the appropriate test for analyzing statutory human rights claims. The Court rejected the application of *Charter* tests when analyzing duty to accommodate disability claims, holding that, “(i)t is not a question of who else is or is not experiencing similar barriers”, and that the use of a comparator analysis, “risks perpetuating the very disadvantage and exclusion from mainstream society the Code is intended to remedy...”¹²⁸ Justice Abella summarized the *O'Malley* test as follows:

[T]o demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

A more detailed analysis of the *Moore* decision and its impact upon the test for establishing discrimination pursuant to statutory human rights regimes, see: “Comparing the Incomparable in Human Rights Claims: Moore Guidance”, Laurie Letheren and Roberto Lattanzio, 2013 Ontario Bar Association Human Rights Review.

¹²⁷ See, for example: *Ball v. Ontario (Community and Social Services)*, 2010 HRTO 360 (CanLII) at paras 62-76.

¹²⁸ *Moore*, *supra* note 62 at paras. 30-31.

A review of Tribunal decisions that have been released since *Moore* indicates that the Tribunal is most often not importing a comparator analysis into its decisions. There are, however, some decisions that do utilize elements of a comparative approach. In *Barber*, the applicant challenged the services provided to her by a Community Care Access Centre. The Tribunal held that:

(t)he Code prohibits discrimination, which is a comparative concept. To establish discrimination because of disability, the applicant must show that she experienced substantive discrimination as compared with others, because of her disability, by the SECCAC.¹²⁹

It remains to be seen whether the Tribunal will adopt a comparator analysis or elements of a comparator analysis in its decisions.

Following *Moore* the Federal Court of Appeal released a decision that interpreted *Moore* as follows:

(T)he Supreme Court reiterated that the existence of a comparator group does not determine or define the presence of discrimination, but rather, at best, is just useful evidence. It added that insistence on a mirror comparator group would return us to formalism, rather than substantive equality.¹³⁰

It has been suggested that comparator evidence may be useful and relevant in limited cases, for example, if the need for disability accommodation is best demonstrated by showing that others without that disability can access a service. In this sense, comparator evidence may be a useful tool for proving a *prima facie* case of discrimination, within the *O'Malley* framework for analyzing statutory human rights claims.¹³¹

¹²⁹ *Barber v. South East Community Care Access Centre*, *supra* note 68 at para 26.

¹³⁰ *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 (CanLII) at para 18.

¹³¹ "Comparing the Incomparable in Human Rights Claims: Moore Guidance", Laurie Letheren and Roberto Lattanzio, 2013 Ontario Bar Association Human Rights Review at 22-23.

B. Justification of Discrimination

1. Respondent Provided Appropriate Accommodation

Where the applicant makes out a *prima facie* case of discrimination, the respondent may avoid liability by establishing that it provided accommodation appropriate for the applicant's disability. For example, in *K.M. v. North Simcoe Muskoka Community Care Access Centre*, the applicant, a person with autism, complained that the CCAC's assessment of her disability and need for speech therapy services was discriminatory because the person conducting the assessment was not sufficiently knowledgeable about autism, insufficient time was spent, and the assessment was not autism-specific. The Tribunal found that the respondent had assessed the applicant in a non-discriminatory manner by modifying the screening process to meet the applicant's needs. Specifically, the assessor modified the screening process by restating particular words, using physical objects to help with identification, and spending more time than usual.¹³²

Respondents may also avoid liability by demonstrating that the person with a disability could not have fulfilled the essential duties or requirements of the job, service or other social ground, even with appropriate accommodation.¹³³ The issue of essential duties most often arises in cases alleging discrimination on the basis of disability in employment.¹³⁴ However, more recently the concept has been applied to cases alleging discrimination in education services. For example, universities and colleges have argued that students entering specialized, professional or academically challenging programs must be able to complete courses at a certain set pace or demonstrate their knowledge in a certain set format. It has been argued that these requirements are essential, and therefore it is not discriminatory to refuse admission to students who cannot meet them, even with accommodation.¹³⁵

¹³²*K. M. v. North Simcoe Muskoka Community Care Access Centre*, 2011 HRTO 695 (CanLII).

¹³³Code, *supra* note 4 atss. 17(1) and (2).

¹³⁴There is a body of human rights and labour arbitration jurisprudence regarding what constitutes an essential duty in the context of human rights and employment. The Ontario Human Rights Commission's *Policy and guidelines on discrimination and the duty to accommodate* discusses essential duties at 15-16.

¹³⁵At the time of writing, there were several decisions pending on this point.

2. Accommodation Would Have Resulted in Undue Hardship

Another justification open to respondents is to establish that it was not possible to have accommodated the applicant's disability without incurring undue hardship. Given that it is a defence to the violation of a fundamental human right, the undue hardship standard has been interpreted narrowly.¹³⁶ In *Renaud*, the Supreme Court held that the term "undue" signifies that some hardship is acceptable and that more than a "mere negligible effort" is required to satisfy the duty to accommodate.¹³⁷ In *Via Rail* the Supreme Court stated that, "(t)he point of undue hardship is reached when reasonable means of accommodation are exhausted and only unreasonable or impracticable options for accommodation remain."¹³⁸

The Code prescribes only three considerations in assessing whether an accommodation would cause undue hardship: cost, outside sources of funding, and health and/or safety risks.¹³⁹ Business inconvenience, resentment from other co-workers and customer preferences must be excluded from consideration of what constitutes undue hardship.¹⁴⁰ In *Bernard v. Waycobah Board of Education*, the complainant was a receptionist at a school. She alleged that her employment was terminated because of behaviour associated with her mental health issues. The Board of Education argued that parents threatened to withdraw students from the school if the complainant was not dismissed. The Canadian Human Rights Tribunal found that the Board of Education could not justify its own conduct by blaming the parents' threats, which were based on discriminatory grounds. The Tribunal cited Beatrice Vizkelety as follows:

¹³⁶Kevin MacNeill, in *The Duty to Accommodate in Employment* (Aurora: Canada Law Book, 2004) at 11-3 states that "(o)verall, the balance of case law characterizes undue hardship as an onerous standard.

¹³⁷*Renaud*, *supra* note 84 at para. 19; in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 SCR 650, at para 122, the Supreme Court stated that undue hardship implies that there may necessarily be some hardship in accommodating someone's disability, but unless that hardship imposes an undue or unreasonable burden, it yields to the need to accommodate.

¹³⁸*Ibid.*, at para 130; see also: *Moore*, *supra* note 62 at para 49.

¹³⁹Code, *supra* note 4 at s. 11.2.

¹⁴⁰*Policy and guidelines on disability and the duty to accommodate*, *supra* note 12 at 22-24.

It happens that respondents will try to justify unequal treatment by blaming “others” for their actions, but, where they do, the discrimination is no less real and apparent. Moreover, the objections of these “others” – assuming they are real – may themselves be founded upon prejudice or stereotypes.¹⁴¹

The Ontario Human Rights Commission has described a cost as “undue” if it is so high that it impacts the survival of the business or changes its essential nature. If the accommodation requires the business to fundamentally change what it does, that may also be considered “undue.”¹⁴² Clearly, different businesses have different financial circumstances: what may be an “undue cost” for a small business may not be undue for a larger one. With respect to costs, the Supreme Court has stated that, “...one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment.”¹⁴³

Respondents seeking to rely on undue costs as a justification for discrimination must present objective evidence of actual costs associated with providing the accommodation as well as evidence that such costs would be undue.¹⁴⁴ Objective evidence of costs may include financial statements and budgets, data from empirical studies, expert opinion, or detailed information about the activity and the requested accommodation. Any funding sources available to the respondent to offset costs of accommodation, such as government programs or community grants, must be taken into account when determining the actual cost of an accommodation.

Respondents may also rely on health and safety considerations to support an undue hardship argument. Respondents have an onus of proving that their health and safety

¹⁴¹1999 (CanLII) 1914 (CHRT).

¹⁴²Ontario Human Rights Commission, “Fact Sheet: How Far does the Duty to Accommodate Go?” online: Ontario Human Rights Commission, <<http://www.ohrc.on.ca/en/resources/factsheets/disability4>>. The Ontario Human Rights set out, “(s)uch costs must be quantifiable and can include costs such as capital and operating costs and the cost of re-structuring. Human rights law recognizes that different businesses have different financial circumstances. What may be an “undue cost” for a small business, may not be undue for a larger one.”

¹⁴³*Grismer*, *supra* note 75 at para 41.

¹⁴⁴See, for example, the Tribunal’s detailed analysis of costs in *Williams v. Town of Iroquois Falls*, 2012 HRTO 1483 (CanLII).

concerns are real and impossible to avoid.¹⁴⁵ Health and safety concerns cannot be impressionistic or speculative.¹⁴⁶ Respondents must demonstrate, based on objective evidence, the nature of the alleged risks to the applicant or others, the severity of the risks and the probability of the risks. The seriousness of the risk must be considered in relation to other risks that exist and which people routinely take.¹⁴⁷

3. Alleged Discrimination is a *Bona Fide Occupational Requirement*

When the applicant alleges that a standard, qualification, rule, policy, practice or procedure is discriminatory or is being applied in a discriminatory way, the “bona fide occupational requirement” (or “BFOR”) test may apply. The 3-part BFOR test was developed by the Supreme Court of Canada in *Meiorin*.¹⁴⁸ First, the employer or respondent must demonstrate that it adopted the standard for a purpose rationally connected to the performance of the job or function. Second, the employer or respondent must establish that it adopted the particular standard in an honest and good faith belief that it was necessary for the accomplishment of the purpose or goal. Third, the employer or respondent must establish that the standard is reasonably necessary for the fulfillment of that legitimate purpose or goal. To demonstrate that a standard is reasonably necessary, it must be established that it is impossible to accommodate the claimant without imposing undue hardship upon the employer or respondent.¹⁴⁹

In *Hydro-Québec*, the Supreme Court clarified the third step of the *Meiorin* test. Justice Deschamps found that the Court of Appeal inaccurately interpreted the *Meiorin* decision, by requiring that Hydro-Québec establish that it was impossible to accommodate the complainant's characteristics. Justice Deschamps clarified that the

¹⁴⁵ *Decker v. K & G Pool Products* (1990), 12 C.H.R.R. D/87 (BCCHR); *Cameron v. Nel-Gor Castle Nursing Home* (1984), 5 C.H.R.R. D/2170 (HRTO).

¹⁴⁶ *Policy and guidelines on disability and the duty to accommodate*, *supra* note 12 at 35-36.

¹⁴⁷ *Ibid.*; on the issue of safety and undue hardship, see: *Gordy v. Oak Bay Marine Management Ltd.*, [2000] BCHRTD No. 15 (BCHRT), rev'd [2000] B.C.J. No. 2504 (BCSC), rev'd [2001] B.C.J. No. 1136 (BCCA); see also: *Gordy v. Oak Bay Marine Management Ltd. No. 2*(2004), 51 C.H.R.R. D/68 (British Columbia Human Rights Tribunal).

¹⁴⁸ *Meiorin*, *supra* note 76.

¹⁴⁹ *Ibid.* at para. 54.

employer has only to demonstrate that it was impossible to accommodate an employee short of undue hardship, not that it was impossible to accommodate the employee at all:

The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work....If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test.¹⁵⁰

The BFOR test is most often applied in the context of employment cases¹⁵¹; however it may be applied to cases alleging discrimination in the receipt of services or other social grounds.

4. Alleged Discrimination is Immune from Code Liability

Section 14 of the Code provides:

A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.¹⁵²

Section 14, also known as the “special programs defence”, recognizes that special programs designed to ameliorate the barriers faced by people with disabilities or other disadvantaged groups are an important way to proactively address individual and systemic discrimination.¹⁵³ In *Ontario Human Rights Commission v. Ontario (Roberts)*,

¹⁵⁰ *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 at paras. 16 and 18.

¹⁵¹ There is a body of labour arbitration jurisprudence on this point.

¹⁵² Code, *supra* note 4 at s. 14(2).

¹⁵³ For a critical analysis of the application of the special programs and ameliorative programs defence, see Tess Sheldon, *The Shield Becomes the Sword: The Expansion of the Ameliorative Program Defence to Programs that Support Persons with Disabilities*, July 29, 2010 available online: ARCH Disability Law Centre <<http://www.archdisabilitylaw.ca/?q=shield-becomes-sword-expansion-ameliorative-program-defence-programs-support-persons-disabilities>>.

the Court of Appeal for Ontario held that section 14 has two purposes: (1) protection of affirmative action programs from attack by people who do not experience the same disadvantage as those the program is designed to assist; and (2) promoting substantive equality to address disadvantage and discrimination.¹⁵⁴

A program must satisfy at least one of the criteria set out in s. 14 to be found to be a special program. An example of a program that may qualify as a special program is the provision of publicly funded services, supports and grants to people with intellectual disabilities or their caregivers with the goal of facilitating their integration and full participation in society; another example is government-funded employment supports and training to assist people with disabilities to find and maintain employment.

In *Roberts*, the Court of Appeal cautioned that special programs must be designed so that restrictions within the program are rationally connected to the program's objective. At issue in *Roberts* was whether the Assistive Devices Program, a government program that provides financial assistance to people who purchase assistive devices, discriminated against Mr. Roberts by excluding him from the program based on his age. The government sought to use the special programs defence to shield the program from human rights review. The Court of Appeal found that the age-based eligibility requirement in the ADP program was discriminatory, and that the program could not be saved under section 14 since it discriminated on the basis of age in an unreasonable manner. Special programs aimed at assisting a disadvantaged group or individual should be designed so that restrictions within the program are rationally connected to the program's objectives.¹⁵⁵

In *Ball v. Ontario*, the Human Rights Tribunal considered whether the provincial Special Diet Allowance program violated the Code in the manner in which it provides benefits to Ontario Disability Support Program (ODSP) recipients. The Special Diet Allowance provides additional funds to ODSP recipients to relieve the disadvantage faced by

The Supreme Court of Canada recently considered the ameliorative program defense in the context of *Charter* litigation in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37 (CanLII).

¹⁵⁴ *Ontario (Human Rights Commission) v. Ontario*, 1994 CanLII 1590 (ON CA).

¹⁵⁵ *Ibid.*

people who have extra dietary costs related to therapeutic diets prescribed by their health care professionals. In 2005, there were significant changes made to the Special Diet Allowance program, reducing benefits to people with particular types of disabilities. The government sought to rely on the special programs defence, and argued that pursuant to section 14 the Special Diet Allowance should be immune from a finding of Code liability. The Tribunal confirmed that the analysis set out in *Roberts* continues to apply. Section 14 only insulates a program from review where the challenge is from a member of a historically privileged group or a disadvantaged person whose disability the program was not intended to benefit. Section 14 does not shield a program from scrutiny where the claimant has a disadvantage that the program was designed to benefit. Special programs cannot internally discriminate against the people they are meant to serve. Special programs must meet the same non-discrimination standard as other services that are not special programs. The Tribunal also found that section 14 does not import a more deferential approach to government in the discrimination analysis.

It is important to note that the availability of the special programs defence does not remove the obligation on employers, service providers and landlords to accommodate people with disabilities up to the point of undue hardship. The Human Rights Commission has noted that, “(i)n some cases, what may appear to be a special program is in fact part of the duty to accommodate... Such programs should not be considered special programs.” The Commission has taken the position that paratransit services are a form of accommodation for people with disabilities, not special programs. The Commission has stated:

Where individuals are unable, because of their disabilities or because of the non-inclusive design of many older transit systems, to access conventional transit systems, transit service providers have a duty to accommodate these needs, up to the point of undue hardship. While some transit providers argue that para-transit is a type of voluntary special program under human rights law, it is the position of the Commission that

para-transit is a form of accommodation that can be required to meet the duty of accommodate under the Code.¹⁵⁶

The Code also includes a number of procedural provisions with respect to the designation of “special program”¹⁵⁷, the duration of the effect of that designation¹⁵⁸ and how that designation may be used as evidence before the Human Rights Tribunal of Ontario.¹⁵⁹ An application may be made to the Ontario Human Rights Commission for a program to be designated as special program.¹⁶⁰ Generally, the Commission has declined to undertake the function of designating special programs.

The OHRC cannot inquire into special programs that are implemented by the Crown. Section 14(9) of the Code provides that those procedural provisions do not apply to a program implemented by the Crown or an agency of the Crown.¹⁶¹ Section 18 of the Code provides that restrictions to membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization are protected from findings of discrimination.

IX. REMEDIES

Human rights legislation is remedial, not punitive, in nature. The Code confers broad powers on the Tribunal to remedy discrimination. Section 45.2 of the Code empowers the Tribunal to order the payment of monetary compensation, including compensation for injury to dignity, feelings and self-respect; order restitution other than through monetary compensation; and order a party to do anything that would promote compliance with the Code.

¹⁵⁶ See Ontario Human Rights Commission, *Position Paper re: Whether the para-transit services provided by public transit services in the cities of Toronto, Hamilton, London, and Windsor are special programs under the Ontario Human Rights Code*, online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/whether-para-transit-services-provided-public-transit-services-cities-toronto-hamilton-london-and#sthash.2cMfSFoR.dpuf>>.

¹⁵⁷ Code, *supra* note 4 at s. 14(2).

¹⁵⁸ *Ibid.* at s. 14(6).

¹⁵⁹ *Ibid.* at s. 14(8).

¹⁶⁰ *Ibid.* at s. 14(2).

¹⁶¹ *Ibid.* at s. 14(9).

A. Public Interest Remedies

The Tribunal has the jurisdiction to award systemic remedies regardless of whether these are expressly sought by the applicant.¹⁶² It is good practice, nonetheless, to remind the Tribunal of its remedial powers and responsibilities to ensure that the aims of the Code are realized through its decisions.

In 2012, the Human Rights Legal Support Centre reported that 70% of its successful decisions before the HRTO and about 75% of its settlements achieved a public interest remedy.¹⁶³

A few examples of public interest remedies include:

- requiring respondents to undertake training regarding human rights, the duty to accommodate and discrimination;
- requiring respondents to post notices regarding the Code in public places;
- requiring respondents to retrofit buildings or services to ensure that they are accessible;¹⁶⁴
- requiring respondent to make a donation to a community organization selected by the applicant;¹⁶⁵
- requiring respondent to consult with the disability community regarding accessibility issues;¹⁶⁶

¹⁶² *Ibid.* at s. 45.2(b).

¹⁶³ HRLSC Jan 9 2012 Main disclosure, available online: AODA Alliance <<http://www.aodaalliance.org/strong-effective-aoda/01232012.asp>> at 13.

¹⁶⁴ See for example: *Lepofsky v. Toronto Transit Commission*, *supra* note 106; *Austin v. Clayton Lakeside-Beaton Inc. and MazenMatar*, 2011 HRTO 31 where the Tribunal ordered a trailer park to provide accessible washrooms and ensure there was a ramp to a general store; *Jakobek v. Toronto Standard Condo Corp No. 1626 2100 HRTO 1901* where the Tribunal ordered a condominium corporation to ensure that the condominium's by-laws specifically allow mobility assistive devices to be parked in the garage.

¹⁶⁵ *Jakobek*, *supra* note 164.

¹⁶⁶ *Hughes v. Canadian Human Rights Commission and Elections Canada*, *supra* note 60. The Canadian Human Rights Tribunal ordered Elections Canada to, within 6 months of the decision, create a plan for greater consultation with voters with disabilities regarding accessibility issues.

- requiring respondent to alter its policies and practices that create barriers for people with disabilities;¹⁶⁷
- requiring respondent to implement a process for receiving feedback or complaints about accessibility issues;¹⁶⁸ and
- ordering that particular legislation should not be enforced;¹⁶⁹

In *Moore* the Supreme Court cautioned that remedies must flow from the discrimination claim. Where an individual claims that s/he has been discrimination against, a human rights tribunal may order individual remedies. Individual remedies may have an impact on others beyond the individual, and in that sense be systemic in nature. However, broad systemic remedies cannot be ordered unless there is evidence and a finding of systemic discrimination.¹⁷⁰ Thus, when seeking systemic remedies, counsel must ensure that the case offers an appropriate evidentiary and factual basis to support this request.

B. General Damages: Injury to Dignity, Feelings, Self-Respect

In *Arunachalam v. Best Buy Canada*, the Tribunal confirmed that two criteria are generally applied when making a global evaluation of the appropriate quantum of general damages: (1) the objective seriousness of the conduct; and (2) the effect on the particular applicant who experienced discrimination. The Tribunal explained that:

The first criterion recognizes that injury to dignity, feelings, and self respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful,

¹⁶⁷ *Ibid.* In *Hughes*, the Canadian Human Rights Tribunal ordered Elections Canada to, within 12 months of the decision, review their existing policies and guidelines and manuals on disability accessibility issues.

¹⁶⁸ See, for example: *Ibid.*

¹⁶⁹ See *Ivancicevic v. Minister of Consumer Services and the Alcohol and Gaming Commission of Ontario*, 2011 HRTO 1714.

¹⁷⁰ *Moore*, supra note 62 at paras. 63-71.

and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.

The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious.¹⁷¹

With respect to the second criterion, the Tribunal in *Sanford v. Koop* explained that the following factors were relevant in assessing the appropriate quantum of general damages:

- Humiliation and hurt feelings experienced by the applicant;
- Loss of self-respect, dignity, self-esteem, and/or confidence;
- The experience of victimization;
- The seriousness, frequency and duration of the offensive treatment; and
- The vulnerability of the applicant.

Recent Tribunal decisions that have considered disability-related discrimination in the context of the termination of the applicant's employment have generally ordered awards ranging from \$10,000 to \$45,000.¹⁷²

C. Restitution

Reinstatement into a job is an available remedy; however it is rarely requested or ordered by the Tribunal.¹⁷³ In *Hamilton-Wentworth District School Board*, the Tribunal

¹⁷¹ *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880 (CanLII) at paras 52-54; see also: *Seguin v. Great Blue Heron Charity Casino*, 2009 HRTO 940 (CanLII) at para. 16.

¹⁷² See, for example: *Lachapelle v. Stargratt*, 2013 HRTO 1232 (CanLII); *Lane v. ADGA Group Consultants Inc.*, *supra* note 87 (\$45,000); *Krieger v. Toronto Police Services Board*, 2010 HRTO 1361 (CanLII) (\$35,000); *Lopetegui v. 680247 Ontario*, 2009 HRTO 1248 (CanLII) (\$20,000); *Mirashrafi v. Circuit Centre*, 2010 HRTO 512 (CanLII) (\$15,000); *Vetricek v. 642518 Canada*, 2010 HRTO 757 (CanLII) (\$15,000); *Duliunas v. York-Med Systems*, 2010 HRTO 1404 (CanLII) (\$15,000); *LeBlanc v. Syncreon*, 2010 HRTO 2336 (CanLII) (\$10,000); *Coscina v. Halton School of Equitation*, 2011 HRTO 1949 (CanLII) (\$10,000).

¹⁷³ *Krieger v. Toronto Police Services Board*, *supra* note 172 at para 182.

ordered reinstatement of an employee many years after his/her dismissal.¹⁷⁴ In *Kreiger v. Toronto Police Services Board*, the Tribunal ordered the reinstatement of a police officer with a disability.¹⁷⁵ The Tribunal noted that when reinstatement is a viable option, it is sometimes the only remedy that can give effect to the goal of human rights legislation, which is to put the applicant in the position that s/he would have been in had the discrimination not taken place. An award of wages lost as a result of discrimination is also available at the Tribunal.

D. Interest

The Tribunal has awarded pre-judgment interest in contravention of settlement applications.¹⁷⁶ Pursuant to section 128(1) of the *Courts of Justice Act*, prejudgment interest runs from the date the cause of action arose to the date of the order. The Tribunal will award post-judgment interest, pursuant to section 129(1) of the *Courts of Justice Act*. Post-judgment interest is payable on any amount of the general damage award and award for lost wages. The applicable interest rates may be found on the website of the Ministry of the Attorney General of Ontario.

E. Costs

The Tribunal has no jurisdiction to award costs.¹⁷⁷

X. CONCLUSION

Human rights and disability is a complex and rapidly evolving area of law. It is an area that will continue to develop as our understanding of disability progresses, as new disabilities emerge, and as new technologies enable different forms of accommodation.

¹⁷⁴ *Hamilton-Wentworth District School Board*, 2013 HRTO 440 (CanLII).

¹⁷⁵ *Kreiger v. Toronto Police Services Board*, *supra* note 172.

¹⁷⁶ See, for example: *Malabre v. LMC Endocrinology Centres (Toronto) Ltd.*, 2013 HRTO 385 (CanLII); *Ahearn v. North Hill Dental Center*, 2012 HRTO 2166 (CanLII); *Medeiros v. Cambridge Canvas Centre*, 2011 HRTO 1519 (CanLII); *Fakira v. London Roof Truss*, 2011 HRTO 365 (CanLII); *Saunders v. Toronto Standard Condominium Corp. No. 1571*, 2010 HRTO 2516 (CanLII).

¹⁷⁷ *Dunn v. United Transportation Union, Local 104*, 2008 HRTO 405 (CanLII); in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (CanLII), the Supreme Court recently considered whether the Canadian Human Rights Tribunal has jurisdiction to order costs in respect of its proceedings.

International law, specifically the *Convention on the Rights of Persons with Disabilities*, provides a framework for disability rights that may help to shape the evolution of human rights law in Ontario and Canada. We at ARCH hope that this chapter offers a helpful starting point for legal practitioners who advise and represent people with disabilities in Ontario.



Chapter 4

Capacity to Instruct Counsel: Promoting, Respecting and Asserting Decision-Making Authority

**Dianne Wintermute, Staff Lawyer ARCH Disability Law Centre
September 2013**

Current to September 2013. Anyone intending to rely on this paper should conduct their own research for updates in the legislation and jurisprudence.

A French version of this paper has been prepared by the Centre for Legal Translation and Documentation. The translation is entitled: *Capacité de mandater un avocat : promouvoir, respecter et faire valoir l'autonomie de décision* and can be found at Chapter 4. The analysis is based on an English version of the law.

Capacity to Instruct Counsel: Promoting, Respecting and Asserting Decision-Making Autonomy¹

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¹ This article is a revision and update of a number of previous, similar articles written by ARCH lawyers and relies heavily on an earlier edition of the Disability Primer 2003, and in particular, Phyllis Gordon's Chapter entitled "Notes on Capacity to Instruct Counsel". I would also like to acknowledge an update to Ms. Gordon's paper which was prepared in 2010 by Ed Montigny, Staff Lawyer at ARCH Disability Law Centre.

I. OVERVIEW

This chapter focuses on addressing the needs of clients whose capacity may be in issue, regardless of the legal issue for which they are seeking assistance. This includes how to accommodate a client if capacity issues arise and how to determine whether a client is capable to instruct counsel.²

In Ontario, the presumption is that an adult client is capable of instructing counsel. This presumption is not rebutted by the fact that a client may be a person with a disability. Even when a disability impacts upon a client's ability to communicate their instructions to counsel, this does not make the client incapable of instructing counsel. Counsel has an obligation to find the appropriate means to accommodate the client's disability related needs to the point that effective communication is possible. In the majority of situations where a disability may appear to compromise a client's ability to provide instruction to counsel, the provision of adequate accommodation will allow the client and lawyer to work together effectively.

Nevertheless, even when accommodation has been provided, there will be occasions when a lawyer has serious concerns about a client's ability to understand the nature of the retainer, the circumstances of the case and the options presented when he or she instructs counsel. When these situations arise,

² There are numerous capacity issues that arise within the context of mental health and addiction. Most are dealt with under the *Health Care Consent Act* S.O. 1996, Chapter 2, Schedule A; and/or the *Mental Health Act* RSO 1990 Chapter 7. In many cases, the *Substitute Decisions Act* S.O. 1992, Chapter 30 may also apply. We do not address the issues that may be relevant to persons who have been committed to a psychiatric facility against their will, or who have been forced to undergo treatment. Nor do we deal with the bulk of issues that arise in the context of litigation before the Consent and Capacity Board or the Ontario Review Board. In most cases, persons within the mental health/psychiatric system are entitled to receive individual rights advice from the Psychiatric Patient Advocates Office. If they wish to challenge a finding of incapacity, treatment decision or involuntary committal before the Consent and Capacity Board, they can usually obtain a lawyer and a legal aid certificate to pay for the lawyer. Legal Aid Ontario requires lawyers who work in this area to complete specialized training. For more detail on these issues please refer to D'Arcy Hiltz and Anita Szegeti in *A Guide to Consent and Capacity Law in Ontario*, Lexis Nexis, 2012. See also *Ontario Consent and Capacity Legislation 2012-12*, Canada Law Book 2012.

a lawyer must be able to assess the client's capacity and decide whether it is possible to continue to accept instruction from the client, or whether, due to the client's inability to sufficiently understand the information related to their legal matter, the lawyer is unable to continue to accept the client's instructions.

Finding a client incapable of providing instruction to counsel is a serious matter that impacts upon a client's ability to access justice. However, taking instruction from a client when their capacity is in question represents a serious breach of a lawyer's ethical obligations. For these reasons, lawyers have a duty to understand capacity from both a practical as well as a legal vantage point. This article represents a practical starting point to help lawyers begin their exploration of this often complex and challenging subject.

II. CAPACITY TO INSTRUCT COUNSEL

Having a particular diagnosis which may affect capacity, such as a mental health issue or dementia, is not, in itself, determinative of an individual's capacity to instruct counsel. While certain conditions may potentially impact upon a person's capacity to make certain decisions, it cannot be assumed that the mere presence of such a disability automatically renders a person incapable to instruct counsel. Each case must be assessed on an individual basis.

The definition most often employed by the courts when they must decide whether a person is capable or incapable of making a particular decision includes two basic elements:

To be "mentally capable" means that a person must have the ability to understand information relevant to making a decision *and* the ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.³ (emphasis added).

³;Advocacy Centre for the Elderly, *Long-term Care Facilities in Ontario: The Advocate's Manual* (2nd edition) 2001; *Health Care Consent Act*, *supra* note 2 at s 4(1) and *Substitute Decisions Act*, *supra* note 2 at s 6.

An important element of the definition above is that the focus is on process rather than outcome. The determination of capacity does not turn on the nature of a person's actual decisions. A person is not incapable simply because their decisions may appear questionable. The inquiry focuses on a person's ability to understand relevant information and appreciate consequences. As long as a person can meet this test they are capable of making decisions. The fact that a lawyer may not agree with those decisions is not relevant to a determination of capacity.

Determining capacity does not involve testing a person's prior knowledge. The goal is to confirm a person's ability to understand and process information. For instance, a lawyer must be satisfied that a client has a basic understanding of the mutual roles of client and solicitor. However, most members of the public do not have a detailed appreciation of what lawyers do, what a retainer means or what the obligation to instruct counsel entails. So the fact that a client may not already understand these issues does not render them incapable. It is a lawyer's duty to explain these issues to the client. Capacity can be tested only once all necessary information has been provided to the client in a clear and easy to understand manner. Only if a client appears unable to understand the information provided to them will a concern about their capacity to instruct counsel arise.

The issue of capacity is further complicated by the fact that an individual's capacity can fluctuate over time. Many mental health issues are episodic, meaning that while there may be periods where a person is incapable of performing a particular function, between such episodes that person will be perfectly able to make all decisions. The capacity of people with certain injuries, such as an acquired brain injury, may improve over time. For these

reasons, it may be necessary in some cases to evaluate a client's capacity on an on-going basis especially if any change in their ability to absorb or process information is detected.

It is not essential that a client understand all the details necessary to pursue their case. Just as any person can hire an expert to handle complex affairs that are beyond their personal expertise, a client can rely on their lawyer or representative to understand the specific details and processes involved in their case.⁴ A client need only:

- a) understand what they have asked the lawyer to do for them and why,
- b) be able to understand and process the information, advice and options the lawyer presents to them, and
- c) appreciate the pros, cons and potential consequences of the various options.

Capacity is task specific. The test must be applied to the specific issue at hand. For instance, a person may be incapable to manage finances, due to an inability to process numerical information. This does not mean that they are also incapable of instructing counsel. It is necessary in every case to examine the precise conduct in question, to determine the essential elements of that conduct, and to inquire as to the client's ability to understand the nature and quality of those elements so that an informed decision can be made. As long as that understanding is present, then any other form of mental health issue, however great, is irrelevant. It follows, therefore, that the criteria to determine whether a mental health issue is relevant are not universal. Rather they will vary from case to case simply because the essential elements of conduct inevitably vary from case to case.⁵

⁴ For a discussion of a related issue see *Kacan v. Ontario Public Service Employees Union*, 2010 HRTO 795.

⁵ *Godelie v. Pauli*, [1990] O.J. No. 1207 (Dist.Ct.), Misener, D.C.J.; see *M.K. v. Nova Scotia (Minister of Community Services)*, [1996] N.S.J. No. 275 at para 66.

Consistent with the task specific notion of evaluating capacity, different legal tests have been developed in different contexts. It is up to counsel to ensure that the requisite standard is met. Some of the areas where specific legal tests have been developed include:

- Capacity to be a party litigant is canvassed in Rule 7 of the Rules of Civil Procedure⁶ and related jurisprudence and is frequently canvassed in the context of limitation periods.⁷ In other fora, there may also be rules that deal with capacity of complainants or applicants. Or, there may be no specific rules, requiring counsel to investigate further how best to proceed.
- Testamentary capacity requirements are thoroughly reviewed in the context of estates jurisprudence.
- Capacity to consent to health care is another detailed area of the law as is the law with respect to powers of attorney.⁸

III. CAPACITY AND PROFESSIONAL OBLIGATIONS

Rule 2.02(6) of the Rules of Professional Conduct⁹ of the Law Society of Upper Canada specifically addresses capacity. It begins with the principle of autonomy, directing a lawyer to maintain a regular relationship as far as is reasonably possible. The Commentary canvasses the gradations of disability that may exist, and the steps that, in some cases, may be necessary to ensure that there is proper assistance for the client with respect to his or her legal affairs.

Client Under a Disability

2.02 (6) When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

⁶ *Courts of Justice Act*, R.S.O. 1990, c. C.43, r.7.

⁷ The *Limitations Act, 2002*, S.O. 2002, c. 24, sched. B, has several implications for persons with disabilities and should be read in its entirety. See Jordan Atin & Ian Hull, Personal Injury and Mental Capacity Law: Strategies for Claims Involving Incapable Parties.

⁸ See Jasmine Sweatmen, Guide to Powers of Attorney (Canada Law Book, 2002).

⁹ Law Society of Upper Canada, *Rules of Professional Conduct, Rule 2.02(6)*.

Commentary

A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions, however, depends on such factors as his or her age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time. When a client is or comes to be under a disability that impairs his or her ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.

A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage his or her legal affairs, then the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.

Where a client does not have capacity, the lawyer's key ethical obligation is to ensure that a client's interests are not abandoned. Termination of a retainer without making serious attempts to ensure the client's legal affairs are attended to when possible and practical would amount to abandonment.

If a lawyer concludes that a client is incapable of instructing counsel, it may be necessary to seek the appointment of a litigation guardian to instruct counsel on behalf of the incapable person. While seeking this type of

accommodation has been complicated in the past,¹⁰ increasingly, administrative boards and tribunals as well as the courts are acknowledging the need to have in place simple, accessible and cost effective processes to permit the appointment of litigation guardians or the use of other forms of accommodation to ensure that litigants with capacity issues are not prevented from asserting their legal rights due to a lack of proper accommodation by the legal system.¹¹

IV. ACCOMMODATION

Before any determination of capacity is made, accommodation must be provided. The Ontario *Human Rights Code* obligates all service providers to accommodate disability. This means that lawyers have a legal obligation to provide whatever accommodations are required by a client with a disability. This includes clients with mental health issues, acquired brain injuries, intellectual disabilities or any other disability that may impact upon a person's ability to understand or process information or appreciate the consequences of making or not making a decision. A lawyer has a professional obligation not to turn away a client simply because they require accommodations that the lawyer may find expensive or inconvenient. In addition, service providers must accommodate people with disabilities without passing on the cost to those persons. This means that a lawyer cannot charge a client for the cost of interpreters or other forms of accommodation.¹²

¹⁰ Tess Sheldon, *Access to Administrative Justice for Persons with Disabilities: Addressing the Capacity of Parties Before Ontario's Administrative Tribunals, Promoting Autonomy and Preserving Fairness*, (December 2009), online: ARCH Disability Law Centre <<http://www.archdisabilitylaw.ca/?q=addressing-capacity-parties-ontario%E2%80%99s-administrative-tribunals-respecting-autonomy-protecting-fairne>>.

¹¹ See *Yuill v. Canadian Union of Public Employees* 2011 HRTO 126.

¹² It is not clear what assistance the Law Society of Upper Canada or the Ontario Bar Association can offer to lawyers who find the cost of accommodating clients with disabilities overwhelming.

The idea behind accommodation is that a person who is unable to perform a particular function due to a disability, will, in most cases, be able to perform that function adequately if they are provided with the proper assistance or accommodation. The obvious example would be providing wheelchair ramps to allow persons who, due to a disability, could not otherwise get from point A to point B if doing so involved climbing stairs.

This principle applies to capacity in the same way it applies to physical disabilities. Clients who have difficulty understanding or processing information should be provided with whatever accommodation they need to improve their ability to understand and appreciate the information relevant to their legal matter. Accommodation may be simple, such as speaking clearly, providing written material in plain language, frequent repetition, or giving a client extra time to absorb information and make decisions. In some cases more complex forms of accommodation may be required.

Supported decision making is a form of accommodation specific to persons with capacity issues. The idea is that an individual or small group of individuals who know a person well assist that person by helping them absorb and process information in a manner that is familiar to them, by communicating the information to them using the terms or gestures that the person in question understands. One example in which supported decision making may work well is a case where a client has a communication disability and therefore has difficulty expressing themselves in a manner that anyone other than those close to them can understand. In such a case, support persons would act as interpreters, explaining the information provided by the lawyer to the person in a manner the person can understand, and conveying the person's decision,

which may be expressed as words or gestures, to the lawyer in a manner the lawyer can understand.¹³

Supported decision making is still a relatively new and untested concept.¹⁴ It has the potential to allow many individuals who might otherwise be declared incapable to retain their autonomy. However, it is not without its challenges for lawyers. The duty to accommodate does nothing to diminish a lawyer's obligation to ensure that he or she is receiving instruction from the client. When a lawyer is receiving instructions via an intermediary such as a support person, there may be situations where it is not clear to the lawyer that the client is actually the person making the decision in question. This is a particular concern in situations where the lawyer cannot understand the words or gestures the client uses to communicate, it may be nearly impossible to confirm that instructions provided through the 'support person' are not simply the opinions and decisions of that support person. Nevertheless, it is necessary to canvas supported decision making and employ it to the extent possible before turning to more drastic measures such as the appointment of a litigation guardian.

If after all options and accommodations have been attempted, it is still clear that a client does not have capacity to instruct counsel, a lawyer must refuse to act until other arrangements have been put in place. As noted above, the lawyer is obligated to take action on behalf of the client to ensure such arrangements are put in place.

¹³ Lawyers should have all support persons and/or interpreters sign confidentiality agreements; also see *Engel v. Winkleigh Co-operative Housing*, 2010 HRTO 1466 for some indication of how tribunals may respond to supported decision making type accommodations.

¹⁴ See Michael Bach and Lana Kerzner, "A New Paradigm for Protecting Autonomy and the Right to Legal Capacity," (2010), Law Commission of Ontario, online: <http://www.lco-cdo.org/en/disabilities-call-for-papers-bach-kerzner>

V. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The *Convention on the Rights of Persons with Disabilities*¹⁵ (CRPD) will be discussed in detail at Chapter 10 of this Primer. However, it is important to note that Article 12 of the CRPD is relevant to the issues of capacity and supported decision making. Article 12 can be used as an aid to statutory interpretation.¹⁶

Article 12 is entitled: “Equal recognition before the law”.¹⁷ Listed among its sections, are:

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

Further, the concept of supported decision making is recognized in Article 12:

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

Finally, safeguards to protect against potential abuses of supported decision making are also acknowledged:

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will, and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible, and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.”

¹⁵ *Convention on the Rights of Persons with Disabilities*, G.A. Res. 61/106, U.N. GAOR, 61st Sess., U.N. Doc. A/Res/61/106 (Dec. 13, 2006) available online at <http://www.un.org/disabilities/convention/conventionfull.shtml>

¹⁶ *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 at para 70

¹⁷ CRPD, *supra* note 15.

VI. PRACTICE SUGGESTIONS

The following are suggestions that may assist in making a capacity determination, keeping in mind that the lawyer's responsibility is to respect the client's autonomy wherever possible.

- *Repetition*

There are often times in a law practice when lawyers are called upon to repeat their legal assessment of a situation to a client a few times. For example, the client might be distraught or unfamiliar with the justice system. Similarly, it may be necessary to take the extra time and explain the situation on more than one occasion to a person with an intellectual disability who learns differently. When a lawyer does this, they are more likely to develop alternative and more effective ways of communicating with the client over time, allowing the client to gain better understanding of the communication.

- *Clear and relevant communication*

Just as people learn differently, some express their views differently. Answers may not be forthcoming to complex questions, nor in the order that the lawyer anticipates. But, if asked to express why they have come to a lawyer, what they are hoping for, what the problem is, the story may unfold with sufficient internal integrity that a lawyer can conclude the client appreciates the relevant information and the foreseeable consequences of different options.

- *A task specific inquiry*

This is a very important principle that is often forgotten. Someone may have the capacity to make certain decisions and not others.

- *Not evaluating prior knowledge*

A lawyer is not testing a client's prior knowledge but is instead inquiring whether the client has sufficient understanding to appreciate relevant information and the effect of the decision they are making.

- *Evaluate your own assumptions about disability*

Many of us have lingering stereotypical assumptions about disability. For example, persons with communication disabilities are frequently assumed to lack ordinary mental capacity. A particularly common assumption is that someone with a mental health issue lacks the capacity to make all sorts of decisions. These and similar assumptions are neither acceptable on a human relations level nor are they ethical or legally valid.

- *Client comfort levels and appropriate accommodation*

All of us think better when we are comfortable in our surroundings and feel a rapport with the person we are talking to. If a lawyer has concerns respecting capacity, it may help to make sure that the client with a disability feels comfortable in the lawyer's office. It may help to speak to the client about the disability and to ask if the client requires further or different accommodation. Lawyers may find the ARCH article "Providing Legal Services to People with Disabilities", Chapter 2 of this Primer, useful in this regard.

- *Episodic loss of capacity*

Any client might lose capacity tomorrow as a result of a significant health incident or an injury. A lawyer then will face the dilemma of no longer being able to take instructions from that client on an active file. A lawyer can hope that the individual has arranged for such eventualities by way of a power of attorney. Where a client has indicated that they have an episodic disability

that leads to intermittent periods of incapacity, it would be wise to plan for such situations. A lawyer will need to consider what steps should be taken to ensure that there is someone to instruct counsel, notwithstanding the periodic incapacity.

- *Recording deliberations*

It is important to make detailed records of difficult legal assessments. Making a determination that an individual has or has not sufficient capacity to make certain decisions or instruct counsel is one of those situations. It is important for a lawyer to maintain detailed notes in the file recording the conversation(s) or other facts that formed the basis of the assessment that the client lacks capacity. It is usually a good idea to ask support staff or another lawyer to attend meetings with a client who may lack capacity to record what is said as well as provide a second opinion concerning that client's ability to instruct counsel.

- *Second Opinions*

At times it may be advisable for a lawyer to make their assessment of a client's capacity together with a colleague invited to the interview with your client's consent. Alternatively, depending on the circumstances, you might consider retaining a professional to conduct a capacity assessment.

VII. COMMENCING LITIGATION

A. Delegation of Authority Under the Human Rights Code

The *Human Rights Code* subsection 34(5) provides that an individual or organization, other than the person who allegedly experienced discrimination,

can bring an application on behalf of that person to the Human Rights Tribunal of Ontario.¹⁸

The Human Rights Tribunal of Ontario has had occasion to consider an alternative to finding a person incapable of proceeding with a human rights application. In its Interim Decision in *Lynn Korevar on behalf of Barbara Kacan v. Ontario Public Service Employees Union*¹⁹ the Tribunal had an opportunity to explore the implications of s. 34(5) of the *Human Rights Code*.

In order for s. 34(5) to be operative, a person with a disability must have the capacity to commence an application, delegate the power to pursue it and terminate it. Other steps in the process, such as conducting the litigation, are the responsibility of the person to whom authority has been delegated. The Tribunal found that:

“...the Legislature must have intended that the role of the person making an application on behalf of another be different from that of a representative... the purpose of s.34(5) is to promote the accessibility of the Code’s processes. It allows an individual to delegate to another individual or organization the ability to take the steps in the Tribunal’s process on his or her own behalf...”²⁰

Because the person who experienced the discrimination must have a very basic capacity to commence, delegate and withdraw an application, it is also important that where or when it is appropriate, both the person with the disability and her delegate jointly make decisions.

B. Litigation Guardians

¹⁸ *Human Rights Code*, R.S.O. 1990 c H-19

¹⁹ *Kacan v. Ontario Public Service Employees Union*, 2010 HRTO 795 (CanLii)

²⁰ *Ibid.* at paras. 9 - 14

In Ontario, if an adult is found to be incapable of bringing their issue before a court, Rule 38 of the *Rules of Civil Procedure*²¹ permits the Superior Court of Justice to appoint a litigation guardian. In *Yuill v. Canadian Union of Public Employees*²², the Human Rights Tribunal of Ontario considered whether it had jurisdiction to appoint a litigation guardian for a person with a disability who was found to be incapable of instructing counsel.

After canvassing a number of sources, the Tribunal found ample support for its power to control its own processes under the *Statutory Powers Procedure Act*²³ and the *Human Rights Code*. The Tribunal held:

In my view, the power to control its own process granted to the Tribunal in the *SPPA* and the *Code* gives it the power to appoint a litigation guardian to represent person under a legal disability where the person is willing to do so. Naming a litigation guardian to make decisions on behalf of a person with a disability in the Tribunal's process is a matter of procedure that falls under its power. While there is little authority on this issue, my interpretation of the Tribunal's procedural powers is supported by the values in the *SPPA*, British Columbia case law, other tribunals' case law and rules, the *Code*, and international law.²⁴

Other tribunals have also held that they have the authority to appoint litigation guardians on behalf of people with disabilities who have been found to be incapable.²⁵

VIII. CONCLUSION

²¹ *Courts of Justice Act*, R.R.O. 1990, Regulation 194, r.38.

²² *Yuill v. Canadian Union of Public Employees*, 2011 HRTO 126 (CanLii)

²³ *Statutory Powers Procedure Act*, R.S.O. 1990 c. S.22

²⁴ *Yuill v. Canadian Union of Public Employees*, 2011 HRTO 126 (CanLii) at para 11

²⁵ See, for example: Tess Sheldon & Ivana Petricone, *Addressing the Capacity of Parties Before Ontario's Administrative Tribunals: Promoting Autonomy and Preserving Fairness*, (October 2009), online: ARCH Disability Law Centre <<http://www.archdisabilitylaw.ca/?q=addressing-capacity-parties-ontario%E2%80%99s-administrative-tribunals-respecting-autonomy-protecting-fairne>>.

The basic principles that can help guide a lawyer when faced with making a decision about a client's capacity include:

- There is a presumption that a client has capacity to instruct a lawyer; and
- The relationship between a lawyer and client does not change regardless of disability. The basic principles of agency and client autonomy apply whether or not a client has a disability.²⁶

Professor Archibald Kaiser identifies a number of possible objectives for an advocate addressing issues affecting persons with disabilities. These are: enhancing client autonomy, including freedom to make choices; assisting clients in developing self-advocacy skills; assisting clients in leading lives which are as independent as possible; contributing to the empowerment of clients in their relationships, their communities and in their access to resources; promoting respect for the rights, freedoms, dignity and worth of the person or group served by the advocate; ensuring that the client's legal and human rights are recognized and protected; and facilitating access to justice; promoting the equality interests of people with disabilities; assisting clients to receive health care, social services and private insurance entitlements; assisting clients in gaining access to supports and treatments which are the least onerous, least restrictive and least intrusive in the circumstances; protecting clients from financial, physical, sexual and emotional abuse, violence and exploitation; fighting the stereotypes, prejudices and stigma that coincide with disability; addressing the negative impact of poverty and promoting an adequate standard of living; promoting social inclusion by trying to ensure access to the physical, social, economic and cultural

²⁶ Phyllis Gordon, "Notes on Capacity to Instruct Counsel" in Disability Law Primer, (Toronto: ARCH Disability Law Centre, 2003), online: ARCH Disability Law Centre <http://www.archdisabilitylaw.ca/?q=cle-disability-law-primer-continuing-legal-education-program-ontario-lawyers>

environment; and removing barriers that hinder full and effective participation in society.²⁷

These objectives underscore the importance of a lawyer's assessment of capacity.

In order for a person with a disability to be fully recognized as an autonomous, independent and fully participating member of our society, a lawyer must be open to the fact that people may express themselves differently; that people may think differently; that people may act differently; or that people may make decisions that a lawyer does not agree with. It is imperative that a lawyer find ways to look beyond stereotypes and to assess a client's capacity with an open mind, with sensitivity to the fact that difference does not mean that a person with a disability is incapable. A client is always presumed to be capable unless otherwise proved.

Any step that removes a client's ability to make decisions for themselves should be taken only in the most obvious and extreme circumstances, where there simply is no other way to proceed. Before considering such a drastic course, lawyers must take all steps possible to work with a client and provide all appropriate accommodations in order to enhance the client's decision-making capacity.

²⁷ H. Archibald Kaiser, *Advocacy for Persons With a Mental Illness: Overcoming the Problems: Proceedings of the Osgoode National Symposium on Mental Health Law*, Toronto, November 25, 2009 at Tab 6



Chapter 5

Protecting the Rights of Persons Subject to a Substitute Decision Maker

**Edgar-André Montigny, Staff Lawyer ARCH Disability Law Centre
September 2013**

Current to September 2013. Anyone intending to rely on this paper should conduct their own research for updates in the legislation and jurisprudence.

A French version of this paper has been prepared by the Centre for Legal Translation and Documentation. The translation is entitled: *Protection des droits des personnes ayant un mandataire spécial* and can be found at Chapter 5. The analysis is based on an English version of the law.

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I. INTRODUCTION

This chapter deals with situations where capacity is at the core of the legal issues for which a client is seeking assistance such as defending, protecting or restoring a client's ability to make decisions after they have been declared incapable or resolving disputes related to the actions of a guardian or other substitute decision maker (SDM).¹ This paper does not deal with the process of declaring a person incapable.² Instead it focuses on issues relevant to assisting a client who has already been declared incapable and has been made subject to a substitute decision maker. For more general information about defending capacity, assessing capacity to instruct counsel and accommodating clients with capacity issues, see Chapter 4 entitled "Capacity to Instruct Counsel: Promoting, Respecting and Asserting Decision-Making Authority" in this Disability Law Primer.

This chapter provides a basic overview of the substitute decision making regime established by the *Substitute Decisions Act, 1992* (SDA). It describes the types of SDM's and how they acquire the legal authority to make decisions for an 'incapable' person. The chapter outlines the various issues persons subject to an SDM may face and suggests options to help deal with those issues in a manner that protects the rights of persons with capacity issues and promotes their autonomy to the greatest extent possible. This is a complex area of law. This chapter does not purport to offer a complete or detailed guide to every issue that can arise. The chapter merely highlights key issues to consider and offers a starting point for lawyers' and advocates' own research into the specific issues faced by individual clients.

¹ This paper has benefited from the input of many individuals. The contributions of Kerri Joffe and Jan Goddard were particularly helpful.

² The most common ways for a person to be declared incapable are a) by a psychiatrist after an assessment pursuant to the *Mental Health Act*; b) after a capacity assessment by a designated capacity assessor (also see s. 16 of the *Substitute Decisions Act, 1992*. The Act provides that members of the public can report someone they think is incapable and at risk of harm to the Public Guardian and Trustee for investigation); c) by the Superior Court of Justice pursuant to the *Substitute Decisions Act*.

II. SUBSTITUTE DECISION MAKING

Substitute decision making refers to a legal system which gives certain individuals the right to make particular types of decisions on behalf of another person who has been declared incapable (or unable) to make that particular type of decision. In Ontario the *Substitute Decisions Act, 1992*,³ is the key piece of legislation outlining, among other things:

- a) the circumstances under which a person can be declared incapable;
- b) the processes to be employed when assessing a person's capacity;
- c) the various types of substitute decision makers;
- c) the processes involved in appointing a substitute decision maker;
- d) the powers and obligations of substitute decision makers; and,
- e) the processes to be employed to terminate a guardianship or remove a substitute decision maker.

It is important to note that there is a major difference between *substitute* decision making and *supported* decision making.⁴ The key distinction between supported and substitute decision making is that supported decision making helps an individual make decisions for themselves. Supported decision making is a type of accommodation that enhances and protects a person's capacity to make decisions thereby allowing them to retain their decision making autonomy. Substitute decision making removes decision making power from the 'incapable' person. Once an SDM is in place to make certain types of decisions for an incapable person, that person is no longer able to make those decisions for themselves and have them legally recognized.

³ *Substitute Decisions Act, 1992*, SO 1992, c 30. See D'Arcy Hiltz and Anita Szigeti, *A Guide to Consent and Capacity Law in Ontario* (Lexis Nexis, 2012) at 23-163.

⁴ Supported decision making is described in more detail in the Capacity to Instruct Counsel chapter in this Disability Law Primer.

A. Appointing a Substitute Decision Maker

There are two basic methods for appointing a substitute decision maker. One method allows a person to designate their SDM, the other allows for the imposition of an SDM upon a person, with or without their input. A person can use a power of attorney to appoint the person whom they wish to have make either property or personal care decisions on their behalf should they become unable to make those decisions for themselves.⁵ If a person has not selected an SDM for themselves, a guardian of property or of the person can be appointed for them by the Superior Court of Justice; a guardian of property can also be appointed through various processes outlined in legislation such as the *Mental Health Act*⁶ or the *Substitute Decisions Act, 1992*. The *Health Care Consent Act* also provides a hierarchy of individuals who may give or refuse consent to treatment on behalf of a person under certain circumstances.⁷

B. Powers of Attorney for Property and Personal Care⁸

An individual can grant an attorney for property (finance) or for personal care to a person they trust and whom they wish to make certain decisions on their behalf. An attorney for property can make decisions related to a person's financial affairs. Attorneys for property generally monitor a person's income, manage investments,

⁵ A power of attorney for property can take effect at any time the grantor wishes it to. The grantor does not need to be declared incapable to allow the attorney to exercise the powers granted by the power of attorney document, unless the document explicitly states that the power of attorney does not take effect until the grantor has been declared incapable of making decisions related to their property. Powers of attorney for personal care only take effect once the grantor has been declared incapable of making personal care decisions.

⁶ *Mental Health Act*, RSO 1990, c M.7. See D'Arcy Hiltz and Anita Szigeti, *A Guide to Consent and Capacity Law in Ontario* (Lexis Nexis, 2012) at 279-418.

⁷ *Health Care Consent Act*, 1996, SO 1996, c 2, s 20. See also commentary in D'Arcy Hiltz and Anita Szigeti, *A Guide to Consent and Capacity Law in Ontario* (Lexis Nexis 2013) at 184-85 for further detail.

⁸ Powers of attorney can involve numerous complex issues. What is provided here is a very general and basic introduction to the topic. For more specific details please see Ian Hull, *Power of Attorney Litigations*, (CCH Canada Limited, 2000); Ontario Bar Association, "Powers of Attorney: A Practitioner's Tool Kit" (6 October 2005); Jasmine Sweatman, *Guide to Powers of Attorney*, (Canada Law Book, 2002); Jordan Atkin, "Practice Gems: Drafting and Administering Powers of Attorney for Personal Care and Property; Avoiding the Pitfalls" (Law Society of Upper Canada, 26 September 2010).

maintain real estate and ensure the grantor's bills are paid, subject to any restrictions or limitations the grantor may have outlined in the power of attorney document.

An attorney for personal care can make decisions about where a person lives, the type of medical or physical care they receive, whether the grantor enters a long-term care facility, and the basic organization of the grantors' day to day activities and personal affairs.⁹

A power of attorney for property can take effect the minute it is signed, unless the document contains specific instructions about when it comes into effect, under what circumstances and for how long. Often, however, when intended to deal with future incapacity, a power of attorney document will stipulate that it comes into effect only after the grantor has been declared incapable of making decisions about their property. To serve this purpose, the document must state that it is a "continuing power of attorney". Since only a "continuing power of attorney" can survive the incapacity of the grantor.¹⁰

It is more difficult to predict exactly when an attorney for personal care must begin making personal care or medical decisions on behalf of the grantor. A power of attorney for personal care is best seen as a reactive document. In most cases an attorney for personal care will be asked to make a specific decision by a health care professional who has concluded that the grantor is no longer capable to make a particular treatment decision. In other cases, s. 49 of the SDA applies to allow an attorney for personal care to make particular decisions once the attorney has reasonable grounds to believe that the grantor is incapable of making that particular decision. Often the attorney will be expected to take on the responsibility for making

⁹ For more detail see Jasmine Sweatman, *Guide to Powers of Attorney*, (Canada Law Book, 2002) at Chapter 4, 97-155.

¹⁰ See *Substitute Decisions Act, 1992*, SO 1992. c 30, s 7(1).

certain decisions in the absence of an official declaration that the grantor is incapable of making personal care decisions.¹¹

In all cases, it is necessary to review the provisions of the SDA to determine whether a particular document is a valid power of attorney, when it takes effect and what powers it grants to the attorney and what, if any, restrictions may be placed on the attorney's powers.¹²

Powers of attorney have the advantage of being controlled by the grantor. As long as a person understands what it means to give another person the power to make certain types of decisions for them and they have a basic understanding of the nature and extent of their property, they are most likely capable to grant and revoke a power of attorney.¹³ Even if a person is not capable to make the specific types of decisions they are asking the attorney to make on their behalf, they may still be capable to decide who should be making those decisions for them. They may also remain capable to revoke a power of attorney or to decide that they would rather have another person making decisions for them. For instance a person who may lack capacity to manage their property may still be capable to revoke a power of attorney and appoint a new attorney for property.¹⁴

Since the grantor is able to select to whom they grant a power of attorney, it is assumed that the person chosen is trusted by the grantor and that the attorney is someone willing to work co-operatively with the grantor to support and protect them. Powers of attorney therefore offer people a way to exercise a degree of control over who will make decisions for them should they become incapable to do so, even to the point of removing an attorney they are no longer happy with – at least as long as they remain capable to do so.¹⁵

¹¹ See *Substitute Decisions Act, 1992*, SO 1992, c 30, s 49(1). For more detail see Law Society of Upper Canada, "The Annotated Power of Attorney for Personal Care" (1 March 2005).

¹² See *Powers of Attorney Act*, SO 1990, c P-20.

¹³ See *Substitute Decisions Act, 1992*, SO 1992, c 30, s 8(1).

¹⁴ See *Substitute Decisions Act, 1992*, SO 1992, c 30, s 8

¹⁵ *Ibid*

This does not mean that problems cannot arise when an attorney for property or personal care is making decisions on behalf of a person found incapable to make those decisions for themselves. An attorney has control over a person's money and property. This power can easily be abused. Unless a person is capable to revoke a power of attorney, it can be difficult to control abuse by an attorney without resorting to litigation which can be complex and costly.

There is no central body that keeps track of power of attorney documents. It is up to each individual to keep a record of any powers of attorney they may have granted or revoked. If a client cannot remember if they granted a power of attorney to someone, it may not be possible to confirm whether a valid power of attorney exists or not, unless the attorney makes themselves known. It is also not necessary for a person named as an attorney in a document to consent to being named. It is possible therefore that even a person named as an attorney for property or for personal care may not be aware of that fact. If an attorney for property is active, the client's bank may be able to confirm this.

C. Guardians of Property and of the Person

If a person who has been found incapable has not, prior to their becoming incapable, granted a power of attorney, the usual practice is for a guardian to be appointed for them.¹⁶

Under the SDA there are two types of guardians:

- 1) guardians of property; and
- 2) guardians of the person.

¹⁶ This does not mean it is not worth exploring whether a client subject to a statutory guardianship may not be able to appoint a power of attorney.

While this paper does not deal in detail with the processes used to determine whether a person is capable or not, it is useful to outline the different types of guardians and how these guardians obtain the authority to make decisions on behalf of another person.

1. Guardians of Property

There are two types of guardians of property.

1) Statutory guardianships for property

- These can be held by the Office of the Public Guardian and Trustee (PGT) or;
- Upon application to the PGT, can be transferred by the PGT to a family member.

2) Court appointed guardians of property.

a. Statutory Guardians: Office of the Public Guardian and Trustee

Pursuant to s. 16 of the SDA, the Office of the Public Guardian and Trustee is the default statutory guardian of property for all persons found incapable of managing property if no other substitute decision maker, such as an attorney for property, is already in place. The PGT will take control of all financial assets and other property and administer this property on behalf of the “incapable” person.¹⁷ Individual “clients” are given a client representative with whom the individual can communicate. Clients

¹⁷ I use the term “incapable” person to refer to a client or person who is subject to a guardian or SDM. I use quotation marks around incapable, since a person can be officially or legally incapable even though they are no longer actually incapable. So while “incapable” may reflect their legal status, it does not necessarily reflect the reality of their situation.

are provided with regular accounting reports. The PGT charges clients fees for these property management services.¹⁸

b. Statutory Guardians: Other than the Public Guardian and Trustee

Family members of an incapable person under the control of the PGT (or in some cases a trust company), can apply to be appointed statutory guardian by the PGT; essentially replacing the PGT as the person's guardian of property. The family relationship is assumed to enhance trust and communication between the parties. It is also assumed that family members will be more attentive to the needs of the incapable person. Also, statutory guardians absolve the PGT of the responsibility to manage the incapable person's affairs using salaried professional staff. Statutory guardians, although entitled to some compensation,¹⁹ are essentially volunteers who do not impose upon public funds.

Pursuant to s. 17(1) of the SDA, the following people can apply to be appointed statutory guardian to replace the PGT as guardian of property:

- incapable person's spouse or partner;
- a relative of the incapable person;
- the incapable person's attorney under a continuing power of attorney (if the power of attorney was made before the certificate of incapacity was issued and does not give the attorney authority over all of the person's property);
- A trust corporation within the meaning of the *Loan and Trust Corporations Act* (if the incapable person's spouse or partner consents in writing to the application), may apply to be appointed statutory guardian to replace the PGT as guardian of property.

¹⁸ See Office of the Public Guardian and Trustee, "Providing Property Guardianship Services: The Role of the Public Guardian and Trustee (2013) online: <<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/roleinguardianservices.pdf>>.

¹⁹ See *Substitute Decisions Act, 1992*, s 40.

Potential statutory guardians must complete an application process to allow the PGT to determine their eligibility for the position and to explore any possible conflicts of interest. They must present a management plan as part of their application. The PGT charges a fee to process these applications.

The PGT can refuse to accept an application if they feel that the applicant is unsuitable for any reason. Pursuant to s. 18(3) of the SDA, they must provide written reasons for their refusal and the applicant can turn to the Superior Court of Justice to challenge the decision.

Once appointed, a statutory guardian is subject to the obligations and fiduciary duties outlined in the SDA and the oversight of the PGT.

c. Court Appointed Guardians

Guardians of property can be appointed by the Superior Court of Justice. In most cases, the guardians appointed by the Superior Court are family members of the incapable person. In some cases, the PGT can be appointed by the Court to step in as guardian. All attorneys for property and guardians of property are subject to the same rules under the SDA.

Court appointed guardianships can provide a guardian with high degree of control over an incapable person. This is especially true when a guardian is given power over both property management and personal care decisions (see below). Although the Court can place limits on the scope of a guardian's powers, in most cases, the Court grants guardians comprehensive control over all aspects of either property management or personal care or both. While court appointed guardians must still make decisions according to the rules set out in the SDA and, they are expected to abide by a management plan approved by the Court, there is little in the way of supervision of Court appointed guardians.

To be appointed a guardian or to have someone else appointed guardian of an individual, it is necessary to bring an application before the Superior Court of Justice for an order declaring the person in question incapable of managing their property or personal care (or both) and appointing the applicant guardian of property and/or of the person. Applicants must provide evidence that the person for whom the guardianship is sought is actually incapable of making the relevant decisions themselves and that a guardian is required to protect the person from harm.²⁰ Pursuant to s. 22(3) of the SDA, the Court should not appoint a guardian if the need for decisions to be made can be met by an alternative course of action that does not require the court to find the person to be incapable of managing their property or personal care and is less restrictive of the person's decision making rights than the appointment of a guardian.

Family members of the 'incapable person' are to be served with the motion materials and allowed to participate in the court process if they wish.²¹ The PGT is a 'statutory' party to the proceeding and must be served with materials. The PGT may play a fairly passive role in the court proceedings. However, the PGT usually sends a letter to the applicant and the court advising them of the PGT's opinion based on a review of the material presented to the Court.²² The PGT usually asks the Court to issue an order requiring the payment by the Applicant of a \$250.00 fee to the PGT for reviewing the file.

Unless there is some formal objection raised to the appointment of a guardian, either because there are concerns about the particular applicant becoming guardian or there are doubts about the need for a guardian, the court generally relies on the veracity of the statements made to the court by the applicant. Although the approach of individual judges may vary, it is not uncommon in unopposed guardianship

²⁰ For more details see *Substitute Decisions Act, 1992*, Part III.

²¹ See *Substitute Decisions Act, 1992*, s 69(6).

²² See *Substitute Decisions Act, 1992*, s 69(1) and (3).

applications, for a guardian to be appointed without the court undertaking a great deal of scrutiny of the record.

The court appointment process is often used when a person has been injured and receives an insurance or other financial settlement or where such a settlement is anticipated. Families also turn to the court when conflicts arise between family members over the actions of an attorney for property, or there is a dispute over which family member should become guardian. Given the costs involved in using the court to appoint a guardian, the process is generally used only when larger sums of money need to be managed on behalf of an incapable person or a guardian of the person is required. Otherwise a statutory guardianship may suffice.

2. Guardians of the Person

In Ontario only the Superior Court of Justice can appoint a guardian of the person. The PGT may be appointed as a guardian of the person, but only in exceptional cases.²³ Otherwise, a family member can only make decisions related to personal care matters (other than medical treatment and admission to long term care) on behalf of another, if they were granted a power of attorney for personal care by the 'incapable' person, while that person was capable. The process for seeking the appointment of a guardian of personal care is outlined above (see Court Appointed Guardians of Property).

3. Powers, Duties and Obligations of Guardians

Guardians, either statutory or court appointed, have obligations. Most importantly, guardians of property must maintain financial records and account for their dealings with the incapable person's assets. Similarly, guardians of the person should keep

²³ The court shall not appoint the PGT as Guardian under section 55 unless the application proposes the PGT as guardian and there is no other suitable person who is available and willing to be appointed. See *Substitute Decisions Act, 1992*, s 57(2.2).

detailed notes of all other activities taken on behalf of the incapable person. Guardians should also, to the extent possible, involve the ‘incapable’ person in their decisions making and make every effort to promote the person’s independence.²⁴

Although there are variations in the precise obligations and duties of guardians depending upon the type of guardianship in question, in general all guardians are subject to the following obligations.

a. Guardians of Property

The SDA lists the powers and duties of a guardian of property as follows:

- s. 32. (1) A guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith for the incapable person’s benefit.
- s. 32. (2) A guardian shall explain to the incapable person what the guardian’s powers and duties are.
- s. 32. (3) A guardian shall encourage the incapable person to participate, to the best of his or her abilities, in the guardian’s decisions about the property.
- s. 32. (4) The guardian shall seek to foster regular personal contact between the incapable person and supportive family members and friends of the incapable person.
- s. 32. (5) The guardian shall consult from time to time with,
 - (a) supportive family members and friends of the incapable person who are in regular personal contact with the incapable person; and
 - (b) the persons from whom the incapable person receives personal care.

²⁴ See *Substitute Decisions Act, 1992*, s 66(8).

- s. 32. (6) A guardian shall, in accordance with the regulations, keep records of all transactions involving the property.
- s. 33(1) A guardian of property is liable for damages resulting from a breach of the guardian's duty

The SDA also lists expenditures that are required to be made by the guardian of property from the incapable person's property:

- s. 37. (1)
 1. The expenditures that are reasonably necessary for the person's support, education and care.
 2. The expenditures that are reasonably necessary for the support education and care of the person's dependants
 3. The expenditures that are necessary to satisfy the person's other legal obligations.

b. Guardians of the Person

Section 59(2) of SDA provides the following list of functions that a guardian of the person *may* perform. The use of the term "*may*" in this section suggests that it cannot be assumed that every court appointed guardian has an autonomic right to exercise every one of these functions. The specific functions that a particular guardian is empowered to exercise should be outlined in the Court order appointing the guardian.

Under an order for full guardianship, the guardian may,

- a) exercise custodial power over the person under guardianship, determine his or her living arrangements and provide for his or her shelter and safety;

- b) be the person's litigation guardian, except in respect of litigation that relates to the person's property or to the guardian's status or powers;
- c) settle claims and commence and settle proceedings on the person's behalf, except claims that relate to the person's property or to the guardian's status or powers;
- d) have access to personal information, including health information and records, to which the person would be entitled to have access if capable, and consent to the release of that information to another person, except for the purposes of litigation that relates to the person's property or to the guardian's status and powers;
- e) on behalf of the person, make any decision to which the *Health Care Consent Act, 1996* applies;
- e.1) make decisions about the person's health care, nutrition and hygiene.
- f) make decisions about the persons employment, education, training, clothing and recreation and about social services provided to the person; and
- g) exercise the other powers and perform other duties that are specified in the order.

4. Qualification of Guardians

Guardians, whether court appointed or appointed by the PGT, are not expected to have any particular qualifications or experience relevant to managing the property or personal care of another person. Guardians are provided with little if any training or

guidance as to how to carry out the rather broad powers they are given.²⁵ Individuals may have a wide range of erroneous ideas about the nature and extent of a guardian's functions or how their responsibilities are to be exercised. Little is done by either the Court or the PGT to dispel these misinformation or assumptions. Guardians are, for the most part, simply left to act as they see fit with little guidance. When combined with the fact that once appointed, there are few if any effective checks on a guardian's actions, this means that many 'incapable' people are left with little in the way of effective protection against a negligent, abusive or misinformed guardian.

D. Does the Client Have an Attorney or Guardian?

At times a person seeking legal advice may not be certain whether they have an SDM or not. Although the law requires that individuals be given notice of a finding of incapacity, the imposition of a guardianship or the scheduling of a hearing at Superior Court to consider the appointment of a guardian, and guardians are required to communicate with the person under their guardianship, some individuals, nevertheless, remain unclear about their capacity status.

If a person is under the guardianship of the Office of the Public Guardian and Trustee, the statutory guardianship of a family member appointed by the PGT, or a court appointed guardianship it should be possible to confirm this by calling the PGT. Pursuant to O Reg. 99/96 under the *Substitute Decisions Act*, the PGT must keep a registry of guardians of both personal care and property, including court appointed guardians. This information can be given out over the telephone or otherwise upon request. If a person is under a guardianship, a telephone call should be able to confirm this.

²⁵ The Office of the Public Guardian and Trustee offers a series of information sheets on their website.

Once it is confirmed that a person has been declared incapable of either personal care or property management and is subject to a guardianship or other SDM, the next question that arises is - are they capable to instruct counsel?

III. Can A Person Under Guardianship Instruct Counsel?

It can be challenging for a lawyer to determine whether they can actually act on the concerns of a person who has been declared incapable and placed under a guardianship. A preliminary issue is of course whether the client is capable to instruct counsel. It cannot be assumed that because a person has been found incapable of either property management or personal care decisions that they are also incapable to instruct counsel. Capacity is task specific. It is up to the lawyer to determine for themselves whether a client is capable to instruct them.²⁶

When it comes to assessing the capacity of a person under a guardianship to instruct counsel the process is the same as it would be for assessing the capacity of any client to instruct counsel. If the person can understand the information relevant to making a particular decision and the person can understand and appreciate the consequences associated with making or not making the decision, they are capable.²⁷

An evaluation of capacity should not take place in the absence all necessary accommodations and supports to enhance a client's capacity. It is not necessary that the client understand the evidentiary or procedural aspects of accomplishing their goal.

If a lawyer has doubts about a person's capacity to instruct, it may help to meet with them on two or three separate occasions to confirm the consistency of their wishes and their understanding of their circumstances. Although a person may be able to

²⁶ See Law Society of Upper Canada, "Capacity to Instruct Counsel" (2011).

²⁷ See *Substitute Decisions Act, 1992*, s 6 and s 45. See also Capacity to Instruct Counsel chapter in this Disability Law Primer.

describe what they want in coherent terms during any one visit, you may have to probe further into their capacity to instruct if their wishes change from visit to visit.²⁸

If an issue falls under the *Substitute Decisions Act, 1996*, section 3 of the Act deems a person capable to retain and instruct counsel for the purposes of defending their rights under the SDA. It may be possible under the Act to represent a person who is not actually capable to instruct counsel. Such circumstances would, however, severely limit a lawyer's ability to effectively assist the person and greatly narrow the scope of issues the lawyer could deal with.²⁹

It is also important to remember that a person may have been declared incapable and placed under a guardianship some time ago. Despite their official legal status of "incapable", they may, in fact, no longer be incapable of managing property or personal care.

The fact that a person is still legally under a guardianship cannot be ignored. The presence of a substitute decision maker can have impact on the options open to a lawyer to act upon a client's instructions.

Even if an individual subject to a guardianship is clearly capable to instruct counsel, it can still be difficult for a lawyer to determine if they can actually deal with the issues that the person raises. Some of the major complaints of clients under a guardianship relate to circumstances that are a product of the person being under a guardianship and having lost their autonomy, particularly if the person is under the guardianship of the PGT. Issues such as lack of control over how their money is spent, having no control over how much they can spend, or in some cases not having control over the nature of their living arrangements are all inherent to being under a guardianship. Unless it is possible to terminate the guardianship, a lawyer's ability to resolve these issues is limited.

²⁸ For more detail on capacity to instruct and accommodations to enhance capacity see the Capacity to Instruct Counsel chapter in this Disability Law Primer.

²⁹ See D'Arcy Hiltz and Anita Szigeti, *A Guide to Consent and Capacity Law in Ontario, 2013*, Lexis Nexis (2012), at 23-25. Also, for a discussion of the challenges related to the presumption of capacity, see *Banton v. Banton*, [1998] OJ No. 3528.

For other questions, the lawyer must canvas whether the client understands and appreciates the risks associated with their chosen course of action.

A. Ethical Issues Related to Determining Capacity to Instruct

For a lawyer, deciding whether they can take instruction from a client under a guardianship raises ethical issues. A lawyer should assume capacity to instruct exists unless there is evidence to the contrary. As long as the client is capable to instruct, the lawyer is obligated to follow the client's instructions even when the lawyer feels that the client's chosen course of action is not in their best interests and/or involves potential risks. The challenge, however, is determining whether the client actually appreciates the risks related to a particular course of action.

In order to determine whether a client is aware of and appreciates the risks involved in their chosen course of action, it is usually necessary for a lawyer to gain an understanding of the client's current situation and the potential impact upon the client of altering that situation. The more serious the risks may be, the more the lawyer should probe the client's understanding of those risks and any thoughts on how they might mitigate those risks. A lawyer cannot ignore risks that may be present, nor can a lawyer allow their own concerns about those risks to cloud their judgement about whether the client understands and appreciates those risks. To the extent that the client will consent to the lawyer speaking to others about their circumstances, it is a good idea to canvas the opinion of people such as the client's doctor, social worker or other family members to obtain as much information about the client as possible from a variety of perspectives. This information may prove helpful when trying to assess the client's own understanding of their situation and the risks to which they may be vulnerable.

For instance, while a client may be very clear about wanting to remove any restrictions on their spending put in place by their guardian, restrictions may have

been put in place if the client's resources are limited or to deal with behaviour that might harm the client. Also, a guardian has an obligation to take action to preserve the person's resources. A lawyer should discuss this situation with the client to confirm that the client understands what taking control over their finances will entail and what will happen if they do not pay their bills or rent. It may also be necessary to canvas the client's understanding of the impact of their disability on their ability to effectively manage their finances. As long as the client understands and accepts the potential consequences of making their own choices about how to spend their money, then a lawyer should follow the client's instructions and seek to limit or remove restrictions on spending, whether by seeking to revoke a power of attorney, terminate the guardianship or through a negotiated arrangement with the SDM.

Lawyers must also recognize that clients can move back and forth from periods of capacity to periods of incapacity. A client may have to rely on the support of that family member or former guardian again in the near future. The family member could become unwilling to provide support. It is necessary to canvas this issue with a client and ask what the client would do if they require assistance in the future and their current family member guardian was unwilling to assist them. It is sometimes necessary to confirm whether the client realizes that in gaining their autonomy, they may lose some or all of the supports and protections that they currently receive. Capacity involves an understanding of the potential gains, along with the potential losses involved in asserting one's decision making autonomy.

If the client appears to see on only the potential benefits of removing restrictions on their actions, and not the potential risks involved, then they may not be capable to instruct counsel on that issue. At the same time a lawyer cannot be too quick to dismiss a client as being incapable to provide instruction simply because the client's choices involve risks. In cases where capacity to instruct may be in doubt, the lawyer should err on the side of finding capacity – and then continue to assess capacity to instruct on a regular basis.

B. Communicating with Guardians

Statutory (aside from the PGT) and court appointed guardians are often close relatives of the incapable person. There are both benefits and risks to a relative having a large degree of control over the actions of a client. Relatives often know the person and their needs intimately. This can allow relatives to provide the specific types of support required. However, family members can also be paternalistic and over-protective toward the incapable person. It is not surprising that family members may value safety over autonomy. Unfortunately, this can create tensions when the 'incapable' person recovers their capacity and seeks to re-assert their autonomy. If a guardian is fearful of the risks involved in increasing the incapable person's autonomy, they may refuse to offer the person any increased freedom. At this point a guardian's actions may conflict with their obligations under the SDA to promote the independence and autonomy of the incapable person to the extent possible.³⁰

Some guardians may welcome the assistance of a lawyer to help them resolve conflicts with the 'incapable' person. In such cases an open and honest discussion between a guardian and a lawyer should help resolve many issues. In other cases, mediation may allow a guardian and an 'incapable' person to meet and resolve the issues between them with the assistance and support a mediator can provide. Unfortunately, without some degree of co-operation from the guardian, mediated resolution is often not possible.

In some cases, the guardian may refuse to speak to a lawyer. There are a number of possible reasons a guardian might refuse to speak to a lawyer representing an 'incapable person'. Family-member guardians are often under the impression that the fact that an individual has been found incapable with respect to property or personal care decisions means that they are also incapable to instruct counsel. Therefore, the guardian may feel they have no obligation to respond to a lawyer purporting to act on instructions from the "incapable" person. Some guardians may

³⁰ See *Substitute Decisions Act, 1992* ss. 31(3) & 66(8)

fear that a “disgruntled” relative or other ‘third party’ has retained the lawyer to ‘stir up trouble’.

Some guardians will seek legal counsel of their own. When the guardian selects a lawyer familiar with capacity and guardianship issue, this can promote more effective communications and quick resolution of disputes. When a guardian turns to a lawyer who does not understand the special nature of guardianship and capacity matters, problems can arise. Some lawyers representing guardians may try to deal with the matter as if it was a purely financial dispute, or, attempt to assert the guardian’s powers without reminding them of their obligations; by doing so, however, the lawyer can create further barriers to communications, increase tensions and complicate the process of resolving the conflict – usually to the detriment of the “incapable” person. Best efforts should be used to de-escalate the situation. If this is not possible, litigation becomes the only way to move the issue forward.

All lawyers should keep in mind that it is the rights of the “incapable” person that are paramount. The entire purpose of the guardianship is to protect the incapable person from harm. At no time should the ‘rights’ or interests of the guardian take precedence over those of the “incapable” person.

The fact is that a guardian has no rights *vis a vis* the “incapable” person, they have only obligations.³¹ It is the “incapable” person who has rights that need to be recognized by everyone involved. A lawyer’s role, regardless of which “side” in the dispute they may represent, is to ensure that the guardian is carrying out their obligations toward the “incapable” person and that the “incapable” person’s rights are being properly protected.

IV. PROTECTING THE RIGHTS OF CLIENTS SUBJECT TO A GUARDIANSHIP

³¹ See *Chu v. Chang*, [2009] O.J. No 4989 (Ont. SCJ) at para. 26.

Once it has been confirmed that the client is subject to a guardianship or SDM, and that they are capable to provide instruction on the specific issues they seek assistance with, it is necessary to determine what course of action may offer the most effective means of resolving the matter. Issues arising in the context of statutory guardianships, whether held by the Office of the Public Guardian and Trustee or a family member, can often be dealt with through more informal processes, while issues related to court appointed guardianships often require more formal court processes.

A. Dealing with Concerns of Clients without Terminating Guardianship

If a client wishes to re-assert their autonomy, terminating a guardianship and returning full decision making authority to the client is usually the best way to accomplish this. This, however, may not be possible or practical in all cases. In some cases, the client may not be capable of making financial or personal care decisions independently.³² Other clients, regardless of their capacity, may not want to re-assert full autonomy. They may want to modify certain aspects of their relationship with their guardian. Even when a guardianship must be maintained, there are ways to effect positive changes to improve the overall circumstances of the client or to make the guardianship less onerous and more suited to the needs of the client.

1. Office of Public Guardian and Trustee is Statutory Guardian of Property

Persons under the statutory guardianship of the PGT can complain about a range of issues. Many complaints could be resolved easily with improved communications between the client and their PGT representative. The quality of interaction between a client and the PGT representative can vary widely as can the level of assistance

³² It is usually best to have this confirmed by a designated capacity assessor.

and support a representative provides to clients. In some cases, control by the PGT can be helpful, especially when the income to be managed is only high enough to cover the expenses that need to be paid.

In some instances, clients find management by the PGT to be heavy-handed and unresponsive to the client's wishes. Many clients complain that they are unable to communicate effectively with their representative and some feel abandoned by their PGT representative when problems arise.

At times a conversation with a PGT representative, a team leader or PGT counsel can help resolve issues. However, many PGT offices are understaffed and there is high turn-over among client representatives. For these reasons, it can often take some time before someone at the PGT is able to take effective action to resolve a problem.

If no progress can be made dealing with the PGT representative or their supervisor, it may be necessary to file a complaint with the provincial Ombudsman. There is no guarantee that the Ombudsman will resolve the situation. However, if many complaints are received, it may produce pressure for a larger scale reform of the system. Although the Ombudsman can only investigate and make recommendations, his recommendations carry political and moral suasion.

a. Obtaining Accounting from PGT

The PGT will provide clients with periodic financial statements accounting for their actions in relation to the client's property. Unfortunately, many clients find the accounting provided to be very difficult to understand. The information is generally not provided in an easy to understand format. The inability to make sense of the accounting can cause clients to fear that the PGT is trying to hide improper behaviour.

In most cases, going through the accounting with a client item by item, can go a long way to resolving these fears. A lawyer may request such a meeting with the PGT representative and their client.

2. Statutory Guardians (other than PGT)

A statutory guardian is subject to the obligations and fiduciary duties outlined in the SDA. If a guardian is failing to live up to their duties and obligations, it may be possible to call on the PGT to step in and investigate or remind the guardian of their obligations. At the same time, it may be possible to negotiate with the guardian or set up mediation to help bring the guardian and the 'incapable' person together to discuss their concerns with the assistance of a professional mediator. As mentioned above, this requires the co-operation of the guardian.

3. Court Appointed Guardians

Court appointed guardians of property are often family members of the incapable person. If the guardian is open to discussion, negotiation or mediation, it may be possible to resolve most if not all of the client's concerns through a co-operative, informal process. If the guardian is not open to informal resolution, achieving a resolution can become more complicated.

There is little in the way of oversight of court appointed guardians. Court appointed guardians generally receive little supervision or direction from the court. If problems arise, another party must bring the problem to the attention of the Court on behalf of the 'incapable' person. To do this, it is generally necessary to bring an application before the Superior Court of Justice (Estates Court) to deal with the matter. It is up to the incapable person or another concerned person³³ to present their case and

³³ It may be necessary for a person other than the 'incapable person' to obtain leave from the court in order for them to be allowed to bring their concerns before a judge.

convince the court that action is required to protect them from a negligent or abusive guardian.

The fact that challenging any aspect of a court appointed guardianship requires using complex and often expensive court processes, can act as a deterrent for 'incapable' persons who wish to challenge the actions of their guardian.

Where there is clear evidence of obvious wrong-doing or inability to act on the part of the guardian, it is possible to seek a Court order terminating the guardianship and/or replacing the guardian. Otherwise, it will be difficult to vary or terminate the Guardianship based on the guardian's actions rather than the proven capacity of the client.

Nevertheless, the following processes, short of termination, can be used to control a guardian's actions:

a. Passing of Accounts

While the Court, when issuing an order appointing a guardian of property, should also order a mandatory passing of accounts at some point in the future, such as two years, this is not always done, particularly if the guardian did not seek such an order. If no other party, such as the PGT, makes the request, the Court does not often impose the requirement on its own initiative.

Neither the court nor the PGT tend to take the initiative to ensure that guardians are ordered to pass their accounts on a regular basis or even have their accounts reviewed. While the PGT takes the position that every guardian should pass their accounts at least once, it is not clear at what point the PGT will take steps to enforce this. The PGT may, however, assist in obtaining financial information from a statutory guardian. Even if no formal passing of accounts is required, a person under

a guardianship is entitled to receive financial information, or an informal accounting, upon request.

In most cases, however, if a court appointed guardian does not provide an accounting, formal or informal, it is usually necessary for the incapable person to take action to obtain a court order obliging the guardian to pass their accounts.³⁴ If there is evidence of possible wrong-doing it may also be possible to seek an order from the Court suspending the powers of the guardian and appointing the PGT as temporary guardian until the issue is resolved.

The court, upon a passing of accounts, may force a guardian to reimburse any amounts found to be unreasonable uses of the incapable person's funds. This process involves litigation and the incapable person may end up paying for both their own costs as well as those of the guardian, with no guarantee that the Court will order any reimbursements. Even if a Court order is obtained, there is no guarantee the guardian will have the funds to reimburse the 'incapable' person. One always has to balance the time, effort and cost involved in pursuing litigation against a guardian with the potential results of such action. In many cases the potential costs may outweigh the potential gains.

b. Management Plans

When a person applies to the Court to be appointed Guardian, they are required to submit a management plan outlining how the person's assets will be used to ensure the person receives the care and support they require. Some management plans are fairly basic.

It should be possible to turn to the PGT or the Court to challenge a guardian if they fail to follow the management plan. However, it is not always clear that such action will resolve the problem.

³⁴ See *Substitute Decisions Act, 1992*, s 42(1).

c. No Mandatory Reassessment of Capacity

Surprisingly, guardianship orders rarely, if ever, include any requirement that the ‘incapable’ person be assessed on a regular basis to confirm whether the guardianship is still required. Within the court appointed guardianship system, no one is responsible to ensure that an ‘incapable’ person’s capacity is regularly assessed to ensure that they do not remain subject to a guardianship if they have regained capacity. If the person is unaware of their rights or unable to obtain assistance, they are unlikely to be in a position to take action to alter their situation. The result is that once found incapable a person can, in some cases, continue to be subject to a court appointed guardianship long after they have improved to the point that the guardianship is no longer necessary.

B. Terminating a Guardianship

The most effective way to promote and protect a client’s autonomy and resolve most issues related to a guardianship is to terminate the guardianship and return control over decision making to the client.³⁵ This is only an option when it is possible to have the client declared capable of managing their property or personal care. An assessment by a designated capacity assessor is the most effective, although not the only, way to demonstrate that a client is capable. A lawyer must canvas for themselves the likelihood that the client could “pass” an assessment. Given the time and costs involved in having a person assessed, it is best not to embark on the process unless there is at least a good chance that the client is capable. Once the client has been found capable, the options available and the processes to follow to terminate a guardianship will depend upon the type of guardianship the client is subject to.

³⁵ In some cases it may be worth considering whether having another Guardian appointed may resolve problems and offer the ‘incapable person’ a chance to work more co-operatively with a new Guardian.

1. Removing a Statutory Guardian (PGT or Other)

Generally, the PGT acts as guardian only as a last resort when no other person is available to act. The PGT will not remain as Guardian if there is evidence that the person granted a power of attorney for property while capable.³⁶ While the PGT may become the guardian of property by default, pursuant to s. 17 of the SDA, family members can apply to the PGT to take over as statutory guardian. In many cases, it is probably in the client's best interests to replace the PGT with a family member guardian, particularly if it is possible to work with the family member in advance to ensure that they understand what is expected of them and the limits of their powers.

A person under a statutory guardianship may also apply to the Consent and Capacity Board for a review of the finding that they are incapable of managing property.³⁷ If the Board is convinced that the person is capable of managing their property, the guardianship of the PGT will be terminated.

The Superior Court of Justice, may also, upon an application by the person who is subject to the guardianship, terminate or suspend the powers of a statutory guardian pursuant to s. 20.3 of the SDA.

³⁶ Pursuant to s. 16.1 of the *Substitute Decisions Act, 1992*, a statutory guardianship will be terminated if:

- a) the incapable person gave a continuing power of attorney before the certificate of incapacity was issued;
- b) the power of attorney gives the attorney authority over all the incapable person's property;
- c) the PGT receives a copy of the power of attorney and a written undertaking signed by the attorney to act in accordance with the power of attorney;
- d) if someone has replaced the PGT as statutory guardian under s.17, the statutory guardian receives a copy of the power of attorney and a written undertaking signed by the attorney to act in accordance with the power of attorney;

³⁷ See *Substitute Decisions Act, 1992*, s. 20.2.

The PGT can also be removed as guardian of property if the person submits to a capacity assessment, performed by a designated capacity assessor, and the assessor declares the individual capable of property management. A positive capacity assessment is sufficient to terminate a statutory guardianship whether it is exercised by the PGT directly or by a family member.³⁸

Pursuant to s. 20.1 of the SDA, statutory guardians are required to arrange a capacity assessment upon request, as long as no assessment has been performed during the last six months.

2. Terminating a Court Appointed Guardianship

To terminate a court appointed guardianship it is necessary to make a motion to the Superior Court of Justice (Estates Court) to obtain a court order terminating the guardianship. Although this is generally a fairly straightforward process, as long as the client can produce sufficient evidence of capacity, the court process can become complicated if a guardian opposes the motion.

a. Preparing Motion Record

³⁸ A statutory guardianship can be terminated (s. 20 SDA) if

- A guardian is appointed by the Court (under s. 22 SDA)
- Notice of the guardian's resignation is given by the guardian to the person and the PGT
- Notice is given to the Guardian from an assessor stating that the assessor has performed an assessment of the person's capacity and is of the opinion that the person is capable of managing their property
- The time for an appeal from a decision of the Consent and Capacity Board on an application under s. 20.2 has expired, if the Board determines that the person is capable of managing property and no appeal is taken or
- An appeal from a decision of the Consent and Capacity Board on an application under s. 20.2 is finally disposed of, if an appeal is taken and it is finally determined that the person is capable of managing property.

The motion record should include the initial Order declaring the person incapable and appointing the guardian, as well as the capacity assessments upon which the order was based. The record should also include the new assessments supporting the termination of the guardianship. New capacity assessments cannot be more than six months old when submitted to the Court. These materials should be presented as exhibits to the affidavit of the person seeking to terminate the guardianships. It is possible to follow a summary process, but only if all criteria are met and no one opposes the motion.³⁹

It is best, in addition to requesting orders declaring the client capable and terminating the guardianship(s), to also seek an order requiring the guardian to transfer control of the client's property to the client and, where a guardianship for property is concerned, an order, pursuant to s. 42(1) of the SDA, requiring the guardian to pass their accounts upon the termination of the guardianship.

Generally, capacity assessments, performed by a qualified capacity assessor, confirming a person's capacity, will be sufficient to justify termination of a guardianship.

b. When Guardian Opposes Motion

In some cases, however, a guardian or other relative may oppose the motion, presenting affidavit evidence or other information to persuade the Court that the positive capacity assessments are not valid.

It may be necessary for the 'incapable' person's representative to remind the court that capacity is not based upon the wisdom of a person's choices. Also, although input from family members is useful, a capacity assessment performed by a designated capacity assessor will generally be given more weight by the Court than informal information provided by relatives or the guardian. An assessor is trained to

³⁹ See Substitute Decisions Act, 1992, PART III, ss. 69-77.

assess a person's ability to "appreciate and understand", without making value judgements about the quality of the individual's decisions. In most cases, unless there is clear evidence that the assessments in question do not meet the necessary standards, the professional opinion of the qualified assessor should be sufficient to overcome concerns of relatives.

In some cases, however, a guardian may launch a more vigorous attack on the incapable person's attempts to terminate the guardianship. They may present information to demonstrate the person's inability to function, they may attack the assessor's qualifications, or claim that the assessor failed to consider necessary information. They may present a competing opinion from another expert or demand that a formal assessment be done by another assessor of their choice.

Regardless of whether a guardian wants to have their own assessor evaluate your client, it is necessary to keep in mind that no one can assess your client without the client's permission.⁴⁰ Advise your client to refuse to submit to an assessment unless you have arranged the assessment. This will ensure that any competing opinions the guardian may present will be based on a review of the records, rather than actual interaction with the individual. An assessment based upon interaction with the individual should always be given more weight than an assessment based on a review of documents and reports alone.

c. Court Ordered Assessments (s. 79(1) SDA)

In order to overcome the client's refusal to consent to an additional assessment, a guardian may seek an order from the Court compelling the client to submit to the assessment, pursuant to s. 79(1) of the SDA. Such orders remove the individual's right to refuse an assessment.

⁴⁰ See *Substitute Decisions Act, 1992*, s 78(1).

The court should not issue such an order unless very specific circumstances are present. Generally, s. 79(1) assessments are used 'up-front' when attempting to have a person declared incapable and a guardianship imposed, but the individual is refusing to allow their capacity to be assessed at all. In such instances, a s. 79(1) order can be used to provide the court with the information required to determine whether a guardianship is required. It is more unusual for a s. 79(1) order to be granted in the context of a motion to terminate a guardianship. In the context of a termination, if positive capacity assessments have been presented to the Court, unless there is clear evidence that those assessments are invalid, seriously flawed or do not meet the statutory requirements, no other assessment should be ordered.

Section 79(1) requires that the judge be satisfied that there are reasonable grounds to believe that the person is incapable. This can pose challenges given that a person attempting to terminate a guardianship is, by virtue of their being under a guardianship, officially incapable. However, this fact cannot be used as 'reasonable grounds to believe the person is incapable' if they have presented the court with recent assessments asserting their capacity. If there is persuasive evidence of incapacity from after the date of the most recent assessments, or there is evidence of obvious weaknesses or omissions in the assessments, then there may be reason to further explore the issue of capacity. Otherwise, it is not appropriate to assert that there is good reason to believe a person is incapable, based on the older assessments used to create the guardianship when there is more recent evidence before the court that states they are capable.

The SDA is intended to ensure a person can re-assert their autonomy at the earliest possible moment. Any decision or order that ignores new positive assessments of capacity and relies instead on much older negative assessments would be subjecting the individual to a higher standard of evidence than required and would also be contrary to the stated objectives and intent of the SDA.

d. Standard of Proof Required when Confirming Capacity

Section 79(1) assessments are often justified on the basis that further information is necessary to confirm the person's capacity because the existing information does not provide certainty about the person's capacity. The SDA does not require certainty or demand that the evidence of capacity meet the higher "beyond a reasonable doubt" standard of proof.

The legal standard to be applied in capacity matters is the civil standard of proof, on a "balance of probabilities."⁴¹ This means that as long as a qualified capacity assessor has determined that it is more likely than not that the person is capable – they are capable. This should be sufficient to convince the Court. As noted by Strathy J. in *Kischer*⁴², it is important to resist the temptation to order an assessment based on the argument that it can't hurt. It can hurt.⁴³

If a s. 79(1) assessment is ordered despite the existence of positive capacity assessments, lawyers face the hard choice of pursuing the rather long two step process of challenging the order or allowing the compelled assessment to proceed.

e. Challenging s. 79(1) Order

Since s. 79(1) orders are generally interlocutory orders granted by a motions judge, it is necessary to turn to the Divisional Court to seek leave to appeal the motion before being able to proceed to appeal the order. This two step process takes time and can involve considerable expense.⁴⁴

⁴¹ See F.K. (Re), 2010 CanLII 55557 (ON CCB) p 4.

⁴² *Kischer v Kischer* [2009] OJ No 96 (SCJ) at para 10.

⁴³ Also see *Zheng v. Zheng* [2012] OJ No 2957 (Div Ct); also see D'Arcy Hiltz and Anita Szigeti, *A Guide to Consent and Capacity Law in Ontario*, (Lexis Nexis 2012) at 49.

⁴⁴ See Ontario, *Rules of Civil Procedure*, r 62.02.

In some cases it may be easier to allow the assessment to proceed, assuming that if the other assessments found the person capable there is no reason to assume a further assessment would come to a different conclusion. Even if the compelled assessment is negative, it would still have to be placed into the pool of evidence of capacity before the court. The court cannot ignore the positive assessments and rely only on the new compelled assessment when the final decision about capacity is made.

Nevertheless, there are still many reasons to challenge a s. 79(1) assessment. A compelled assessment “is an intrusive and demeaning process” that involves a “substantial intervention into the privacy and security of the individual,”⁴⁵ This intrusion is all the more objectionable when the client has already voluntarily submitted themselves to assessment.

f. Who Pays for Guardian’s Opposition

One problem with turning to the Superior Court to resolve disputes involving a court appointed guardian is that the guardian is able to take his legal fees and costs from the account of the incapable person. A guardian can oppose the incapable person’s attempts to assert their autonomy before a court, while using the incapable person’s funds to pay the costs. The cost of pursuing litigation against the ‘incapable’ person is not a deterrent to the guardian pursuing unnecessary or unreasonable legal action.

At the same time, the guardian can refuse to release funds for the incapable person to hire a lawyer of their own. While this may be improper, correcting the problem may involve further litigation and additional expense for the incapable person. This puts a lawyer in the difficult situation of having to balance the protection of the client’s rights with the potential costs of doing so.

⁴⁵ See *Abrams v. Abrams*, [2008] OJ No 5207 (SCJ) at para 50.

It may also be possible to submit a letter to the guardian and the Court early on in any litigation warning that any excessive use of the 'incapable persons' funds will be vigorously opposed. The problem is that there is no guarantee that the Court will issue an order requiring a guardian to reimburse 'excessive' costs; and even if an order is issued, there is no guarantee the guardian will have sufficient personal funds to make restitution.

V. CAPACITY ASSESSMENTS

Capacity assessments are an essential tool when asserting or re-asserting a client's capacity to manage their own finances or activities of day to day living. Once a person has been declared incapable of either property management or personal care, the only clear way to reverse that declaration is to produce a capacity assessment stating that the person is now capable.

If it appears that a person subject to a statutory guardianship for property may be found capable, the best step to take is to arrange for a designated capacity assessor to perform an assessment of the individual's capacity to make property decisions. If a person is subject to a court appointed guardianship it may be necessary to also obtain an assessment of the person's capacity to make personal care decisions, depending upon the nature of the guardianship.

There is no obligation upon a person under a guardianship to obtain permission from their guardian to be assessed, or to use an assessor of the guardian's choice. Guardians may argue that any assessment done without their consent or performed by an assessor not of their choosing is illegitimate.

There is no requirement that only an assessor with specialist training can assess people with certain conditions or injuries, such as acquired brain injury.

While a specialist's report may be required when claiming damages based upon a specific loss of function, a capacity assessment is a different kind of assessment. A capacity assessor is not trying to compare the person's previous state or abilities

with their ability after their accident etc.; a capacity assessment determines whether the person meets a threshold test according to the established test of being able to understand and appreciate the information necessary to make a particular type of decisions and the consequences of making or not making a particular decision. All designated capacity assessors are qualified to make this assessment.

In some cases, where the individual being assessed may also have difficulty communicating due to physical or intellectual disability, it may be prudent to retain an assessor with experience assessing individuals with these communication disabilities. An assessor with specialized experience may be better able to accommodate the person's particular disability and therefore be better able to obtain the information needed to allow a proper assessment of capacity.

It is always best to ensure an assessor is aware of the client's background, the cause of their incapacity and any other relevant details that may help inform the assessor's evaluation. It is advisable for the assessor to review any previous assessments and, where possible, speak to medical or psychiatric professionals who have dealt with the client. Although an assessment does not have to canvas every issue in detail or provide an exhaustive review of all relevant evidence, the more complete an assessment and the more thorough an assessor's preparation before conducting the assessment, the less chance there is that the assessment will be successfully challenged.

As with statutory guardianships, the production of positive capacity assessments will usually be sufficient to terminate a court appointed guardianship. Terminating a court appointed guardianship on the basis of positive capacity assessments requires that an application be made before the Superior Court of Justice (Estates Court) to obtain a court order terminating the guardianship.

An assessment cannot be more than 6 months old when it is submitted to the court, so it is best to ensure that all will be ready to proceed to court before scheduling an assessment.

A. Who Should Prepare Assessment

In general a formal report prepared by a designated capacity assessor on the proper forms should be presented to either the PGT or the Court as evidence of capacity to justify the termination of a guardianship.

While physicians and others can prepare assessments of capacity in some instances, the report of a designated capacity assessor will usually take precedence over other reports due to the specialized training designated capacity assessors receive and the level of relevant detail their reports usually offer. Nevertheless, when competing or conflicting assessments are before the court, in deciding which carries more weight, a judge generally takes into consideration a variety of factors such as the overall quality and usefulness of the assessment, the level of relevant detail offered and the qualifications and experience of the individual performing the assessment.

B. Who Pays for Assessment

Capacity assessments can be expensive. A basic report on a person's capacity to manage property can cost between \$800.00 and \$1,500.00. In cases of specific injury such as an acquired brain injury some may argue that only a neuro-psychiatric specialist has the training and expertise necessary to evaluate a person's capacity. Such reports can cost three to four times as much as a regular capacity assessment. While such specialist reports may be necessary when making a claim for damages, the SDA does not require such reports to assert capacity. Designated capacity

assessors are assumed to be qualified to determine capacity for the purposes of activities under the SDA.

The challenge is paying for the assessment. Where the guardian supports the individual, the guardian can release funds from the individual's account. The guardian can refuse to pay for the assessment or insist that an assessor of their choice is used. While a statutory guardian is required under the SDA to arrange and pay for an assessment upon request (as long it is has been at least 6 months since the last assessment), there is no such clear obligation on the part of a court appointed guardian to co-operate with a request for an assessment from the 'incapable' person. There is no effective way to enforce this requirement against an unwilling guardian without pursuing litigation and obtaining a court order. In such cases, it is easier and quicker for a lawyer to arrange an assessment themselves.

The Capacity Assessment Office may be able to cover the cost of assessments in certain situations. If the person under a guardianship is on ODSP or other social assistance and the guardian is refusing or is unable to release funds to cover the cost of an assessment, an application can be made to the PGT for funding.

Otherwise, a person who may be capable may find themselves unable to assert their capacity due to their inability to cover the cost of an assessment. If they have sufficient funds to cover the cost, but the guardian is refusing to pay, it may be necessary to obtain a court order compelling the guardian to pay.

C. Preparing a Client for an Assessment

The best way to prepare a client for an assessment is to review the assessment process from step to step so the client has a good idea of what is going to happen, what questions they will be expected to answer and what is coming next. As part of

this preparation, it may be useful to review the Capacity Assessment guidelines with the client.⁴⁶

It may be useful to run through some sample questions to gauge a client's ability to respond clearly and effectively. It is particularly important to ensure that the client is familiar with the current state of their financial affairs.⁴⁷ You can help a client focus their responses on the most relevant details. It is usually helpful to provide a client with a wide range of possible styles of questions to ensure they can respond. The key is to help the client feel comfortable with the process to help the client to remain calm when the actual assessment is carried out. Usually the more a client knows about the process and their role within that process the better able they are to focus on providing effective answers.

D. Rights Advice

It never hurts to remind a client that under normal circumstances they have the right to refuse an assessment.⁴⁸ This may be relevant when someone other than counsel for the client is urging the client to submit to an assessment. At the same time, when an assessment may help achieve the client's goals, you might also advise them that while they can refuse to be assessed, by doing so they may not have the evidence they require to be able to challenge a guardianship or re-assert their autonomy.

VI. CONCLUSION: OTHER ISSUES

A. Reasserting Autonomy

⁴⁶ See Capacity Assessment Office, *Guidelines for Conducting Assessments of Capacity* (2005), online: <<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity/2005-06/guide-0505.pdf>>.

⁴⁷ To further this, it may be useful to request updated financial information from the person's guardian.

⁴⁸ The exception to this rule is when the Court has issued an order, pursuant to s. 79(1) of the SDA compelling the person to submit to an assessment.

Being found capable does not mean that a client has no further need for support. If possible, a lawyer should collaborate with the client and professionals who can assist the client to make the transition to more independent living. In particular, the client may require assistance with banking issues, given that the client may not have used a bank in many years.

A lawyer's obligation extends at least to the point of ensuring that all property has been returned to the client's control and the client has been given information to help locate assistance to learn how to manage their property.

B. Future Instances of Incapacity

Capacity fluctuates and the fluctuations may be frequent. A lawyer should encourage a client to seek the necessary assistance as soon as they notice any changes in their overall well-being. You can provide a client with basic information about what to do if they find themselves in a mental health facility and how to protect their rights. You can also encourage a client to select a friend or family member they would want to make decisions for them should they become unable to do so for themselves. If the client can put in place Powers of Attorney for property and personal care, while they are capable to do so, there may be no need to resort to either a statutory or court appointed guardianship in the future. By selecting the person who will make decisions for them in advance, the client can select a person they trust, inform the person of their wishes and values to ensure that the person makes decisions consistent with the client's needs and wishes.



Chapter 6

Disability and Public Education in Ontario: A Primer

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October 2013

Current to September 2013. Anyone intending to rely on this paper should conduct their own research for updates in the legislation and jurisprudence.

A French version of this paper has been prepared by the Centre for Legal Translation and Documentation. The translation is entitled: *Le handicap et l'éducation publique en Ontario: guide d'introduction* and can be found at Chapter 6. The analysis is based on an English version of the law.

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I. Introduction

The importance of ensuring an equal and discrimination free educational environment, and the perception of fairness and tolerance in the classroom are paramount in the education of young children.¹

The importance of Education was underscored by Aristotle over two millennia ago, opining that in an ideal state, the law maker's most important priority must be the education of children and youth.² Public education remains a cornerstone of our society, and education services free from discrimination is a fundamental element in its delivery.

The purpose of this paper is to provide a basic introductory primer on education law as it relates to students with disabilities within the public primary and secondary school system in Ontario. This paper will provide an overview of the legislative framework for education service delivery, as found in the *Education Act*³, and the applicability of the *Human Rights Code (Code)*.⁴ As well, this paper provides an introduction to a number of issues specific to students with disabilities, and a discussion on developments such as Canada's ratification of the United Nations *Convention on the Rights of Persons with Disabilities (CRPD)*.⁵

A significant factor contributing to the persistence of barriers students with disabilities face is that much of the discussion regarding the accommodation of students with disabilities occurs within an already existing framework of services. Education experts who make decisions regarding into which education setting a student will be placed and what educational resources will be provided to that student do so by considering the range of existing services and resources.

¹ *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825 at para 82 (SCC).

² Aristotle, *The Politics and the Constitution of Athens*, ed. By Stephen Everson, (Cambridge: Cambridge University Press, 1996), Book VIII at 195.

³ RSO 1990, c. E. 2. [*Education Act*]

⁴ RSO 1990, c. H.19. [*Code*]

⁵ UN GAOR, 61st Sess., 76th Mtg., UN Doc. GA/10554 (2006), online: United Nations Enable <<http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>> [*CRPD*].

Rarely does this assessment include an examination of the education system as a whole, with a view to creating more inclusive school environments that are readily accessible and fully accommodate children of all abilities.⁶

There are a plethora of barriers and legal considerations that may arise within the education law context. The scope of this paper is to provide a brief introduction only, and will not provide in-depth analysis into those legal issues. The issues that may arise in this area of practice can be complex, fact specific, and may involve other legislative and regulatory schemes. Issues that may arise include youth criminal justice matters, transportation, student's service animal, truancy, child protection legislation, and workplace safety and labour law. This paper will also not consider education through privately funded schools and post-secondary education. The aim of this paper is to provide legal practitioners and lay advocates with an introductory understanding of education law and human rights as a starting point in their legal research.

II. Overview of Education Law in Ontario

In Ontario, the *Education Act*⁷ governs the delivery of publically funded elementary and secondary education services. Children in Ontario are required to attend school or receive education services between the ages of 6 to 18.⁸ Certain students with disabilities who are identified as "exceptional" through formal processes as set out in the *Education Act* (to be discussed below at pages 17 - 26) may remain in a secondary program until the age of 21, however this is discretionary.⁹ All children have a right to attend public school.

⁶ A. Wayne MacKay & Janet Burt-Gerrans, "Inclusion and Diversity in Education: Legal Accomplishments and Prospects for the Future" (Paper presented to the Canadian Association for Community Living National Conference, November 3-5, 2002) [unpublished] at 4, 5.

⁷ *Education Act*, *supra* note 3.

⁸ *Ibid*, s 21(1).

⁹ *Identification and Placement of Exceptional Pupils*, O Reg 191/98, s 16(3). [*JPRC Reg.*].

A. Who is your ‘client’?

In this area of practice, it is always important to ensure, as an advocate, that one clearly understands her/his role, and from whom they receive instructions when carrying out that role. Essentially, the question to ask oneself is – “who is your client”. As a starting point, ARCH Disability Law Centre underscores that the person with a disability should instruct advocacy directly, as it relates to their interests. If due to disability and/or age, it is deemed that direct instruction is not possible notwithstanding all appropriate accommodations provided, then the student’s involvement in decision-making must be maximized as much as possible as appropriate in those circumstances.¹⁰

Whether minors can act on their own behalf will be dependant on the context they are in. In formal litigation, litigation guardians may be required pursuant to the specific rules guiding those processes.¹¹ Within the framework of the *Education Act*, there are specific considerations given to when students can initiate processes on their own behalf; thus it is important to understand the rights afforded within the specific legislative context applicable to the student’s situation. For example, a student may appeal, on their own behalf, a suspension or expulsion decision if they are aged 18 years or older, or if they are 16 or 17 years of age and have withdrawn from parental control.¹² A student does not have the right to request Identification, Placement and Review Committee meeting; however some participatory rights are afforded to students aged 16 or older.¹³

¹⁰ See Chapter 2 on “Providing Legal Services to Persons with Disabilities”, and Chapter 4 on “Capacity to Instruct Counsel” in this *Disability Law Primer*.

¹¹ See e.g. *Rules of Civil Procedure*, RRO 1990, Reg 194, r 7; See also *Children’s Law Reform Act*, RSO 1990 c C-12; See Ontario, Human Rights Tribunal of Ontario, *Practice Direction on Applications on Behalf of Another Person*, (July 2008, last amended March 2010) online: HRTO <<http://www.hrto.ca/hrto/index.php?q=en/node/62>>.

¹² *Education Act*, *supra* note 3, ss 309(1), 311.7(2).

¹³ *IPRC Reg.*, *supra* note 9, ss 5, 6, 7, 15, 16, 18, 19, 23, 24, 28, 29.

B. Historical Context

Historically, children with disabilities were not permitted to access education services in the same manner as their peers, and experienced practices of exclusion and segregation. An emphasis was placed on ‘treatment’ rather than education. This legacy of exclusion is well reflected in a 1950 judgement¹⁴ of the Supreme Court of Canada, whereby the expulsion of two students from public school was upheld on grounds of an alleged incapability to follow the academic course load and their conduct at school. High deference was afforded to administrators and educators and much weight was placed on testimonial evidence that described the behaviour of the students as having a negative impact on their peers and that they were “arriérés mentaux”.¹⁵ Weight was given to a physician’s testimony, on behalf of the school board, who opined that the students did not belong in a school setting, but rather belonged in an institution.¹⁶

In 1980, the Ontario legislature introduced the *Education Amendment Act, 1980* (Bill 82); an amendment to the *Education Act* of extreme significance for children with disabilities in Ontario.¹⁷ Bill 82 placed responsibility on school boards to provide education services to students with disabilities.¹⁸ This event can be viewed as a turning point in education delivery in Ontario, as the right to education for all students was legislated, falling within the purview of the Ministry of Education. Prior to this amendment, public school boards were not obligated to provide education services to students with disabilities.

C. Overview of Legislative Framework

The purpose of the *Education Act* is clearly articulated within the Act which aims to:

¹⁴ *Bouchard v. Saint-Mathieu-de-Dixville (Municipalité) Commissaires d’écoles*, [1950] S.C.R. 479 [Bouchard].

¹⁵ *Ibid.* at 485.

¹⁶ *Ibid.* at 480, 481.

¹⁷ See C.J. Hodder, “The Education Act (Ontario) 1980: A Review” (1984) online: <<http://link.springer.com/article/10.1007%2F01807941#page-1>>

¹⁸ See *Education Act*, *supra* note 3, ss 1(1), 8(3), 170(1) para 7.

provide students with the opportunity to realize their potential and develop into highly skilled, knowledgeable, caring citizens who contribute to their society.¹⁹

While not a direct service provider of education services to children, the *Education Act* states that the Minister shall:

ensure that all exceptional children in Ontario have available to them, in accordance with this Act and the regulations, appropriate special education programs and special education services without payment of fees by parents or guardians resident in Ontario, and shall provide for the parents or guardians to appeal the appropriateness of the special education placement, and for these purposes the Minister shall,

(a) require school boards to implement procedures for early and ongoing identification of the learning abilities and needs of pupils, and shall prescribe standards in accordance with which such procedures be implemented; and

(b) in respect of special education programs and services, define exceptionalities of pupils, and prescribe classes, groups or categories of exceptional pupils, and require boards to employ such definitions or use such prescriptions as established under this clause.²⁰

The interpretation of this section is critical to the delivery of appropriate education services to students with disabilities, and the level of accountability that exists of school boards and the Ministry of Education to ensure that each student with a disability has access to appropriate and meaningful education services. The Court of Appeal for Ontario stated the following with regards to this provision:

Under s. 8(3), the Minister's obligation is to ensure that appropriate special education programs and services are made available to exceptional pupils in Ontario. This can entail an obligation to ensure that a group of exceptional pupils has available a particular special education program or a service only if it is the only appropriate program or service for that group. If there are alternatives, the Minister is not required by that section to ensure the availability of any specific program.²¹

¹⁹ *Education Act*, *supra* note 3, s 0.1(2).

²⁰ *Education Act*, *supra* note 3, s 8(3).

²¹ *Wynberg v Ontario*, 82 OR (3d) 561 at para 129.

With regards to the delivery of education services by school boards to students with disabilities, the *Education Act* states that boards are obligated to:

provide or enter into an agreement with another board to provide in accordance with the regulations special education programs and special education services for its exceptional pupils;²²

Adjudicators have subsequently continued to recognize the division of responsibilities between a school board and the Ministry of Education.²³ Nonetheless, the Ministry may be held accountable within the realm of its responsibilities although this will be highly dependent on the nature and facts of each case, as “the Ministry does have a role in how a Board exercises its responsibilities even in relation to particular students.”²⁴ The individual facts and the manner within which a claim is framed will dictate whether any liability can be found against the Ministry of Education.²⁵

The *Education Act* provides a number of avenues for redress in certain contexts.²⁶ There may be numerous possible recourses that fall beyond the *Education Act*. Although the appropriateness, effectiveness and strategic value of any course of action requires an assessment specific to each case and the issues raised in each set of facts, the following may be possible avenues to consider: an application to the Human Rights Tribunal of Ontario (HRTO) (as will be discussed below), a constitutional challenge pursuant to the *Canadian Charter of Rights and Freedoms*,²⁷ a complaint to the Ontario College of Teachers,²⁸ and

²² *Education Act*, *supra* note 3, s 170(1), para 7. See also *Special Education Programs and Services*, RRO 1990, Reg 306.

²³ See e.g. *JY by his next friend RY v Hamilton-Wentworth Catholic District School Board*, 2013 HRTO 806; *EP v Ottawa Catholic School Board*, 2011 HRTO 657; *Schafer v Toronto District School Board*, 2010 HRTO 403; and see *Sagharian v Ontario (Education)*, 2007 Canlii 6933 (ONSC).

²⁴ *Davidson v Lambton Kent District School Board*, 2008 HRTO 294 at para 34.

²⁵ See *Sigrist and Carson v London District Catholic School Board*, 2008 HRTO 14 at paras 15-20.

²⁶ See e.g. *Education Act*, *supra* note 3, ss 57, 265(1)(m), 309, 311.7.

²⁷ Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [Charter].

²⁸ See online: Ontario College of Teachers <<http://www.oct.ca/public/complaints-and-discipline>>.

civil claims for remedies before the courts.²⁹ The Ombudsman of Ontario does not have jurisdiction to consider complaints involving school boards or children's aid societies. However, the Ombudsman does have jurisdiction to investigate decisions made by the Ministry of Education.³⁰

D. Accessing Services and General Considerations

1. Access and Immigration Status

In Ontario, a child shall not be denied primary or secondary public education due to that child's immigration status or that of her/his parent(s).³¹

The Ministry of Education has released a Policy/Program Memorandum which provides guidance to school boards and reinforces that children cannot be refused admission to school because of their parent's immigration status.³² Thus, school boards are not legally obligated to refer families with no immigration status or documents to immigration authorities.

School administrators may need to verify a student's name or home address, however this can be accomplished through a variety of ways and immigration documents are not required.

2. School Health Support Services

The School Health Support Services Program (SHSS), is a program of the Ministry of Health and Long-Term Care and it is mandated to ensure that children with disabilities have a right to access the supports they need in school (i.e. public school, private school, home-school or treatment program) as it relates to

²⁹ See e.g. *Fleischmann v Toronto District School Board*, 2004 CanLII 29548, 181 OAC 244. Ontario Superior Court of Justice granted an interim application ordering the school board to assign a specific Special Needs Assistant to a student with disabilities.

³⁰ See online: Ombudsman Ontario <<http://www.ombudsman.on.ca/Home.aspx>>.

³¹ *Education Act*, *supra* note 3, s 49.1.

³² Ministry of Education, *Policy/Program Memorandum No. 136 - Clarification Of Section 49.1 Of The Education Act: Education Of Persons Unlawfully In Canada*, (issued December 3, 2004), online: Ministry of Education <<http://www.edu.gov.on.ca/extra/eng/ppm/136.html>>.

their complex disability-related needs, medical, therapeutic and other health related needs. The Ministry of Education's Policy/Program Memorandum 81 ("PPM 81") articulates this delivery of support services, and the shared responsibility to provide these services amongst school boards, the Ministry of Education, the Ministry of Health and Long-Term Care and the Ministry of Community and Social Services, depending on the nature of the service required.³³ Some health support services include speech language therapy, speech remediation, administration and injection of medication, catheterization, assistance with mobility, and assistance with feeding and toileting.

The PPM 81, and the *Interministerial Guidelines for the Provision of Speech and Language Services (as applicable to the Education Act)*³⁴ provide the starting point for determining the type of health support services required and which of the three Ministries is responsible, or the manner in which that responsibility is shared.

A comprehensive review of SHSS was conducted and a final report released in 2010, titled *Review of School Health Support Services: Final Report*.³⁵ The Report provides a helpful overview of the program and identifies areas needing redress.

3. Demonstration/Provincial schools

Provincial Schools and Demonstration Schools are governed by the Ministry of Education directly, and not by school boards. These schools provide alternate

³³ Ontario Ministry of Education, *Policy/Program Memorandum No. 81 – Provision of health Support Services in School Settings*, (issued July 19, 1984), online: Ministry of Education <<http://www.edu.gov.on.ca/extra/eng/ppm/81.html>>.

³⁴ Ministry of Education, Ministry of Health, Ministry of Community and Social Services, *Interministerial Guidelines for the Provision of Speech and language Services (as applicable to the Education Act)*, (September 1988), online: Ministry of Education <<http://www.edu.gov.on.ca/extra/eng/ppm/guide.html>>; see also Ministry of Education, *A Model for the Provision of Speech and Language Services*, online: Ministry of Education <<http://www.edu.gov.on.ca/extra/eng/ppm/model.html>>.

³⁵ Deloitte & Touche LLP, *Review of School Health Support Services: Final Report*, (July 2010), online: Ministry of Health and Long-Term Care <http://www.health.gov.on.ca/en/public/contact/ccac/docs/deloitte_shss_review_report.pdf>.

specialized education services to students who are Deaf, blind or who have severe learning disabilities. Information specific to these programs, such as eligibility requirements, roles and responsibilities, and the general framework is set out in Regulation.³⁶

4. Section 23 Programs

For children who require care or treatment in facilities or are in custodial or correctional facilities, educational programming may nonetheless be provided by a school board within the treatment or custodial setting. The delivery of individualized education programming within these facilities is referred to as a section 23 program.³⁷ These facilities must be government- approved and may include hospitals, group homes, custodial facilities, and treatment facilities. Some section 23 programs may also operate within a school. The Ministry of Education acknowledges that in such cases “**where pupils cannot attend local schools** because of their need for care and/or treatment, suitable educational programs which recognize the primacy of the care and/or treatment needs may be provided by the school board within the facilities.”³⁸ A school board and facility are required to enter into an agreement in order for the education services to be provided by the school board within the facility; this agreement will set out the scope and nature of services provided.³⁹

5. Ontario Student Record (OSR)

Schools are obligated to maintain a record for each student enrolled containing specific information. This record is called the Ontario Student Record (OSR).⁴⁰

³⁶ *Ontario Schools for the Blind and Deaf*, RRO 1990, Reg 296.

³⁷ *Grants For Student Needs — Legislative Grants For The 2013-2014 School Board Fiscal Year*, O Reg 120/13, s 23.

³⁸ Ontario Ministry of Education, *Policy/Program Memorandum No. 85 – Educational Programs for Pupils in Government-Approved Care and/or Treatment Facilities*, (issued January 20, 1986), online: Ministry of Education < <http://www.edu.gov.on.ca/extra/eng/ppm/85.html>>. See also Ministry of Education, *Guidelines – 2005: For Approval of Educational Programs for Pupils in Government Approved Care and/or Treatment, Custody and Correctional Facilities*, online: Ministry of Education < <http://www.edu.gov.on.ca/eng/general/elemsec/speced/facilitiesamount/>>.

³⁹ *Ibid.*

⁴⁰ *Education Act*, *supra* note 3, ss 265, 266.

The nature of the contents, and manner which such content is maintained, stored and disclosed, is articulated in a policy document titled *Ontario Student Record (OSR) Guideline*.⁴¹ The Guidelines state that as per the *Education Act*, “only supervisory officers and the principal and teachers of the school have access to the OSR for the purpose of improving the instruction of the student”.⁴² Every student has a right to access her or his OSR, and parents also have that right if the student is under the age of 18.⁴³ A student or parent may request the removal of information maintained in the OSR if it is inaccurate or no longer “conducive to the improvement of instruction of the pupil”.⁴⁴ The contents of the OSR are privileged.⁴⁵ The OSR is often a useful starting point when exploring and advising on education related matters.

6. Access to Information

The collection, use, storage and disclosure of students’ personal information by publicly funded school boards are governed by the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*.⁴⁶ With regards to Provincial Schools and Demonstration Schools, the governing legislation is the *Freedom of Information and Protection of Privacy Act (FIPPA)*.⁴⁷ The Information and Privacy Commissioner of Ontario released a revised guide which provides helpful information when navigating access to information legislation as it applies to the OSR and other student’s personal information.⁴⁸

⁴¹ Ministry of Education, *Ontario Student Record (OSR) Guideline*, (Toronto: Queen’s Printer for Ontario, 2000) online: Ministry of Education <<http://www.edu.gov.on.ca/eng/document/curricul/osr/osr.html>> [*OSR Guideline*].

⁴² *Ibid* at 14.

⁴³ *Ibid*. See also *Education Act*, *supra* note 3, s 266(3).

⁴⁴ *Education Act*, *supra* note 3 at s 266(4). See also *OSR Guideline*, *supra* note 41 at 22.

⁴⁵ *Education Act*, *supra* note 3 at s. 266(2).

⁴⁶ RSO 1990 c M-56.

⁴⁷ RSO 1990 c F-31.

⁴⁸ Ann Cavoukian, *A Guide to Ontario Legislation Covering the Release of Students’ Personal Information*, revised: June 2011 (Toronto: Information and Privacy Commissioner, 2011) online: IPC <<http://www.ipc.on.ca/images/Resources/educate-e.pdf>>.

III. Convention on the Rights of Persons with Disabilities and Inclusive Education

The quality and manner in which education services are delivered to students of all abilities should now be significantly informed by the United Nations *Convention on the Rights of Persons with Disabilities (CRPD)*, ratified by Canada on March 11, 2010.⁴⁹

A. *The CRPD, Inclusive Education and Article 24*

The *CRPD*, like Canadian human rights jurisprudence, rejects a formal equality, “separate but equal” doctrine of human rights and in no way contemplates any separate or parallel delivery of education services. Among the obligations imposed by the *CRPD*, the duty to “ensure an inclusive education system at all levels”⁵⁰ is of significant relevance. Article 24 of the *CRPD* envisions the delivery of primary and secondary education to students of all abilities in a truly inclusive manner, by ensuring that all necessary supports and accommodations are provided.⁵¹ The United Nations Special Rapporteur on the Right to Education stated that article 24 in the *CRPD*, “unambiguously recognized the link between inclusive education and the right to education of persons with disabilities”.⁵²

Article 24 (1) of the *CRPD* obligates States Parties to ensure the following:

1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and life long learning directed to:
 - a. The **full development of human potential and sense of dignity and self-worth**, and the strengthening of respect for human rights, fundamental freedoms and human diversity;

⁴⁹ *CRPD*, *supra* note 5.

⁵⁰ *CRPD*, *supra* note 5, art 24, para 1.

⁵¹ *CRPD*, *supra* note 5, art. 24; See also United Nations, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities, Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol*, (Geneva: UN, 2007) at 82-85.

⁵² UN Human Rights Council, Special Rapporteur on the rights to education, Vernore Munoz, *The right to education of persons with disabilities: Report of the Special Rapporteur on the right to education*, U.N. Doc A/HRC/4/29 (2007) at para 21.

- b. The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, **to their fullest potential**;
- c. Enabling persons with disabilities to participate effectively in a free society. [emphasis added]

Article 24(2) of the *CRPD* requires States Parties to ensure that children with disabilities are not excluded from public primary or secondary education on the basis of disability; that children with disabilities have equal access to inclusive, quality and free primary education; that support required to facilitate effective education is provided; and that “[e]ffective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion”.⁵³ Significantly, article 24(2) establishes that the goal of these provisions of the *CRPD* is “full inclusion”.⁵⁴

Article 24(3) contemplates the role of education service providers to deliver meaningful opportunities for social development to facilitate full participation within communities. The *CRPD* identifies the importance of learning “sign language and the promotion of the linguistic identity of the deaf community”⁵⁵; learning Braille and augmentative and alternative forms of communication, and that all communication, “in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development”.⁵⁶

As can be expected, there was much debate around the drafting of this article by Canada, other country delegations, and non-governmental organizations (“NGOs”) concerning what is meant by inclusive education.⁵⁷ One such debate

⁵³ *CRPD*, *supra* note 5, art 24, para 2(e).

⁵⁴ *CRPD*, *supra* note 5, art 24, para 2.

⁵⁵ *CRPD*, *supra* note 5, art 24, para 3 (b).

⁵⁶ *CRPD*, *supra* note 5, art 24, para 3 (c).

⁵⁷ By General Assembly resolution 56/168, the United Nations established the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities. This Committee was charged with drafting what became the *CRPD*. The resolution also invited states and non-governmental organizations who were not members of the Committee to make submissions on the Committee’s work. *Comprehensive and integral international convention to promote and protect the rights and dignity*

centered on whether inclusive education, as a goal and obligation in the *CRPD*, should include the term “special” education. Canada disagreed and took the position that “every child should be included in an education system that meets his or her individual needs, optimizing the opportunity to learn and be included in a supportive education system.”⁵⁸

The debates provide additional insight into Canada’s understanding of what is meant by inclusive education. An early draft of the article stated that inclusive education was to be provided “to the extent possible”, however Canada strongly opposed this qualifier and successfully advocated its removal, proposing instead that “persons with disabilities can access inclusive, quality, free primary and secondary education on an equal basis with others”.⁵⁹ To address the concerns regarding the burden of creating an inclusive general education system, Canada proposed that a subparagraph of the draft article read: “... States Parties shall ensure that effective individualized support measures are provided in environments which maximise academic and social development, consistent with the goal of full inclusion.”⁶⁰ Ultimately, Canada’s proposals were accepted.

Following the adoption of the *CRPD*, a United Nations document aimed at providing guidance for politicians to encourage and facilitate the implementation of rights contained in the *CRPD*, states the following regarding the rationale behind article 24 as being:

...based on a growing body of evidence that shows that inclusive education not only provides the best educational environment, including for children with intellectual disabilities, but also helps to break down barriers and challenge stereotypes. This approach

of persons with disabilities, GA Res. 56/168, UN GAOR, 56th Sess., UN Doc. A/56/PV.88 (2001), online: United Nations <<http://www.un.org/esa/socdev/enable/disA56168e1.htm>>.

⁵⁸ Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 3rd Sess., vol. 4, no. 5, Daily summary of discussions related to Article 17: Education, UN Convention on the Rights of People with Disabilities (2004) 4, online: United Nations Enable <<http://www.un.org/esa/socdev/enable/rights/ahc3sum17.htm>>.

⁵⁹ Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 7th Sess., Contributions by Governments: Canada (2006), online: United Nations Enable <<http://www.un.org/esa/socdev/enable/rights/ahc7canada.htm>>.

⁶⁰ *Ibid.*

helps to create a society that readily accepts and embraces disability, instead of fearing it. When children with and without disabilities grow up together and learn, side by side, in the same school, they develop a greater understanding and respect for each other.⁶¹

In a report released by the Special Rapporteur, it is stated that inclusive education is not a “one-system-fits-all” solution.⁶² Internationally, there have been numerous articulations of inclusive education preceding the *CRPD*. The Special Rapporteur sums up inclusive education as follows:

Inclusive education is based on the principle that all children should learn together, wherever possible, regardless of difference [citing Salamanca Statement on Principles, Policy and Practice in Special Needs Education, para. 3]. Inclusive education acknowledges that every child has unique characteristics, interests, abilities and learning needs and that those learners with special education needs must have access to and be accommodated in the general education system through a child-centered pedagogy. Inclusive education, by taking into account the diversity among learners, seeks to combat discriminatory attitudes, create welcoming communities, achieve education for all as well as improve the quality and effectiveness of education of mainstream learners [Ibid., para. 2]. In this way, educational systems should no longer view persons with disabilities as problems to be fixed; instead, they should respond positively to pupil diversity and approach individual differences as opportunities to enrich learning for all [citing UNESCO, *Guidelines for Inclusion: Ensuring access to education for all*, United Nations Educational, Scientific and Cultural Organization, France, 2005, p.9].⁶³

Notwithstanding the *CRPD*'s clear articulation of inclusion, and Canada's prominent and strong position in negotiating article 24, there remains ongoing discord as to what inclusion is, and what it looks like on a practical level, by disability groups, educators and administrators. For the purposes of this paper,

⁶¹ United Nations, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities, Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol*, (Geneva: UN, 2007) at 82-83, online: United Nations Enable <<http://www.un.org/disabilities/documents/toolaction/ipuhb.pdf>>.

⁶² *Supra* note 52 at para 41.

⁶³ *Supra* note 52 at para 9.

the term “inclusive education” represents much more than mere placement as to where the child is accessing education services. In a Report titled “Special Education Transformation”, the authors Dr. Sheila Bennett, and the Honourable Kathleen Wynne, then Parliamentary Assistant to the Minister of Education (currently Ontario’s Premier) underscore the importance of applying a variety of practices in the regular classroom such as differentiated instruction and universal design in supporting all learners of all abilities. Although the authors state that the typical or regular class is the starting point, they recommend that if other placement options are required for a particular student outside of the regular class, that such placements be “duration-specific” and “intervention focused” and that such placements are “subject to regular reviews”.⁶⁴ Regulation⁶⁵ provides that a regular class placement is the starting consideration when conducting placement decision-making in Ontario.⁶⁶

The Supreme Court of Canada in its seminal decision in *Eaton v Brant County Board of Education*⁶⁷ underscored the importance of “integration” notwithstanding its decision on the merits. The Court disagreed with Justice Arbour’s Court of Appeal Decision⁶⁸ and found that there is no legal presumption to inclusion. In the Supreme Court’s recent decision in *Moore v. British Columbia (Education)*,⁶⁹ Justice Abella articulated the need to ensure that all students are provided meaningful access to education. Jurisprudence from the Special Education Tribunal acknowledges the importance for students to be with their age-appropriate peers within their communities.⁷⁰

⁶⁴ Dr. Sheila Bennett & Kathleen Wynne, *Special Education Transformation: The Report of the Co-Chairs with the Recommendations of the Working Table on Special Education*, (Toronto: Ontario Ministry of Education, 2006) at 8.

⁶⁵ *IPRC Reg.*, *supra* note 9, s 17.

⁶⁶ But see *Kozak v Toronto District School Board*, 2010 ONSC 2588 (Ont Div Ct), the Ontario Divisional Court applied a limiting interpretation of section 17.

⁶⁷ [1997] 1 SCR 241 [*Eaton*].

⁶⁸ *Eaton v Brant County Board of Education* 22 OR (3d) 1; 123 DLR (4th) 43 (ON CA).

⁶⁹ 2012 SCC 61, [2012] 3 S.C.R. 360 [*Moore*].

⁷⁰ See e.g. *Ms. I. v The Toronto District School Board*, OSET (English) File #46c at 17, but the OSET did not order a fully inclusive placement. The OSET’s Decision was upheld by the Ontario Divisional Court in *Ismail v. Toronto District School Board*, 2006 CanLII 20687 (ON SCDC).

B. Universal Design, Differentiated Instruction, and Inclusive Education

Universal design⁷¹ refers to the proactive approach to designing and ensuring that environments, services and products are usable by the largest and broadest possible community without the need for specialized accommodations, modification, and retrofit.⁷² Within the Education context, this concept is often referred to as Universal Design for Learning (“UDL”). Although Article 24 of the *CRPD* does not expressly incorporate Universal Design, its interpretation is informed by the *CRPD* itself which does expressly incorporate this concept.⁷³ UDL and differentiated instruction within an education setting promote flexibility and offer techniques and strategies to meet the diverse and individual needs of the student population of all abilities.⁷⁴

⁷¹ Conceived by the Centre for Universal Design at North Carolina State University, Universal Design espouses seven principles aimed at ensuring the most number of users are considered when designing new spaces. The seven principles are:

1. Equitable use: the design is useful and marketable to people with diverse abilities;
2. Flexibility in use: the design accommodates a wide range of individual preferences and abilities;
3. Simple and intuitive use: use of the design is easy to understand, regardless of the user’s experience, knowledge, language skills, or current concentration level;
4. Perceptible information: the design communicates necessary information effectively to the user, regardless of ambient conditions or the user’s sensory abilities;
5. Tolerance for error: the design minimizes hazards and the adverse consequences of accidental or unintended actions;
6. Low physical effort: the design can be used effectively and comfortably and with a minimum of fatigue; and
7. Size and space for approach and use: appropriate size and space is provided for approach, reach, manipulation, and use regardless of user’s body size, posture, or mobility.

The Centre for Universal Design (1997). *The Principles of Universal Design, Version 2.0*. Raleigh, NC: North Carolina State University. Copyright © 1997 NC State University, The Centre for Universal Design. See also Molly Follette Story, “Principles of Universal Design” in Wolfgang F.E. Preiser *et al.* eds., *Universal Design Handbook*, (New York: McGraw-Hill, 2001) at 10.3.

⁷² Kerri Joffe & Roberto Lattanzio, “Inclusive Education: Opportunities for Re-Design” in Roderick C. Flynn ed., *CAPSLE 2010: The Rocky Road Ahead: Balancing Competing Interests/Concilier les interest divergents une périlleuse escalade* at 85. Proceedings of the Twenty-First Annual Conference of the Canadian Association for the Practical Study of Law in Education, held in Calgary, Alberta, April 25-27, 2010, (Toronto: CAPSLE, 2011) at 97 – 105.

⁷³ *CRPD*, *supra* note 5, arts 2, 4(f). See also Chapter 10 on “The UN Convention of the Rights of Persons with Disabilities” in the *Disability Law Primer*.

⁷⁴ Ministry of Education, “Education for All: The Report of the Expert Panel on Literacy and Numeracy Instruction for Students With Special Education Needs, Kindergarten to Grade 6” (2005) at 11, online: Ontario Ministry of Education <<http://www.edu.gov.on.ca/eng/document/reports/speced/panel/speced.pdf>>; Although not yet official policy, the Ministry of Education released *DRAFT Learning For All K-12* in June 2009, and revised the draft document in 2011. The document expressly adopts universal

IV. Ontario's Framework for Education Services specific to Students with Disabilities

A. IPRC Overview (review of regulatory framework)

1. Overview of Process

There are numerous regulations pursuant to the *Education Act* that directly impact students with disabilities. Notably, *Ontario Regulation 181/98, Identification and Placement of Exceptional Pupils*,⁷⁵ (IPRC Regulation) sets out the framework for the identification and placement of students who require additional supports in order to meaningfully access education services. This process, called the Identification, Placement and Review Committee (IPRC), is mandated to identify and review the needs of a student and decide on the most appropriate placement for that child.

The Supreme Court of Canada considered the IPRC process in *Eaton v Brant County Board of Education* and confirmed that the test to be met in its decision-making is that of the "best interests of the child".⁷⁶

This process can be initiated by either the Principal or the parent or guardian ("parent") of the child.⁷⁷ The IPRC Regulation sets out the process for the requesting of meetings, timelines and school board obligations. Parents have the right to participate in this process and parental consent is required for the implementation of the identification and placement decision. However, if the parent does not consent and if the time limit to appeal has expired, the school

design for learning and differentiated instruction as key instructional approaches to respond effectively to all students. See online: Ministry of Education < <http://www.edu.gov.on.ca/eng/general/elemsec/speced/LearningforAll2011.pdf>>.

⁷⁵ IPRC Reg., *supra* note 9.

⁷⁶ *Eaton*, *supra* note 67.

⁷⁷ IPRC Reg., *supra* note 9, s. 14(1).

board may implement the IPRC's placement decision.⁷⁸ The student does have some participatory rights if aged 16 or older, as discussed above.⁷⁹ Children aged less than 16 years may be invited to attend an IPRC meeting by Committee members, with parental consent.⁸⁰

It is often the case that IPRC's are conducted when children have been in school for several years; however, it ultimately depends on the support needs of each individual child. It is important to remember that a school is still required to provide services, programming and accommodations regardless of whether an IPRC has been conducted. IPRC's may be appropriate in certain situations and not in others. The Ministry reported that in 2010/2011 school year, "more than 191,600 students were identified by an IPRC as exceptional pupils. A further 127,600 students who were not formally identified were provided with special education programs and services".⁸¹

Every school board must develop a 'Parent Guide', and make it accessible to parents. The Guide should include information concerning the school board's Special Education Plan, the IPRC, and how to appeal IPRC decisions.⁸²

2. Key Terms

Exceptionality

Children who are identified by an IPRC as having a need for accommodation in their education are called 'exceptional'. An "exceptional" student is defined in the *Education Act* as:

a pupil whose behavioural, communicational, intellectual, physical or multiple exceptionalities are such that he or she is considered to need placement in a special education program by a committee, established under subparagraph iii of paragraph 5 of subsection 11 (1), of the board,

⁷⁸ *IPRC Reg.*, *supra* note 9, s. 20, 25.

⁷⁹ *IPRC Reg.*, *supra* note 9.

⁸⁰ *IPRC Reg.*, *supra* note 9, s. 15(4).

⁸¹ Ontario Ministry of Education, An Introduction to Special Education in Ontario online:<www.edu.gov.ca/eng/general/elemsec/speced/ontario.html>.

⁸² *IPRC Reg.*, *supra* note 9, s13.

- (a) of which the pupil is a resident pupil,
- (b) that admits or enrolls the pupil other than pursuant to an agreement with another board for the provision of education, or
- (c) to which the cost of education in respect of the pupil is payable by the Minister; (“élève en difficulté”)⁸³

The *Education Act* identifies five main categories of exceptionalities: behaviour; communication; intellectual; physical; and multiple.⁸⁴ The five categories of exceptionalities have been further explained by the Ministry of Education in policy materials, and further subcategories have been identified.⁸⁵

A Memorandum released by the Director of the Special Education Policy and Programs Branch served to remind school administrators that the categories are to be interpreted broadly and reaffirmed that “[a]ll students with demonstrable learning based needs are entitled to appropriate accommodations in the form of special education programs and services, including classroom based accommodations”.⁸⁶

The Memorandum further states that:

Inclusion of some medical conditions (e.g., autism) in the [*Special Education: A Guide for Educators (October 2001)*] definitions of the five categories of exceptionalities is not intended to exclude any other medical condition that may result in learning difficulties, such as (but not limited to) Attention Deficit Disorder/Attention Deficit-Hyperactivity Disorder (ADD/ADHD), Fetal Alcohol Syndrome, Tourette Syndrome, Myalgic Encephalomyelitis, Chronic Fatigue Syndrome, and Fibromyalgia Syndrome [...].

The determining factor for the provision of special education programs or services is not any specific diagnosed or undiagnosed

⁸³ *Education Act*, supra note 3, s.1(1).

⁸⁴ *Ibid.*

⁸⁵ See Ministry of Education, *Special Education: A Guide for Educators*, (Ontario: Ministry of Education, 2001) at A18-A20, online: Ministry of Education <<http://www.edu.gov.on.ca/eng/general/elemsec/speced/guide.html>>.

⁸⁶ Barry Finlay, Director of Special Education Policy and Programs Branch, Ministry of Education, Memorandum to Directors of Education, Supervisory Officers and Secretary-Treasurers of School Authorities and Director of Provincial Schools Branch and Superintendent of Centre Jules-Léger, dated December 19, 2011.

medical condition, but rather the needs of individual students based on the individual assessment of strengths and needs.⁸⁷

Individual Education Plan

An Individual Education Plan (IEP) is a plan that is written by the school in consultation and in collaboration with the parents and child.⁸⁸ Within a human rights framework (as will be discussed below), the IEP is considered as the accommodation plan for students with disabilities.⁸⁹ The IEP sets out the learning expectations of the child and any accommodations and special education services that the child requires to achieve those learning goals.⁹⁰

Once an IPRC decides on placement and identification, and parents agree, the school is required to develop and complete (and provide a copy to the parent or student if over 16 years of age) an IEP within 30 days of the placement taking effect.⁹¹ Regulation 181/98 stipulates that the Principal is to consult with the parent, or pupil if aged 16 or over, when developing the IEP.⁹²

The IEP is not a static document and must be reviewed and revised as needed. As per Regulation, the IEP must include:

- a) specific education expectations for the pupil;
- b) an outline of the special education program and services to be received by the pupil; and
- c) a statement of the methods by which the pupil's progress will be reviewed.⁹³

⁸⁷ *Ibid.*

⁸⁸ *IPRC Reg., supra note 9, ss 6(2) – (8), 8.*

⁸⁹ *E.P. v. Ottawa Catholic School Board*, 2011 HRTO 657 at paras 7,8,10,12.

⁹⁰ *IPRC Reg., supra note 9, ss 6(2) – (8).*

⁹¹ *IPRC Reg., supra note 9, s 6(2) - (4).*

⁹² *IPRC Reg., supra note 9, s 6(6).*

⁹³ *IPRC Reg., supra note 9, s 6(3).*

The Ontario Ministry of Education document titled *The Individual Education Plan (IEP): A Resource Guide*, 2004 provides a more detailed understanding of the IEP in Ontario.⁹⁴

Placement

The IPRC is tasked to make a decision about the placement of a student once they are identified as having one or more exceptionalities. The test that the decision maker must meet is whether the placement is in the best interest of the student.⁹⁵ Placement decisions are not concerned necessarily with bricks and mortar (i.e. what specific school). Rather, the range of options include:

- A regular class with indirect support;
- A regular class with resource assistance;
- A regular class with withdrawal assistance;
- A special education class with partial integration; and
- A special education class full time.⁹⁶

Placements should not be limited to these if there are other creative solutions that best meet the strengths and needs of the student, and the placement decision should be made within an inclusive approach to education service delivery. Placement is not a defined term in the *Education Act*.

The Special Education Tribunal commented on placement as “not a description of a physical place where a child is put to receive a program. A placement must be described in sufficient detail to allow parents to make an informed decision about whether the placement would meet the child’s needs”.⁹⁷

⁹⁴ Ministry of Education, *The Individual Education Plan (IEP): A Resource Guide*, 2004,(Ontario: Ministry of Education, 2004) online: Ministry of Education <<http://www.edu.gov.on.ca/eng/general/elemsec/speced/guide/resource/>>.

⁹⁵ *Eaton*, *supra* note 67.

⁹⁶ *Supra* note 85 at D10 - D11.

⁹⁷ *D v Windsor Essex Catholic District School Board*, OSET (English) File No. 38 at 27.

Transition Plan

The *IPRC Regulation* states the Principal must develop a transition plan for a student identified with exceptionalities if the student is 14 years of age or older.⁹⁸

The Ministry of Education stated in a recent Policy/Program Memorandum released by the Ministry of Education, to come in effect in 2014, that:

A transition plan must be developed for *all students who have an IEP*, whether or not they have been identified as exceptional by an Identification, Placement, and Review Committee (IPRC) and including those identified as exceptional solely on the basis of giftedness. The transition plan is developed as part of the IEP.⁹⁹

At the discretion of the school board, a transition plan can also be developed for students who do not have an IEP and have not been identified as 'exceptional'.¹⁰⁰ The Plan should be developed in consultation with parents and where appropriate, the student, community partners and services agencies, and post-secondary institutions.¹⁰¹

II. *Appealing an IPRC Decision*

The *IPRC Regulation* sets out the process to appeal a decision of the IPRC on the identification and/or placement of a student, whether it is its first decision or one on review. Once an IPRC Statement of Decision is received, parents may file a notice of appeal with the school board within 30 days from the date that they receive it, or parents may choose to request a second meeting with the IPRC as set out in the Regulation (such a request for a second meeting must be made

⁹⁸ *IPRC Reg.*, *supra* note 9, s 6(4).

⁹⁹ Ministry of Education, *Policy/Program Memorandum No. 156 - Supporting Transitions For Students With Special Education Needs*, (issued February 1, 2013), [PPM 156] online: Ministry of Education <<http://www.edu.gov.on.ca/extra/eng/ppm/ppm156.pdf>>.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.* For more information, see Ministry of Education, *Transition Planning: A Resource Guide, 2002*, (Ontario: Ministry of Education, 2002) online: Ministry of Education <<http://www.edu.gov.on.ca/eng/general/elemsec/speced/transiti/transition.html>>.

within 15 days of receipt of the Statement of Decision).¹⁰² If a second meeting is requested, but no resolution is achieved, then parents have a further 15 days from their receipt of the IPRC's written notice following the second meeting, to file a notice of appeal.¹⁰³ This appeal is to the Special Education Appeal Board (SEAB), a panel consisting of one member chosen by the school board, one chosen by the parent/pupil and a chair jointly selected by both members.¹⁰⁴ SEAB's jurisdiction is only to make recommendations to the school board with regards to placement and/or identification, and must provide its reasons in writing.¹⁰⁵

When calculating timeframes and limitation periods, there have been inconsistent practices by school boards. The calculation of time can become an important element when considering options as to the most appropriate legal recourse available to a student and when to advise appealing, requesting an IPRC or reconvening. The time frames set out in Regulation 181/98 rely on the calculation of "school days"¹⁰⁶ and "days". While time limits related to IEPs mostly refer to "school days", the calculation of time concerning IPRC appeals is based on the counting of "days", not school days. The counting of "days" refers to calendar days, thus including Saturdays and Sundays. However, if a time limit ends on a weekend or school holiday as defined by Regulation, the deadline is extended to the first school day after that holiday. Regulation 304 defines holidays but does not include summer as holidays.¹⁰⁷ Therefore, it is ARCH's interpretation that when calculating 'days', time continues to be calculated during the summer months.

III. IPRC Appeals to the OSET

¹⁰² *IPRC Reg., supra note 9, ss 19, 24, 26(2)(3).*

¹⁰³ *IPRC Reg., supra note 9, s 26 (2)(3).*

¹⁰⁴ *IPRC Reg., supra note 9, s 27.*

¹⁰⁵ *IPRC Reg., supra note 9, ss 28(6), 29.*

¹⁰⁶ *Education Act, supra note 3, s 1(1) defines "school day" as "a day that is within a school year and is not a school holiday"*

¹⁰⁷ *School Year Calendar, Professional Activity Days, RRO 1990, Reg 304, s 2(4).*

Pursuant to s. 57(3) of the *Education Act*, parents who have exhausted all rights of appeal may appeal an IPRC decision to the Ontario Special Education Tribunal (OSET). The OSET can either dismiss an appeal or grant the appeal and “make such order as it considers necessary with respect to the identification or placement.”¹⁰⁸ Appeals before the OSET are considered as hearings *de novo* and the OSET decisions are final and binding.¹⁰⁹

The OSET offers mediation to parties of an appeal at no cost. The mediation is conducted by a Tribunal member other than the member conducting the hearing on appeal.¹¹⁰

The OSET has developed a series of *Information Sheets* providing information on a number of practice issues. These materials, as well as the OSET’s Rules of Procedure, and the Tribunal’s decisions can all be accessed *via* the Tribunal’s website.¹¹¹ The OSET is now part of the newly formed Social Justice Tribunals Ontario (SJTO), along with the Human Rights Tribunal of Ontario, thus it is important to ensure that you are aware of any information or direction released by the SJTO as it impacts the OSET.¹¹²

The *Education Act* limits the OSET’s jurisdiction to deciding matters related to identification and/or placement.¹¹³ It is clear from the *Education Act*, and OSET decisions such as *W.F. v The Ottawa Catholic School Board*¹¹⁴ that the Tribunal does not have jurisdiction to deal with cases and make orders related solely to programming, services and accommodation issues. The OSET may, however, make recommendations on programming, services and accommodations.

¹⁰⁸ *Education Act*, *supra* note 3, s 57(4).

¹⁰⁹ *Education Act*, *supra* note 3, s 57(5).

¹¹⁰ Ontario Special Education Tribunal, *Rules of Procedure*, January 2011, Rule 9.1, online: OSET <<http://www.oset-tedo.ca/eng/pdfs/rules.pdf>>. See also the Ontario Special Education Tribunal Practice Direction – Mediation online: OSET <<http://www.oset-tedo.ca/eng/pdfs/mediation.pdf>>.

¹¹¹ Online: Ontario Special Education Tribunal <<http://www.oset-tedo.ca>>

¹¹² Online: Social Justice Tribunals Ontario <<http://www.sjto.gov.on.ca/english/default.html>>.

¹¹³ *Education Act*, *supra* note 3, s 57(3)-(4).

¹¹⁴ OSET File No. 2008-02, (May 26, 2008) at 13, online: OSET <<http://www.oset-tedo.ca/eng/pdfs/may262008.pdf>>.

The OSET has struggled with this distinction and the inherent interconnectedness of placement of students and the appropriateness of programs and services. At times, the OSET has blurred the lines between placement and services. In *D v. Windsor Essex Catholic District School Board*, the Tribunal stated that an appropriate placement could not be decided without hearing about the programming that would be offered because “[i]f the program is inappropriate, then it follows that the placement is inappropriate”.¹¹⁵ Thus, the Tribunal may consider services and programs when they are found to be interconnected with making a determination on placement.¹¹⁶

Thus, the *Education Act* leaves no mechanism to adjudicate, enforce, or mediate/conciliate disputes related to accommodations and IEP development and enforcement; a piece so critical to ensuring that meaningful education services are provided and to facilitating inclusion. In addition, the Ministry of Education usually does not intervene in any substantial way in such cases when contacted by parents.

Following a comprehensive review of OSET decisions, Angela Valeo summarized her findings and opined:

[t]he Tribunal may not be the vehicle for parental voice and involvement that it was originally intended to be. This is especially so for appeals concerning the inclusion of students with multiple handicaps into the regular class. The legislation envisioned an equal, collaborative relationship between school boards and parents, but the practice of school boards has shown otherwise. Boards’ practices are in part supported by legislation which is vague and noncommittal.¹¹⁷

¹¹⁵ *Supra* note 97 at 7.

¹¹⁶ See *C v Simcoe County District School Board*, (September 15, 2003) OSET File No. 34 at 3.

¹¹⁷ Angela Valeo, “Special Education Tribunals in Ontario” (2003) 18 *Int’l Journal of Special Education*, 2003, Vol 18, No.2., 18 at 27, online: [International Journal of Special Education <http://www.internationalsped.com/documents/Special%20Education%20Tribunals%20in%20Ontario\(2\).doc>](http://www.internationalsped.com/documents/Special%20Education%20Tribunals%20in%20Ontario(2).doc).

It is usually recommended that parents and students advocate within the school and school board i.e. school principal, superintendent, director, and school board trustee. Parents may also find support by contacting a representative of the school board's Special Education Advisory Committee (SEAC). The Education Officers at the Ministry of Education Regional Offices may provide helpful information.

V. Duty to Accommodate & Undue Hardship in the Education Context

Adequate special education, therefore, is not a dispensable luxury. For those with severe learning disabilities, it is the ramp that provides access to the statutory commitment to education made to *all* children in British Columbia.¹¹⁸

It is well established that education services are considered a service pursuant to Ontario's *Code*.¹¹⁹ The scope of service is broad and may include more than traditional delivery of pedagogy and may include other aspects of education such as school functions, extra-curricular activities, field trips, and a student's development.¹²⁰

As discussed above, the *Education Act* provides for a number of appeals and recourses for parents, such as the IPRC appeal process, however there is no formal process or appeal mechanism available to address disputes related directly to programming, services, accommodations and supports. Thus, although a decision to place a student in a particular setting can be challenged, the nature of the supports or accommodations provided or denied cannot be directly challenged in any formalized process pursuant to the *Education Act*.

¹¹⁸ *Moore, supra* note 69 at para 5.

¹¹⁹ See Ontario Human Rights Commission, *Guidelines on Accessible Education*, (Revised 2009) at 5, online: OHRC <http://www.ohrc.on.ca/en/guidelines-accessible-education> [*OHRC Guidelines*]. See also *Peel Board of Education v. Ontario (Human Rights Commission)* (1990), 12 C.H.R.R. D/91 (Ont. S.C.); *Moore, supra* note 69.

¹²⁰ *Ibid.* See also Chapter 3 on "Human Rights and Disability Law" in this *Disability Law Primer* regarding Services.

If the disputes involve allegations of discrimination, then an application to the Human Rights Tribunal of Ontario (HRTO) may be appropriate. Education service providers have an obligation to provide services in a manner free from discrimination and to provide the most appropriate accommodations to students with disabilities short of undue hardship.

The most appropriate accommodation is one that most respects the dignity of the student with a disability, meets individual needs, best promotes inclusion and full participation, and maximizes confidentiality.

An accommodation will be considered appropriate if it will result in equal opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges enjoyed by others, or if it is proposed or adopted for the purpose of achieving equal opportunity, and meets the student's disability-related needs.

The aim of accommodation is the inclusion and full participation of students with disabilities in educational life. Education providers must make efforts to build or adapt educational services to accommodate students with disabilities in a way that promotes their full participation. Barriers must be prevented or removed so that students with disabilities are provided with equal opportunities to access and benefit from their environment and face the same duties and requirements as everyone else, with dignity and without impediment.¹²¹

Within a statutory human rights context, an applicant must demonstrate that a claim alleging discrimination is based on a protected ground, such as disability.¹²² Disability is a defined term in the *Code*;¹²³ its definition is comprehensive and interpreted in a broad and purposive manner espousing a social model of disability.¹²⁴ Thus, regardless of whether exceptionality has been

¹²¹ *OHRC Guidelines*, *supra* note 119 at 21.

¹²² *A.J.J. v Toronto District School Board*, 2013 HRTO 1189 at paras 20-23.

¹²³ *Code*, *supra* note 4, s 10(1).

¹²⁴ See *Québec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City)* [2000] 1 SCR 665 [*Mercier*]. For a recent analysis of disability within the education and human rights context, see HRTO decision *J.L. v York Region District School Board*, 2013 HRTO 948. See also Chapter 3 on "Human Rights and Disability Law" in this *Disability Law Primer*.

formally identified by an IPRC, a student may nonetheless be found to have a disability pursuant to the *Code*.

A. Jurisdiction and Role of HRTO

The HRTO clearly does have jurisdiction in matters related to accommodation and discrimination with the education context, however, the Tribunal also found that the OSET has exclusive jurisdiction in matters related to the identification and placement of students.¹²⁵ Thus, careful consideration must be placed on identifying the core issues when framing the case to ensure that the proper forum is chosen and that appeal rights are preserved.

The HRTO described its role in education service cases as follows:

[71] The Human Rights Tribunal is not an alternative or substitute body to monitor and regulate the special education scheme under the [Education Act](#). Generally the Tribunal will not second guess the IPRC placement and recommended accommodations and will not supervise a school's implementation of an IEP. In order to establish discrimination under the *Code*, the evidence must demonstrate that the accommodations provided were significantly inappropriate or inadequate.

[72] Similarly, the Tribunal is not an alternative or appeal body from decisions under the Safe Schools scheme under the [Education Act](#). In order to establish discrimination under the *Code*, the evidence must demonstrate that the school failed to appreciate or accommodate the impact of the student's learning disabilities in assessing culpability or in choosing a penalty.¹²⁶

¹²⁵ See *Sigrist (Litigation guardian of) v. London District Catholic School Board*, 2010 HRTO 1062 at paras 22 - 57; *Schafer v. Toronto District School Board*, 2009 HRTO 785 at paras 27 - 40; *Campbell v. Toronto District School Board*, 2008 HRTO 62 at paras 28 - 70.

¹²⁶ *Schafer v Toronto District School Board*, 2010 HRTO 403, at paras 71, 72.

Applications filed at the HRTO must be framed as allegations of discrimination; not as complaints about quality of service, discord concerning the manner of service delivery, or disputes as to whether regulatory provisions within the *Education Act* have been adhered to. The manner in which an application is framed is critical to its success.

When choosing the appropriate forum, careful consideration should also be given to what remedies are being sought. The HRTO has broad remedial powers at its disposal, as opposed to the very limited powers conferred to the OSET. A further consideration, as discussed above, is that the HRTO and OSET are now part of the Social Justice Tribunals Ontario cluster. Adjudicators from the tribunals within the cluster have been cross-appointed. This may have an impact on how education related matters are resolved before both Tribunals.

Arguably, litigation may generally not be the most effective recourse in education matters due to reasons such as the time sensitive nature of education cases, a significant power and resource imbalance, lack of legal representation, and the deterioration of relationships that occurs in an adversarial process which makes the student's ongoing learning experience difficult (and which at times may make any remedies meaningless to that student). Nonetheless, this may be the only recourse in some cases. It is critical that lawyers assess when it is best to become involved in a dispute and whether all informal advocacy efforts have been exhausted.

B. Moore v. British Columbia (Ministry of Education)

The Supreme Court of Canada recently considered a matter that squarely dealt with school board and government obligations to accommodate students with disabilities within a statutory human rights framework. The much anticipated

decision of *Moore v British Columbia (Ministry of Education)*¹²⁷ was released on November 9, 2012. This case originated from the British Columbia Human Rights Tribunal and centered on a student diagnosed with a severe learning disability. The allegations of discrimination were based on the alleged failure to be appropriately accommodated in the receipt of education services, by both the school board and Ministry of Education. The Respondent school board had recommended that the student, Jeffrey, attend an intensive program for students with severe learning disabilities for remediation. However, the year that Jeffrey became eligible, the program in question was cut due to financial cost saving measures. Following the closure of the intensive remediation program, Jeffrey alleged that the services offered were not beneficial to him. He subsequently attended private school to receive the necessary remediation services.

The British Columbia Human Rights Tribunal found that the school board and Ministry failed to provide Jeffrey with appropriate accommodations because he was not provided the effective remediation required, and because services were cut to students with severe learning disabilities without sufficient alternate services in place. The matter was judicially reviewed by the British Columbia Supreme Court¹²⁸ and the Tribunal's decision was overturned. An appeal to the Court of Appeal for British Columbia was dismissed.¹²⁹

On appeal to the Supreme Court, the Honourable Justice Abella for a unanimous Court, found that Jeffrey was discriminated by the Respondent school board and stated:

Comparing Jeffrey only with other special needs students would mean that the District could cut *all* special needs programs and yet be immune from a claim of discrimination. It is not a question of who else is or is not experiencing similar barriers.¹³⁰

¹²⁷ *Moore, supra* note 69.

¹²⁸ *British Columbia (Ministry of Education) v Moore*, 2008 BCSC 264.

¹²⁹ *British Columbia (Ministry of Education) v Moore*, 2010 BCCA 478 [*Moore BCCA*].

¹³⁰ *Moore, supra* note 69 at para 20.

The matter before the Court was framed as a pure accommodation question, which requires a highly individualized investigation as to whether the accommodations provided were the most appropriate, short of undue hardship. In this case, the evidence showed that Jeffrey was provided various resources and supports, and the school board contended that Jeffrey received more supports than any other student. However, the Court reaffirmed that the inquiry does not stop there. Although it was accepted that Jeffrey received accommodations in the form of learning assistance, the Court found that this was not the accommodation appropriate for Jeffrey given his individualized support needs.¹³¹

The traditional test for establishing discrimination was reaffirmed by the Court and summarized by Justice Abella as follows:

[T]o demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.¹³²

The test was further articulated by Justice Abella in this manner:

The inquiry is into whether there is discrimination, period. The question in every case is the same: does the practice result in the claimant suffering arbitrary — or unjustified — barriers on the basis of his or her membership in a protected group. Where it does, discrimination will be established.¹³³

In considering the Respondent's undue hardship defence in the *Moore* case, the Supreme Court of Canada stated the following:

¹³¹ *Moore, supra* note 69 at para 52.

¹³² *Moore, supra* note 69 at para 33.

¹³³ *Moore, supra* note 69 at para 60.

There is no doubt that the District was facing serious financial constraints. Nor is there any doubt that this is a relevant consideration. It is undoubtedly difficult for administrators to implement education policy in the face of severe fiscal limitations, but accommodation is not a question of “mere efficiency”, since “[i]t will always seem demonstrably cheaper to maintain the status quo and not eliminate a discriminatory barrier” (*VIA Rail*, at para. 225).

[...]

More significantly, the Tribunal found, as previously noted, that the District undertook *no* assessment, financial or otherwise, of what alternatives were or could be reasonably available to accommodate special needs students if the Diagnostic Centre were closed.¹³⁴

The *Moore* decision provides significant guidance to practitioners as it is the first decision of the Supreme Court to consider a disability accommodation case in education services within a statutory human rights framework. This decision underscores the highly individualized human rights approach to accommodation within the delivery of education services and the high standard that must be imposed on school boards relying on a defence of undue hardship.¹³⁵

C. Duty to accommodate and undue hardship at the HRTO

The legal framework outlined in *Moore* was adopted by the HRTO in the recent decision in *RB v Keewatin-Patricia District School Board*.¹³⁶ This is the first decision from the Tribunal that considered and applied the *Moore* decision in an education context. The HRTO found that the Applicant was denied ‘meaningful access to education’, as articulated in *Moore*.¹³⁷ The Tribunal found that a *prima facie* case of discrimination was made out, but that the Respondent school board did not establish an undue hardship defence. The HRTO found that notwithstanding a difficult relationship between the school and Applicant’s

¹³⁴ *Moore*, *supra* note 69 at paras 50, 52.

¹³⁵ See Laurie Letheren & Roberto Lattanzio, “Comparing the Incomparable in Human Rights Claims: *Moore* Guidance” (Paper delivered at the Ontario Bar Association, June 7, 2013) [unpublished] online: ARCH Disability Law Centre <<http://www.archdisabilitylaw.ca/?q=comparing-incomparable-human-rights-claims-moore-guidance>>.

¹³⁶ 2013 HRTO 1436 at paras 213 - 224.

¹³⁷ *Ibid* at paras 213, 259.

mother, it was insufficient to justify the discrimination experienced by the student.¹³⁸

In Ontario, the *Code* specifically articulates three considerations when assessing whether an accommodation would cause undue hardship to the service provider: 1) cost; 2) outside sources of funding, if any; and 3) health and safety requirements, if any.¹³⁹ The defence of undue hardship implies that hardship must be endured in order to avoid discrimination. It is only when the hardship reaches the point of becoming “undue” that the defence is made out.¹⁴⁰

1. Cost and outside sources of funding

The onus on the accommodation provider is high to demonstrate that the cost of accommodating would “alter the essential nature or substantially affect the viability of the educational institution”.¹⁴¹ The HRTO in *M.O. v. Ottawa Catholic District School Board*, found a school board’s defence of undue hardship to be insufficient in its analysis, and furthermore dismissed the concern of costs associated with a possible precedent that such an accommodation may set if provided.¹⁴²

2. Health and Safety Concerns

As with cost, it is accepted that some risk can be tolerated until it is “undue”. This element of the undue hardship defence is often raised in the context of a student’s disability related behaviour as posing a safety risk to other students and/or staff. The recent amendments to the *Occupational Health and Safety Act*,

¹³⁸ *Ibid* at paras 255 – 266.

¹³⁹ *Code*, *supra* note 4, ss 11(2), 17(2), 24(2). See Chapter 3 on “Human Rights and Disability Law” in this *Disability Law Primer* for analysis on undue hardship.

¹⁴⁰ *Renaud v. Central Okanagan School District No. 23*, [1992] 2 S.C.R. 970 at 984.

¹⁴¹ *OHRC Guidelines*, *supra* note 119 at 35-36.

¹⁴² *M.O. v. Ottawa Catholic District School Board*, 2010 HRTO 1754 at 79 – 86.

¹⁴³ referred to as Bill 168, have impacted the manner in which these matters are framed as workplace violence issues.¹⁴⁴

When health and safety concerns are being assessed, it is important to remember that such risk assessments should only take place after appropriate accommodations have been provided and precautions taken.¹⁴⁵ As with cost, impressionistic evidence of undue safety risk will be insufficient.¹⁴⁶

D. Preliminary and Procedural matters

When preparing an application to be filed with the HRTO, there are numerous procedural and preliminary considerations that should be taken into account, such as jurisdictional issues as addressed briefly above. Many of these considerations are beyond the scope of this paper; however, four considerations will be dealt with below.

1. Publication Ban and Anonymization

Any litigation has the potential for undesired consequences such as the release of sensitive and private information that could be damaging. Within the context of a child with a disability, the vulnerability for stigma and unintended negative future consequences is considerably heightened.

The HRTO *Rules of Procedure* states that:

¹⁴³ *Occupational Health and Safety Act*, RSO 1990, c O-1.

¹⁴⁴ See Victoria Réaume & Brendan McCutchen, "Occupational Health and Safety Rights of Staff and Special Education Rights of Students: Are they complementary or contradictory?" (prepared for the Sixth Annual Advanced Issues in Special Education Law, Osgoode Professional Development, Osgoode Hall Law School (October 27, 2011) [unpublished], online: Cavalluzzo Hayes Shilton McIntyre & Cornish LLP <<http://www.cavalluzzo.com/publications/newsletters/Occupational%20Health%20-%20Safety%20Rights%20of%20Staff%20-%20Special%20Education%20Rights.PDF>>.

¹⁴⁵ *OHRC Guidelines*, *supra* note 119 at 39.

¹⁴⁶ *Ibid.*

3.11 The Tribunal may make an order to protect the confidentiality of personal or sensitive information where it considers it appropriate to do so.

3.11.1 Unless otherwise ordered, the Tribunal will use initials in its decisions to identify children under age 18 and the next friend of children under 18. It may use initials to identify other participants in the proceeding if necessary to protect the identity of children.¹⁴⁷

Rule 3.11.1 has been interpreted by the HRTO as an automatic anonymization of the name of a child applicant and his/her next friend.¹⁴⁸ The HRTO has ordered the anonymization of individuals, in addition to the child and next friend, when demonstrated that there is a vulnerability to stigma.¹⁴⁹

The onus to justify a publication ban however, is more onerous than that of justifying anonymization.¹⁵⁰ A publication ban involves placing “restrictions on what others may do and directly infringes their expressive freedom”.¹⁵¹

2. Expedited Process

A request to the HRTO to expedite proceedings may be appropriate in some cases. The HRTO *Rules of Procedure* at Rule 21.1 allows for requests to expedite proceedings in urgent circumstances requiring an urgent resolution.¹⁵² The test to meet however is high.¹⁵³

¹⁴⁷ Human Rights Tribunal of Ontario, *Rules of Procedure*, July 2010, Rule 3.11, online: HRTO <<http://www.hrto.ca.wsd16.korax.net/hrto/sites/default/files/whats%20new/section%2034%20rules%20-%20english.doc>>. See also *Statutory Powers Procedure Act*, RSO 1990, c S-22, s 9.

¹⁴⁸ *TB v Halton District School Board*, 2013 HRTO 304 at para 12.

¹⁴⁹ See *CM v York Region District School Board*, 2009 HRTO 735 at paras 25, 26; *TS v Toronto District School Board*, 2010 HRTO 176 at paras 10, 11;

¹⁵⁰ *CM v York Region District School Board*, 2009 HRTO 735 at paras 22-25; *TS v Toronto District School Board* 2010 HRTO 176 at paras 13, 14.

¹⁵¹ *CM v York Region District School Board*, 2009 HRTO 735 at para 25.

¹⁵² *Supra* note 144, Rule 21.1.

¹⁵³ *Weerawardane v. 2152458 Ontario Ltd.*, 2008 HRTO 53 at para 9.

In an interim decision involving a student with disabilities alleging a failure to accommodate, the HRTO granted the request to expedite proceedings, finding that:

[h]aving regard to all of the circumstances, including the applicant's medical condition that led to him being withdrawn from school in May 2012, and the trespass notice and communication ban that remains in place against the applicant's sole custodial parent, the Tribunal grants the Request to Expedite. I am satisfied that truly urgent circumstances exist that may affect the fair and just resolution of the merits of the Application if the Application does not proceed on an expedited basis.¹⁵⁴

3. Interim Remedies

The HRTO's Rules of Procedure set out the process and test to meet if requesting interim remedies. Interim remedies are awarded in exceptional circumstances.¹⁵⁵ In an interim decision, the Tribunal granted a request for interim remedies which included access to school until the merits of the application were dealt with.¹⁵⁶ The Tribunal member applied the test in Rule 23 as set out in *TA v. 60 Montclair*¹⁵⁷ finding that the level of instruction provided during the student's exclusion from school was inadequate and sufficient evidence showed that the Applicant would experience harm.

4. Access to OSR at Early Stage of Process

There are cases where school board respondents request access to the entire OSR when preparing a Response to the Application as filed. There are a number of interim decisions released by the HRTO denying access to the OSR at the

¹⁵⁴ *R.B. v. Keewatin-Patricia District School Board*, 2013 HRTO 1721 at para 45.

¹⁵⁵ *Supra* note 147, Rule 23.

¹⁵⁶ *R.B. v. Keewatin-Patricia District School Board*, 2013 HRTO 130.

¹⁵⁷ 2009 HRTO 369.

preliminary stages of the process, prior to formal disclosure and timelines taking place.¹⁵⁸ The recommended course of action is to identify and assess the documents requested by the respondent, rather than granting a blanket waiver. The HRTO “does not have the power to order a party to waive privilege,”¹⁵⁹ however the Tribunal may consider parts or all of the application as an abuse of process if information necessary to the respondent in its preparation of a Response is denied.¹⁶⁰ The HRTO framed the question as “whether, in the absence of the consent sought, the respondents are able to reasonably comply with their obligation under the Rules to respond to the Application”.¹⁶¹

VI. Disciplinary Measures

The *Education Act* at Part XIII – Behaviour, Discipline and Safety sets out a “progressive discipline” approach to dealing with inappropriate student behaviour. This section sets out the process for suspension and expulsion, and appeal rights of those decisions, and ensures that when any student is disciplined and removed from school, that some form of programming is nonetheless available.¹⁶² This Part sets out the Provincial Code of Conduct and also considers bullying specifically.¹⁶³

The Child and Family Services Review Board is the designated Tribunal tasked to hear appeals of school board decisions to expel students.

¹⁵⁸ *Pellew v. Muki Baum Treatment Centres*, 2010 HRTO 222 at paras 12 - 15; See also *T.S. v. Toronto District School Board*, 2010 HRTO 605 at paras 10 - 13. See also *Campbell v. Toronto District School Board*, 2010 HRTO 463; *Thomas v. Toronto District School Board*, 2010 HRTO 484.

¹⁵⁹ *Pellew v Muki Baum Treatment Centres*, 2010 HRTO 222 at para 12.

¹⁶⁰ *Ibid* at para 13.

¹⁶¹ *Ibid* at para 15.

¹⁶² *Education Act*, *supra* note 3, s 312. See Ministry of Education, *Policy/Program Memorandum No. 141, School Board Programs For Students on Long-Term Suspension* (issued December 5, 2012) online: Ministry of Education <<http://www.edu.gov.on.ca/extra/eng/ppm/141.pdf>>; see also Ministry of Education, *Policy/Program Memorandum No. 142, School Board Programs For Expelled Students* (issued December 5, 2012) online: Ministry of Education <<http://www.edu.gov.on.ca/extra/eng/ppm/142.pdf>>.

¹⁶³ *Education Act*, *supra* note 3, s 301.

With regards to disability specifically, students cannot be suspended or expelled solely due to disability-related behaviour. Regulation 472/07, *Behaviour, Discipline and Safety of Pupils* sets out factors that must be considered when a suspension or expulsion is being considered, including:

Mitigating factors

2. For the purposes of subsections 306 (2), 306 (4), 310 (3), 311.1 (4) and clauses 311.3 (7) (b) and 311.4 (2) (b) of the Act, the following mitigating factors shall be taken into account:

1. The pupil does not have the ability to control his or her behaviour.
2. The pupil does not have the ability to understand the foreseeable consequences of his or her behaviour.
3. The pupil's continuing presence in the school does not create an unacceptable risk to the safety of any person. O. Reg. 472/07, s. 2.

Other factors

3. For the purposes of subsections 306 (2), 306 (4), 310 (3), 311.1 (4) and clauses 311.3 (7) (b) and 311.4 (2) (b) of the Act, the following other factors shall be taken into account if they would mitigate the seriousness of the activity for which the pupil may be or is being suspended or expelled:

1. The pupil's history.
2. Whether a progressive discipline approach has been used with the pupil.
3. Whether the activity for which the pupil may be or is being suspended or expelled was related to any harassment of the pupil because of his or her race, ethnic origin, religion, disability, gender or sexual orientation or to any other harassment.
4. How the suspension or expulsion would affect the pupil's ongoing education.
5. The age of the pupil.
6. In the case of a pupil for whom an individual education plan has been developed,
 - i. whether the behaviour was a manifestation of a disability identified in the pupil's individual education plan,
 - ii. whether appropriate individualized accommodation has been provided, and

- iii. whether the suspension or expulsion is likely to result in an aggravation or worsening of the pupil's behaviour or conduct. O. Reg. 472/07, s. 3; O. Reg. 412/09, s. 4.¹⁶⁴

As will be discussed below, where suspension and expulsion is deemed inappropriate because the behaviour at issue is clearly a manifestation of disability, the school board may address that behaviour in other ways, such as excluding the student.

VII. Exclusion from public school

At issue is access. The denial of access or reduced access is often caused by attitudinal barriers and a non-inclusive school culture; and secondly a failure to appropriately accommodate. Other factors at play may be a perception of workplace safety issues,¹⁶⁵ funding considerations, improper or inadequate investigation and/or implementation of appropriate supports needed, possible bullying, intersection of Code related grounds, and a variety of other factors.

A. Principal's powers – s. 265.1m

The *Education Act* confers multiple powers and duties to a school principal, as set out at section 265 of the *Education Act*. In particular, section 265 (1)(m) states the following:

access to school or class

- (m) subject to an appeal to the board, to refuse to admit to the school or classroom a person whose presence in the school or classroom would in the principal's judgment be detrimental to the physical or mental well-being of the pupils;

A formal acknowledgement of the exclusion in writing is critical to understanding the legal basis upon which the exclusion is based and to evaluate what possible

¹⁶⁴ *Behaviour, Discipline and Safety of Pupils*, O Reg 472/07, ss 2, 3.

¹⁶⁵ *Supra* note 143; See also *supra* note 144.

recourse and remedies are available. Obtaining such clarification in writing may require some advocacy if a school board is not forthcoming.

Often, parents are not provided reasons for the exclusion, or the legal authority for the exclusion. Exclusions may be for a shorter period of time until certain events occur such as assessments, accommodations and interim accommodations, or the administering of chemical restraints. Other times, the exclusions are perceived to be permanent.

The Ministry provides limited direction in Policy/Program Memorandum stating that this provision is not to be used as a form of discipline and that parents are to be notified of the exclusion and of their right to appeal under clause 265(1)(m) as soon as possible.¹⁶⁶ The Court of Appeal has also considered the legal authority and application of this section.¹⁶⁷ Some Boards, like the Toronto District School Board have adopted a Governance Procedure¹⁶⁸ outlining the process for an appeal under section 265(1)(m), which provides for substantial discretion to the Board in the conduct of the hearing.

When considering appealing to a school board, considerations should include: the power imbalance, lack of representation, bias, reprisals and whether the remedy available would be at all significant. It is also important to be aware that school boards may take the position that the appeal is limited to the upholding or quashing of the Principal's decision regarding section 265 (1)(m) and can not consider issues related to accommodations and the IEP. Therefore, even if a parent was to be successful at a section 265(1)(m) hearing, the underlying issues may not be dealt with. If the remedy is to quash the decision and allow the student access to school, the underlying problems such as a failure to accommodate and attitudinal barriers, will persist.

¹⁶⁶ Ministry of Education, *Policy/Program Memorandum No. 145, Progressive Discipline and Promoting Positive Student Behaviour*, (issued December 5, 2012) at 5.

¹⁶⁷ *Bonnah v. Ottawa-Carleton District School Board*, (2003) 64 OR (3d) 454 (Ont. CA).

¹⁶⁸ Toronto District School Board, *Hearing of an Appeal Under Section 265 (1)(m) of the Education Act - Governance Procedure - PR602* (adopted May 18, 2011).

There may be other legal avenues that may be appropriate depending on the facts and remedies sought. In a recent interim decision released by the HRTO, a 9 year old student with disabilities who was excluded from school due to disability-related behaviour was ordered back to school with conditions. In cases where a *prima facie* case of discrimination can be made out, the HRTO may be an effective alternative to an appeal to the school board.¹⁶⁹

B. Trespass Orders

In 2008, amendments to the *Safe Schools Act* were accompanied by regulatory amendments to ensure that the trespass provision at section 305 of the *Education Act* was no longer applied to exclude children with disabilities from school.¹⁷⁰

Section 305 of the *Education Act*, *Regulation 474/00*, and section 265 (1)(m) may nonetheless be applied to exclude parents from school property in certain circumstances. Depending on the facts of each case, an appeal to the school board, a human rights application or a civil action may be appropriate.¹⁷¹

C. Shortened Days

¹⁶⁹ *Supra* note 156. See also *supra* note 136.

¹⁷⁰ *Access to School Premises*, O Reg 474/00, s 3(3) [*Regulation 474/00*].

¹⁷¹ See *Supra* note 136 at paras 252 – 254. See also *Foschia v. Conseil des Ecoles Catholiques de Langues Francaise du Centre-Est*, 2009 ONCA 499 at paras 22-24, in a matter relating to a trespass order against a parent of a student, the Court of Appeal for Ontario dealt with a challenge to the application of section 265(1)(m) and regulation 474/00 order excluding the parent from his children's school. The parent commenced legal action against the school board alleging negligence, intentional infliction of mental suffering and misfeasance in public office.

The Court of Appeal dismissed the negligence claims and found that a judicial review of the decision of the Board of Trustees was the most appropriate route. Also, they considered the misfeasance in public office claim and considered the extended continuation for the ban against the plaintiff. The parent argued that the extension of the ban was motivated by malice towards him. The Court of Appeal allowed the claim of misfeasance to continue, as this was a preliminary decision in response to the school board's attempt to having it thrown out. The matter itself had not been fully heard but the decision is informative as it leaves an opening to framing these types of issues as misfeasance in public office, if all the elements are met. In its decision, the Court provided a useful review of the elements for proving misfeasance in public office.

Regulation 298 allows for the shortening of school days to less than the required five hours a day of instruction “for an exceptional pupil in a special education program”.¹⁷² The Ministry in its resource material, *Special Education: A Guide for Educators*, provides the following direction regarding s. 3(3):

A board should not use this section for its own benefit, for example, because of a shortage of staff. This subsection applies in situations where it is for the benefit of the child that the instructional program be shortened. This might occur, for example, if the exceptional pupil does not have sufficient stamina to attend for a full school day, or is medically unable to attend for the full day.¹⁷³

Shortened days may be an inappropriate response by school boards to disability-related behaviour or complex disability-related needs. It may be formally presented to parents in early grades, as the only option due to their child’s disability without alternate programming. Justification by school boards may include the limited availability of an educational assistant; however this was not the legislative intent.

VIII. Conclusion

Legal matters related to students with disabilities and the receipt of education services can be complex. This is an area of law that continues to evolve and that involves multiple legal frameworks and obligations.

There have been important developments in this area of law, most notably, the Supreme Court of Canada decision in *Moore v. British Columbia (Education)* which sets out a clear articulation of the right to individualized accommodation within the education services context. The Human Rights Tribunal of Ontario has recently adopted this framework in a decision finding that a school board denied a student meaningful access to education.

¹⁷² *Operations of Schools – General*, RRO 1990, Reg. 298, s. 3(3) [*Regulation 298*].

¹⁷³ *Supra* note 85 at A15.

Lastly, it is paramount that a student with a disability be provided the opportunity to participate, inform and guide any and all advocacy efforts, wherever possible.



Chapter 7

Obtaining Services for Persons Who Have Been Labelled with an Intellectual Disability: A Primer

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September 2013

Current to September 2013. Anyone intending to rely on this paper should conduct their own research for updates in the legislation and jurisprudence.

A French version of this paper has been prepared by the Centre for Legal Translation and Documentation. The translation is entitled: *Obtenir des services pour les personnes ayant été étiquetées d'une déficience intellectuelle : guide d'introduction* and can be found at Chapter 7. The analysis is based on an English version of the law.

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I. Introduction

Developmental Services is the term used to describe the supports and funding that is provided to adults with intellectual disabilities¹.

In this paper, we describe the evolution of the services and supports available to persons who have been labelled with an intellectual disability and the delivery practices of such services.

In Ontario, the supports and services that are now available are governed by *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act*², (“Social Inclusion Act”). These services are funded by the Ontario Ministry of Community and Social Services. A description of these services, the application process and the quality assurance measures that are to be put in place by service providers are set out in this primer. Since these supports and services continue to be reviewed and updated, those assisting a person who has been labelled with an intellectual disability will need to check for updates and changes on the Ministry of Community and Social Services site³ and the Developmental Services Ontario⁴ site.

This primer also contains a section on the use of the Ontario *Human Rights Code* (“Code”) to enforce the rights of persons who have been labelled with an intellectual disability.

¹ The Term “intellectual disability” is often interchanged with the term “developmental disability”. In this paper we will use the phrase “labelled with an intellectual disability”.

² *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act*, SO 2008, c 14 at e-laws http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_08s14_e.htm

³ Online: Ministry of Community and Social Services <http://www.mcscs.gov.on.ca/en/mcscs/programs/developmental/>

⁴ Online: Developmental Services Ontario <http://www.dsontario.ca/>

II. Historical Overview of Canada's Treatment of Persons Who Have Been Labelled with Intellectual Disabilities⁵

A. Warehousing in Institutions

In the early 19th century it was acceptable to force people, whom society saw as unworthy or unwanted and whom it was “best” to have hidden away, into very large institutions. It was an acceptable practice in Europe and North America to warehouse the “undesirables” – orphans, unmarried mothers, poor and elderly.

During the late 19th century, Ontario began to build new institutions to house people who had been labelled with intellectual disabilities. In 1839, the Ontario government had passed "*An Act to Authorise the Erection of an Asylum within this Province for the Reception of Insane and Lunatic Persons*"⁶. Under this Act, the Government of Ontario had the authority to establish the first provincial asylum for people who had been labelled with intellectual disabilities.

The Orillia Asylum for Idiots, later known as the Huronia Regional Centre, was built in 1876. By 1968 Huronia had 2,600 residents⁷. The Ontario Hospital School in Smiths Falls, later named the Rideau Regional Centre, opened in 1951 and at its peak had 2,650 residents⁸. The government continued to open more and more of these institutions⁹.

⁵ For more information see online: Ministry of Community and Social Services, "From institutional to community living: A history of developmental services in Ontario" <http://www.mcsc.gov.on.ca/en/dshistory/>

⁶ See online Ministry of Community and Social Services, "The evolution of government policy and legislation: 1839 – 1960" <http://www.mcsc.gov.on.ca/en/dshistory/legislation/1839-1960.aspx>

⁷ See online: Ministry of Community and Social Services, "Huronia Regional Centre" <http://www.mcsc.gov.on.ca/en/dshistory/firstInstitution/huronia.aspx>

⁸ See online: Ministry of Community and Social Services, "Rideau Regional Centre" <http://www.mcsc.gov.on.ca/en/dshistory/firstInstitution/rideau.aspx>

⁹ For a list of all the government operated institutions for people who had been labelled with an intellectual disability go to online: Ministry of Community and Social Services, "Government-operated institutions for people with a developmental disability" http://www.mcsc.gov.on.ca/en/dshistory/firstInstitution/list_institutions.aspx

In the 1950s and 1960s the Ontario government began a public promotion of the idea that people who had been labelled with intellectual disabilities should receive treatment and support services in the institutions. Families were influenced into thinking that institutions were the best place for their children because they could receive all the medical and rehabilitation services that they needed in order to reach their full potential. Here is a link to a clip of a video “One on every street” produced by the Ontario department of health, which demonstrates the messaging that parents were given about care for their children with intellectual disabilities.

<http://www.mcass.gov.on.ca/en/dshistory/reasons/index.aspx>

By the mid 1970s, the government operated 16 institutions for individuals with an intellectual disability. At their peak in 1974, more than 10,000 children and adults lived in them¹⁰.

B. Community Living Movement

Not all families believed that institutions were the best places for their children to thrive. However, the reality was that their choice was between the institutions or having their children stay at home with no outside services or supports and no right to attend school. In 1970s Ontario, children who had been labelled with intellectual disabilities had no right to attend school. Families began to organize to set up classes for children. They relied on volunteers to teach the children until the Ontario Ministry of Education began offering education grants for schools for children who had been labelled with intellectual disabilities. This movement became known as “Community Living” movement. In Ontario, Community Living organizations began to expand and eventually formed the Ontario Association of Retarded Children now known as the Ontario Association for Community Living¹¹. The Association grew rapidly in the 1980s. Much of the work done by

¹⁰ *Ibid.*

¹¹ Online: Community Living Ontario, “About Us” <http://www.communitylivingontario.ca/about-us>

the Association was on the development of residential housing in which 4-6 people with intellectual disabilities would be supported to live together in the community. Employment services were also expanded.

C. People First

In Canada during the 1970s more and more people with disabilities began to organize and advocate for their rights to be included as valued members of society.¹² Individuals who had been labelled and institutionalized began to advocate for the right to live in the community. They recognized that because they had lived in institutions, they required help and support in order to live and work in the community. They began to organize in various cities across Canada in order to form networks for people who had been labelled with intellectual disabilities to support one another as self-advocates.

When forming these networks, they explained that they had endured years of being talked about, ordered about and labelled and, they wanted to be able to support each other in their right to be seen as “people” first. This is how the name for the organization “People First” came about. There continue to be numerous People First organizations across Canada. People First of Canada¹³ is organized and governed by people who have been labelled with an intellectual disability. This organization provides resources, training, and advocacy to “(s)upport people who have been labelled [with an intellectual disability] to speak for themselves and to help each other”¹⁴.

The idea that people who had been labelled with an intellectual disability should be moved from institutions and be provided with opportunities to live in a community of their choice began to gain some support in Ontario in the 1970s.

¹² Online: Disability Rights Free Culture, “Disability Rights and the Canadian Charter of Rights and Freedoms” http://disabilityrights.freeculture.ca/exhibits_th_c.php

¹³ Online: People First Canada, “About Us” <http://www.peoplefirstofcanada.ca>

¹⁴ Online: People First Canada, “Visions and Goals” http://www.peoplefirstofcanada.ca/visions_goals_en.php

In the early 1970s, the Ontario government sponsored two reports into the living conditions in institutions. Both the Williston Report¹⁵ which was released in August 1971 and the Welch Report¹⁶ released in 1973 identified the abuse and neglect that was present in institutions and recommended moving people out of institutions and into the community. In 1974 the *Developmental Services Act* was passed. There is more on these reports and the Act set out below.

People First, along with other organizations such as Community Living, was instrumental in lobbying the Ontario government to close all institutions in which people with intellectual disabilities had been warehoused. People First Canada produced a very powerful documentary called, *The Freedom Tour*, to raise awareness both within Canada and internationally about the conditions of these institutions and the need to find alternate arrangements to allow people to live in the community of their choice.

Although it took over 30 years, all institutions in Ontario were eventually closed. On March 31, 2009, *The Freedom Tour* was simultaneously shown in over 30 locations in Ontario to mark the closing of the final three institutions. To view the trailer for *The Freedom Tour*, please go to:

<https://www.youtube.com/watch?v=13y4BI0Lets>

D. Huronia Class Action

Although the institutions are closed, former residents continue to be negatively impacted by their experiences while living in these institutions. Two former residents proceeded with a class action claim for compensation. The law firm Koskie Minsky represented the class of former residents of the Huronia Regional

¹⁵ Online: Ontario Department of Health, "Present Arrangements for the Cure and Supervision of Mentally Retarded Persons in Ontario", by Walter B. Williston, (Toronto: Ontario Ministry of Community and Social Services

<http://www.mcass.gov.on.ca/documents/en/mcass/dshistory/legislation/Williston%20Report.pdf>

¹⁶ Online: "Community Living for the Mentally Retarded in Ontario: A New Policy Focus", by Robert Welch, Provincial Secretary for Social Development, 1973.

<http://www.mcass.gov.on.ca/documents/en/mcass/dshistory/legislation/Welch%20Report.pdf>

Centre in a suit against the Ontario government. The former residents alleged that the government failed in its duty of care. They alleged that the “failure to care for and protect class members resulted in loss or injury suffered by them, including psychological trauma, pain and suffering, loss of enjoyment of life, and exacerbation of existing mental disabilities.”¹⁷

The members of the Class include:

- Anyone who lived at Huronia at any time between January 1, 1945 and March 31, 2009 and was alive as of April 21, 2007, or
- Parents, spouses, children or siblings of someone who lived at Huronia between March 31, 1978 and March 31, 2009 and was alive as of April 21, 2007, or
- An estate trustee of someone who lived at Huronia between 1945 and 2009 who died after April 21, 2007.

A settlement of the class action was reached on September 17, 2013. Full details of the settlement can be read on the Koskie Minsky website.¹⁸ Some of the highlights of the settlement were:

- An apology to all former residents of Huronia from the Province of Ontario;
- \$35,000,000 Settlement Fund;
- The compensation awards will not be subject to tax or government clawbacks;
- The application process is paper based and does not require former residents to testify;
- The maximum compensation that a claimant can receive is \$42,000;
- The documents produced in this case will be accessible for scholarly research
- Commemorative Initiatives including

¹⁷ The Plaintiff’s factum can be read online: Marilyn Dolmage as litigation guardian of Marie Stark and Jim Dolmage as Litigation Guardian of Patricia Seth and Her Majesty the Queen in the Right of Ontario and Huronia Regional Centre (Appellant’s Factum)

http://www.koskieminsky.com/site_documents/080659_FACTUM_25jan10.pdf

¹⁸ Ibid. Settlement Agreement

http://www.kmlaw.ca/site_documents/080659_SettlementAgreement_17sep13.pdf

- a commemorative plaque on the grounds of Huronia
- opportunity to access the grounds of Huronia
- proper maintenance of the cemetery at Huronia and cataloguing of those interred
- opportunity for scholars to attend and archive artifacts from Huronia

Should there be a surplus after all claims have been made by the class members, the settlement sets out some proposals on how the surplus will be distributed. The aim of the proposed term will be to assist organizations to support people who have been labelled with intellectual disabilities to advocate for themselves and to tell their stories about living in Huronia.

Class members should consult the Koskie Minsky website to learn about the claims process.¹⁹

E. Transformation of Thinking - Towards Inclusion

In 1971 the Ontario Ministry of Health commissioned Walter Williston to review the provision of care for people with intellectual disabilities. The resulting report from this investigation recommended that the care of people with intellectual disabilities be moved from institutions to the community. Residential supports were to be based in the community in settings that were similar to the surrounding residential housing. Supports and services for those living in the community were to be drawn from the community.²⁰

In 1974, Robert Welch released the Welch paper which again recommended that people with intellectual disabilities move from institutions and into communities where they will receive the supports and services they need. The Welch report recommended the establishment of protective services in the community;

¹⁹ Online: Kosky Minskie, "Huron Regional Centre Developments" <http://www.kmlaw.ca/Case-Central/Overview/Status-Of-Case/?rid=99>

²⁰ Supra note 15.

community based residential care; and the development of policies to allow for the integration of employment supports for work in the community²¹.

F. Developmental Services Act²² (now repealed)

In 1974, the Ontario government passed the *Developmental Services Act*, which transferred the responsibility for funding for care and services for people who had been labelled with intellectual disabilities from the Ministry of Health to the Ministry of Community and Social Services. Under this *Act*, the Ministry provided funding for programs and services such as group homes, sheltered workplaces, day programs and life skills training for people who had been labelled with intellectual disabilities and their families. Funding was also provided to families and caregivers who were supporting children and adults with intellectual disabilities in their home.

Despite the fact that the move in Ontario was towards de-institutionalization, the types of supports and programs funded under the *Developmental Services Act* did not promote inclusion of people with intellectual disabilities in their community. The programs that were funded continued to segregate people who had been labelled with an intellectual disability. All programs were specific to people who had been labelled with intellectual disabilities and meant that they most often lived, worked, socialized and were educated in isolation from other people who had been labelled with intellectual disabilities.

G. Adult Protection Services

Another program that was put in place in the 1970s was Adult Protection Service Workers (APSW). It was recognized that in the move to encourage

²¹ Supra note 16.

²² Online: Ministry of Community and Social Services, "History of Developmental Services" <http://www.mcscs.gov.on.ca/en/dshistory/legislation/1980s.aspx>

independence and community inclusion for people who had been labelled with an intellectual disability some supports needed to continue. The APSW program was designed to pair an individual with a worker who could provide social support, guidance and who could assist the individual to advocate for further participation in the community. The APSW program continues to date. More information about this program can be found at <http://www.apsao.org/>.

H. Social Inclusion Act

The Government of Ontario first introduced the Bill for the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act*, (“Social Inclusion Act”) in 2008. The government saw the need for more consistency in the assessment of people’s needs and in the delivery of supports and funding. This consistency and modernization of the system for accessing services for people who have been labelled with an intellectual disability was to be achieved through the Social Inclusion Act.

The community supporting people who have been labelled with intellectual disabilities was fairly supportive of the Social Inclusion Act and was hopeful that it would promote further inclusion of people who have been labelled with intellectual disabilities in their communities²³. To some, the Act held the promises of more consistent eligibility criteria; self directed funding; greater coordination of services to allow for more choice and flexibility in programs and

²³ See for example the description provided on the website of Community Living Ontario online: Community Living Ontario, “Supports and Services” <http://www.communitylivingontario.ca/issues/policy-issues/supports-and-services>

supports; and, more accountability from those who receive funds and from agencies who offer services.

When the Social Inclusion Act was introduced, there was hopeful expectation that the Act would shift Ontario's developmental services sector away from institutionalized care and segregation towards a system of services and supports that would enable people who have been labelled with intellectual disabilities to exercise more independence, have greater decision-making power over their day-to-day lives, and ultimately live as full citizens in communities of their choosing.²⁴

III. Supports and Services Under the Social Inclusion Act

The Social Inclusion Act was proclaimed into force in 2012 and the *Developmental Services Act* and its regulation were repealed.

According to section 4, the Social Inclusion Act applies to these services:

- Residential services and supports (arranging and providing a place to reside and all supports needed in the residential setting);
- Activities of daily living services and supports (including assistance with meal preparation, banking, skills training, using public transportation);
- Community participation services and supports (including work activities, volunteer activities, recreational activities);
- Caregiver respite services and supports (services provided by someone other than a primary caregiver for the benefit of the person who has been labelled with an intellectual disability).
- Professional and specialized services (including social workers,

²⁴ Joffe, K. "Enforcing the Rights of People with Disabilities in Ontario's Developmental Services System", 2010, Law Commission of Ontario at page 5.

- psychologists, speech-language therapists);
- Person-directed planning services and supports (assisting a person to define their goals, life vision etc);
 - Any other prescribed services and supports.

Each of these services is defined in the Act²⁵.

A. Who is Covered

1. Proving Eligibility

The Act applies to persons who have been labelled with a developmental disability or intellectual disability, who are resident in Ontario and are at least age 18. The term “residency” is not defined in the Act or Regulations. The Policy Directive for Application Entities states that an applicant must prove residency with a document that contains the applicant’s name and address. Some clients may not have such a document.

For the purposes of the Social Inclusion Act, a person has a “developmental disability” if:

the person has the prescribed significant limitations in cognitive functioning and adaptive functioning and those limitations,

(a) originated before the person reached 18 years of age;

(b) are likely to be life-long in nature; and

(c) affect areas of major life activity, such as personal care, language skills, learning abilities, the capacity to live independently as an adult or any other prescribed activity.

According to Policy Directive for Application Entities, “Confirmation of Eligibility for Ministry-Funded Adult Developmental Services and Supports ²⁶”:

²⁵ Supra note 2 ss 3(2)

²⁶ Online: Ministry of Community and Social Services, “Policy Directive for Application Entities” http://www.mcsc.gov.on.ca/en/mcsc/publications/developmentalServices/policy_application/2_directives.aspx

“Adaptive functioning” means a person’s capacity to gain personal independence, based on the person’s ability to learn and apply conceptual, social and practical skills in his or her everyday life.

“Cognitive functioning” means a person’s intellectual capacity, including the capacity to reason, organize, plan, make judgments and identify consequences.

Ontario Regulation 276/10 outlines the criteria for determining if a person has significant limitations in cognitive and adaptive functioning.²⁷

The terms “Habilitative support” and “History of requiring habilitative support” are also defined in Ontario Regulation 276/10.²⁸

If an individual applying for services under the Social Inclusion Act has documentation from a psychologist or psychological associate that clearly indicates the individual does not meet the definition of developmental disability outlined in the Act, the Application Entity shall make the decision that the individual is not eligible for services and supports.

²⁷ Ontario Regulation 267/10 subsection 2(1) and 3

For the purposes of subsection 3 (1) of the Act, a person has significant limitations in cognitive functioning if the person meets one of the following criteria:

1. The person has an overall score of two standard deviations below the mean, plus or minus standard error measurement, on a standardized intelligence test.
2. The person has a score of two standard deviations below the mean in two or more subscales on a standardized intelligence test and the person has a history of requiring habilitative support.
3. On the basis of a clinical determination made by a psychologist or a psychological associate, the person demonstrates significant limitations in cognitive functioning and the person has a history of requiring habilitative support

http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_100276_e.htm

²⁸ Ontario Regulation 267/10 subsection 2(2)

“habilitative support” means support where the objective of the support is to enable the person to acquire, retain and improve skills and functioning related to activities of daily living in the areas of self-care, communication and socialization;

“history of requiring habilitative support” means a history of having support needs that are life-long in nature and are due to functional impairment caused by a congenital injury, condition or disease or by an injury, condition or disease acquired prior to age 18

http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_100276_e.htm

If the person applying for services does not have a clear determination by a psychologist or psychological associate that the person either has or does not have a developmental disability, the following procedures are to be followed in these cases²⁹:

- If the individual is 18 years of age or older and the documentation provided indicates the presence of a developmental disability (e.g., school or medical records), the Application Entity will facilitate referral to a ministry funded agency for assessment.
- If the individual is 18 years of age or older and has an assessment that indicates the presence of a developmental disability but the information in the assessment is insufficient to confirm whether the individual meets the definition of a developmental disability the Application Entity shall ask the individual to obtain the required information from the psychologist or psychological associate who prepared the original report. If the individual cannot obtain the information required, the Application Entity shall forward the individual's documentation to a Ministry-funded agency to determine whether the individual meets the definition.
- Following a review of the individual's documentation, if the psychologist or psychological associate determines that additional assessment of the individual is required, the Application Entity shall refer the applicant to a Ministry-funded agency for a further assessment.

Requiring an applicant for services to provide documentation prepared by a psychologist or a psychological associate can be a barrier to obtaining services. A psychological assessment is costly and there may be long waiting lists for government funded assessments. Advocates who assist persons who have been labelled with an intellectual disability in obtaining other benefits such as Ontario Disability Support or Canada Pension Disability often encounter similar barriers when attempting to obtain the required documentation to support a finding of eligibility. Due to the nature of such a disability, a person may never have had the need to undergo an assessment or obtain a clear diagnosis. Many adults who have been labelled with intellectual disabilities may only have received medical

²⁹ Supra note 26

attention for their physical health needs and no real medical assistance for the intellectual disability. The general practitioner who may have provided medical treatment to the individual is most likely not a psychologist and is not qualified to provide such a diagnosis even though he or she may have treated the individual throughout their life.

2. Those Who Are Automatically Eligible for Services and Supports

Some people who were receiving services and supports under the *Developmental Services Act* or who were on waiting lists for services are automatically considered as eligible for supports and services under the Social Inclusion Act. On December 14 2012, Ontario Regulation 414/12 was passed which made the following individuals eligible for services and supports under the Social Inclusion Act.

Adults who:

- were receiving Passport Program funding as of April 1, 2012;
- transitioned from Special Services at Home to the Passport Program on April 1, 2012;
- were on the Special Services at Home waitlist as of March 31, 2012; or
- applied and were found eligible for adult services and supports under the *Developmental Services Act* between January 1, 2011 and June 30, 2011, and began to receive support or were waitlisted for support during that time.

Children who:

- are receiving Special Services at Home and turned 18 by March 31, 2013;
- turned 18 between April 1, 2012 and March 31, 2013 and were on a

waiting list for Special Services at Home before they turn 18.³⁰

It is ARCH's understanding that the intent of the Ministry was that eligibility for services was to be reviewed every five years. A review may result in a finding of ineligibility even for those who had been made automatically eligible under Ontario Regulation 414/12.

"Eligibility" for supports and services does not mean that these persons will automatically begin receiving services and supports. Only those who transitioned from Passport and Special Services at Home (see below) will continue to receive the same level of funding until they are reassessed. The Ministry has created a chart that describes how the regulation affects the eligibility of adults who were at various stages of eligibility prior to the enactment of the Social Inclusion Act. This chart is recreated as "Appendix A".

B. Application Process

All applicants start their application process at a Developmental Services Ontario (DSO) organization, where staff review documentation to confirm eligibility for services and supports. There are nine Developmental Services Ontario organizations across the province. To find the DSO in your area go to:

<http://www.dsontario.ca/agencies>

Once eligibility is confirmed, the applicant's support needs will be determined. In the first part of this process the applicant's areas of interest, likes and dislikes and plans for the future are explored. In the second part of the process the applicant will complete the Supports Intensity Scale (SIS). This assessment is used to determine the services and supports the applicant will need to succeed at home, in the community, at work, in education, etc. The unique needs of the

³⁰ Online: Ministry of Community and Social Services, "New regulation clarifies eligibility for adult developmental services"

<http://www.mcsc.gov.on.ca/en/mcss/programs/developmental/regulation.aspx>

person are to be assessed at this point to ensure that the most appropriate supports are provided. The focus of these assessments is described in the Social Inclusion Act as “person directed planning”. The aim of the plans is to help the individual to frame their life plans and goals. They may include such things as the type of residential housing the person would like, the types of programs, work or volunteer opportunities they would like to pursue. People who support an individual who has been labelled as a person with an intellectual disability may be part of the discussions around the development of these plans.

After this information is gathered, the DSO is to prepare an “Assessor Summary Report” that is intended to help link the applicant to appropriate services and supports. DSOs will make referrals to support agencies of the applicant’s choice.

1. Eligibility Decisions

The Ministry of Community and Social Services has created policy directives for the organizations that receive and process applications for services under the Social Inclusion Act. These organizations are “Application Entities”. The Directive can be read at:

http://www.mcscs.gov.on.ca/en/mcscs/publications/developmentalServices/policy_application/1_directives.aspx.

The Directive outlines the type of information the application entities are to provide, how the information is to be made available, and general business operations.

As indicated above under, “Who is Covered”, the Directive also outlines the process to be followed in determining eligibility for services under the Social Inclusion Act.

The decision about eligibility is to be communicated in writing within 20 business days of receipt of all documentation. If an applicant is found to be ineligible, the applicant can request a review of that decision within 25 days of receipt of the decision of ineligibility. The application entity has 15 business days to make a new decision. There are Stage 2 and 3 requests to review an eligibility decision. Each stage has its own set timelines and documentation requirements which are outlined in the Directive, "Review Process for Decisions on Eligibility"³¹. A Stage 3 decision is final. Such a decision could likely only be reviewed through a judicial review process.

2. Waiting Lists and Prioritization

According to information contained on the Developmental Services website³², the government intends that "funding entities will be created to allocate funding and prioritize referrals for services and supports". The funding entities will also provide support for people who are on waiting lists for services. There is no indication about the timing for the creation of the funding entities. Until they are created, regional DSO agencies are to work with support agencies in the community to prioritize referrals and to assist those who are on waiting lists for services and supports.

The Directive, "Individuals in Urgent Need of Support"³³, addresses situations in which a person may need to apply for urgent services and supports such as in situations where the person's primary unpaid caregiver is no longer able to provide care or where the individual is homeless or at risk of becoming homeless. The

³¹ Online: Ministry of Community and Social Service, "Policy Directive Review Process for Decisions on Eligibility "
http://www.mcass.gov.on.ca/en/mcass/publications/developmentalServices/policy_application/3_directives.aspx

³² Supra note 3

³³ Online: Ministry of Community and Social Service, "Policy Directive Individuals in Urgent Need of Support"
http://www.mcass.gov.on.ca/en/mcass/publications/developmentalServices/policy_application/6_directives.aspx

Directive does not allow the application entity to provide emergency services but only outlines the need for an application entity to have a process in place to deal with emergency requests.

The lack of adequate funding and resources means that appropriate supports and services cannot be provided quickly. Often persons who are in need of support in their daily activities will be forced into hospitals and mental health facilities to receive care. The Policy Directive for Application Entities states that in cases where there is need for an emergency response, the Application Entity shall direct the individual to emergency services (police, hospital or local clinic). It also states that when a request is made for urgent support “the Application Entity shall complete or update the Application package ..as soon as possible and no later than twelve (12) months”.³⁴

C. Passport and Special Services at Home

Prior to April 2012, there were two sources of Ministry of Community and Social Services funding that could be used to purchase individualized supports and services for children and adults. These are Passport and Special Services at Home (SSAH).

1. Passport

Starting April 1, 2012, adults who have been labelled with an intellectual disability who are seeking direct funding are to be supported through the Passport program. Adults who were receiving SSAH funding prior to April 1, 2012 are now supported entirely through the Passport program. Only children can now apply for new funding under the SSAH program. If an individual was receiving SSAH in

³⁴ Online: Ministry of Community and Social Service, “Policy Directive for Application Entities” http://www.mcsc.gov.on.ca/documents/en/mcss/publications/developmental/ds_policy_directive.pdf

the past, she or he will continue to receive the same amount of money and can use the money in the same way as they had in the past. This will continue until the recipient is reassessed.

New applications are to be made through one of the nine Ministry of Community and Social Services Developmental Services Offices located across Ontario.

For more information about these changes go to this link:

<http://www.dsontario.ca/news/changes-to-passport/>.

The intent of Passport funding is to allow adults who have been labelled with intellectual disabilities to attend activities and receive supports that will allow them the opportunity to have greater participation in their community.

According to the Passport Guidelines of the Ministry of Community and Social Services regarding the Passport program, this program is to help to:

- improve the quality of participation in the community by providing supports that fund individual goals, work activities and community participation;
- smooth the transition from school to life as an adult in the community;
- promote independence;
- foster social, emotional and community participation skills; and
- promote continuing education and personal development.

Passport funding can also be used to give the main caregiver for the person with the disability a rest or break from their care giving duties.

A copy of the Ministry of Community and Social Services Passport Guidelines can be found at:

<http://www.mcass.gov.on.ca/en/mcass/publications/developmentalServices/passportGuidelines/tableOfContents.aspx>.

The Addendum to the Passport Guidelines that took effect on July 1, 2013 can be read at:

<http://www.mcsc.gov.on.ca/en/mcsc/publications/developmentalServices/passportGuidelines/addendum.aspx>.

2. Special Services at Home

Special Services at Home (SSAH) Program is now only available for children. Both children who have been labelled with intellectual disabilities and physical disabilities are eligible. If approved, families are provided with funding to purchase supports and services that they could not usually provide themselves and are not available elsewhere in the community.

According to information contained on the Ministry of Community and Social Services website, the program helps families pay for special services in or outside the family home as long as the child is not receiving support from a residential program. For example, the family can hire someone to:

- help the child learn new skills and abilities, such as improving their communications skills and becoming more independent;
- provide respite support to the family - families can receive money to pay for services that will give them a break (or "respite") from the day-to-day care of their child.

The amount of money a family receives depends on:

- the type and amount of service the child needs;
- other help that is available in the community; and
- the kind of support that the family is already receiving.

3. Availability of These Programs

There are extensive waiting lists for both the Passport and the SSAH programs. Many families are faced with extremely difficult situations of having no supports or services once their dependent adults have left high school or have reached age 18. Their dependent adults require daily assistance in order to participate in their community. Without funding and with limited services and resources, families often have to decide whether to change the employment situation of one parent in order to have someone to assist the person with the disability during the day and allow him or her to participate in their community. When proper funding and supports are not available to them, the other option for the family often is to have the dependent adult placed in a group home, hospital or long term care facility. The result for the person with the disability is social isolation, loss of independence and loss of dignity.

In November 2012, the Ontario Ombudsman's Office announced its investigation³⁵ into "the province's services for adults with developmental disabilities who are in crisis situations". According to the Ombudsman's Office news release, "The investigation will focus on two issues – whether the Ministry is adequately responding to urgent situations involving adults with developmental disabilities, and whether it is doing enough to co-ordinate, monitor and facilitate access to services for them. " Once the Ombudsman completes the investigation and releases a report, more information will be available on the ARCH website.³⁶

4. Direct Funding

According to information provided by the Ministry of Community and Social Services, funding entities will be taking applications from those who wish to purchase and manage their own supports and services under a direct funding model in the future. This model would allow an individual to receive a block

³⁵ Online: Ontario Ombudsman, "Ontario Ombudsman to investigate province's services for adults with developmental disabilities in crisis," TORONTO (November 29, 2012) <http://www.ombudsman.on.ca/Newsroom/Press-Release/2012/Ontario-Ombudsman-to-investigate-provinces-servic.aspx>

³⁶ Online ARCH Disability Law Centre <http://www.archdisabilitylaw.ca>

amount of funding from which they can choose the supports and services that they wish to acquire. The expectation is that direct funding would allow individuals more choice and would allow them to have their needs better met through the individualized funding.

There is no indication of when the Ontario government plans to begin funding this program, what the criteria may be for eligibility for direct funding or, how much funding may be allocated to each individual who qualifies. It is unclear whether this “Direct Funding” will be something different than Passport and SSAH.

A Ministry of Community and Social Services news release dated July 30, 2013, indicates that the Ministry has enhanced supports in Developmental Services following the 2013 Budget. According to the news release the enhanced supports include new or additional direct funding for 850 adults with a developmental disability to support their community participation and provide respite to caregivers.

The backgrounder to this news release indicates that this money is to be allocated through the Passport program.

IV. Rights Enforcement

The Social Inclusion Act does not provide any rights for those who receive services and supports. Nor does it provide any individual redress for rights violations.

As Kerri Joffe noted:

Stakeholders with disabilities consistently stated that the government’s failure to include rights in the Social Inclusion Act is one of the legislation’s most significant shortcomings ... Including rights in the Social Inclusion Act framework is important for several reasons. Symbolically, it demonstrates that the humanity and dignity of people with intellectual disabilities is not merely recognized in words, but in substantive rights that

people can use to improve the quality of their daily lives. Practically, including rights in the legislation is the first step towards creating a culture of rights within the developmental services sector, thereby increasing the possibility that people with disabilities will have more autonomy, control and self-determination over their lives.³⁷

V. *Complaints Mechanisms*

Section 26 of the Social Inclusion Act requires service agencies to have written procedures for initiating complaints to the agency and for how the agency will deal with such complaints. Section 26 also requires service agencies to ensure that these written procedures comply with the regulations. Section 38(p) of the Act provides that the Lieutenant Governor in Council may make regulations governing practices and procedures relating to complaints processes, however as of the date of this paper, no such regulations have been released. The Ministry has released a “Policy Directive for Service Agencies”. The Directive can be read at:

http://www.mcass.gov.on.ca/documents/en/mcass/publications/developmental/ds_policy_directive.pdf.

The Directive states that all agencies are to have written policies and procedures for receiving and responding to complaints and providing feedback. These policies and procedures are to be written so that they are understood by everyone who would want to know about them. Complaints can be made by an individual who is receiving services, a person submitting the complaint on the individual's behalf or a member of the public. The policy must address the different ways the complaint can be communicated, the process for investigation and for responding; timelines for each step of the process; the roles of the individuals who are to be involved in receiving and responding to complaints; and how to ensure that the process is free of intimidation or coercion.

³⁷ Supra note 23 at pages 33-4.

The Policy Directive for Service Agencies also addresses the need to ensure that a complaint will not result in a threat to services.

This concern about the potential risk to the individual who is making the complaint is often the reason that complaints are not made. The threat of reprisal is often a fear held by those who have experienced abuse or neglect or their support people. This is particularly true for people who may not communicate verbally and who are isolated.

VI. Quality Assurance Measures

The Policy Directive for Service Agencies also has a section on “Supporting People with Challenging Behaviour”. This section outlines the requirements for Behaviour Support Plans and the use of Behaviour Intervention Strategies. The Directive states, “The Ministry’s position is that physical restraint should be used solely as a last resort in crisis situations, unless otherwise identified in an individual’s behaviour support plan.” The terms “physical restraints”³⁸ and “crisis situations”³⁹ are both defined in the Directive. Each service provider is to have a review committee made up of third parties, including one clinician who has expertise in supporting adults who have been labelled with an intellectual disability who have “challenging behaviours”. The review committee is to review

³⁸ A “physical restraint”, as an example of a type of intrusive behaviour intervention in Ontario regulation 299/10, includes “a holding technique to restrict the ability of the person with a developmental disability to move freely, but does not include the restriction of movement, physical redirection or physical prompting if the restriction of movement, physical redirection or physical prompting is brief, gentle and part of a behaviour teaching program.”

³⁹ A “crisis situation” is defined in the regulation as “a circumstance where,
(a) a person with a developmental disability is displaying challenging behaviour that is new or more intense than that which was displayed in the past and the person lacks a behaviour support plan or the strategies outlined in the person’s behaviour support plan do not effectively address the challenging behaviour
(b) the challenging behaviour places the person at immediate risk of harming themselves or others or causing property damage, and
(c) attempts to de-escalate the situation have been ineffective.”

the Behaviour Support Plans and determine whether intrusive interventions are ethical and appropriate for the individuals.

Ontario Regulation 299/10, “Quality Assurance Measures”, provides further details on the requirements for a Behaviour Support Plan⁴⁰, safety and security measures⁴¹, reporting incidents of abuse⁴², and the use of intrusive interventions and training on intervention techniques⁴³. The Ministry has also released a “Guide to the Regulation on Quality Assurance” which can be read here: HTTP://WWW.QAMTRAINING.NET/DOCS/ENGLISH/DS_PLAINLANGGUIDE_ENG_FINAL.PDF.

VII. Abuse and Available Recourse

A. Incidents of Abuse⁴⁴

Abuse can cause both physical and mental harm. It can include:

- **physical** abuse such as slapping, pushing, kicking, holding down, use of lifts and aids inappropriately to purpose inflict pain and fear, etc.;
- **neglect** such as depriving a person of food, water, shelter, heat, medical care or hygiene;
- **emotional and psychological** abuse such as insults, segregation, forced feeding, depriving of activities of interest, denial of access to an intimate partner, harassment or intimidation;
- **sexual** abuse such as unwanted touching;

⁴⁰ Ontario Regulation 299/10 s 18.

⁴¹ Ibid s 12

⁴² Ibid s 8 and 9

⁴³ Ibid s 19-21

⁴⁴ Under section 1 of Ontario Regulation 299/10 abuse is defined as, “abuse” means action or behaviour that causes or is likely to cause physical injury or psychological harm or both to a person with a developmental disability, or results or is likely to result in significant loss or destruction of their property, and includes neglect;

- **financial** exploitation such as misusing funds or assets or denying the individual access to their funds or assets.

For many people who have been labelled with an intellectual disability the neglect and exploitation they experience may be more subtle and may not be recognized as abuse. For example, if a person who supports the individual deems a behaviour such as refusing to eat a meal to be inappropriate or uncooperative, the individual may not be able to watch a television program or listen to her music. Although some may not see this as abuse, the psychological impact that can result from being punished for trying to assert one's choice or independence should be seen as abuse.

B. Prevention and Reporting

Ontario Regulation 299/10 Quality Assurance Measures requires all service agencies to have policies and procedures for preventing and reporting abuse⁴⁵. The regulation requires agencies to have procedures for documenting and reporting abuse, supporting the person who has experienced the abuse, dealing with employees or volunteers who are suspected of committing the abuse, mandatory training and notifying police and others of the abuse.

An important provision of Ontario Regulation 299/10 regarding preventing and reporting abuse is subsection 8(2) which covers education and awareness building for persons receiving services. Section 8 (2)(c) states that all agencies shall:

provide mandatory education and awareness-building on abuse prevention and reporting to persons with a developmental disability receiving services and supports from the service agency in a language and manner that is appropriate to the capacity of the person with a

⁴⁵ Supra note 40 s 8 and 9

developmental disability when the person begins to receive services and supports from the service agency and every year thereafter.

However, as Kerri Joffe stated in *“Enforcing the Rights of People with Disabilities in Ontario’s Developmental Services System,”* rights education is seen by stakeholders with disabilities as an important way to achieve the goals of a human rights-based approach, namely to develop a culture of rights in the developmental services sector and empower people with disabilities to be active participants and consumers of services⁴⁶. However, agencies will not have fulfilled this mandatory obligation to provide education and awareness–building if the education is not provided in ways that are fully accessible to the persons with disabilities who are receiving services. All education must be delivered in a way that reflects the unique ways in which the recipients of the information communicate, understand and process information. The education materials must use language and be put in a context that is relevant to the lived experiences of those who are to gain the education. Since agencies are in full control of the material they use to deliver the abuse education, there is some concern among disability stakeholders that this education is not truly accessible to the persons who are to receive the education.

Similar concerns regarding access and effectiveness have been expressed about the provisions covering the reporting of abuse contained in Ontario Regulation 299/10. The agencies themselves have full control over the development and

⁴⁶ Supra note 23 at 109 to 114

implementation of their policies and practices for abuse monitoring and reporting. If the agency fails to follow its own procedures, has inadequate procedures or fails to take appropriate steps to address the abuse, the victim or his or her support people have no prescribed recourse. The regulation contains no rights enforcement mechanism for the potential victims of abuse. As Kerri Joffe has indicated, “The human rights principle of accountability requires that people with disabilities must have recourse to an independent adjudicative body if they are not satisfied with the service provider’s response to the complaint”⁴⁷.

Unfortunately, despite submissions from ARCH and others about the need for an independent reviewer or adjudicative body to monitor agencies for potential abuse, the Social Inclusion Act and its regulations do not provide for such a body.

Individuals who have been labelled with intellectual disabilities who receive supports and services and in particular those who receive residential services fear reprisals for reporting abuse. Family members and others who support individuals who receive supports and services are often labelled as difficult, complainers and trouble makers when they alert agencies to their concerns about abuse. Family members and other support persons have often been banned from attending the home where the person labelled with the intellectual disability lives and receives supports or, from the community facility where that person receives supports. At times, the agencies have threatened to withdraw supports and services because the agency claims they can no longer deal with the “difficult” family members or support persons. In some instances when a family member or support person has been faced with the threat that the person receiving services will encounter reprisal or withdrawal of services, they have had

⁴⁷ Joffe, at 118 to 120

success when they have escalated the matter to the Regional Office of the Ministry of Community and Social Services. In some cases, a third party has been brought in to do a review of the service provider. In other situations, the service provider may decide that they will no longer provide services to the individual. In situations of abuse, the individual may have to be removed from the service provider. In both these situations, an individual could be dropped to the bottom of the waiting list for future services even though the individual was not given a choice in terminating services.

C. Human Rights Considerations

1. Differential Treatment Because of Disability

In some situations, the infringement of a person's rights by a service provider could be framed as a breach of the Ontario *Human Rights Code*.

Although all plans of care are to be "person centred" under the Social Inclusion Act, a person's culture, religion, creed, sexual orientation etc. are often not respected by the service provider.

Group homes and day programs rarely provide individuals with choice in food. People are often given the same things to eat over and over again. People are often also given foods to eat that do not conform with their religious or cultural observances.

People who live in group homes or other residential facilities may be forced to attend a religious institution of the Christian faith and are not provided with support to attend a synagogue, mosque, temple, etc. In addition, people who are provided residential supports may be forced to listen to bible readings, music, radio and television programs with religious themes and the residence may only recognize Christian holidays. ARCH is aware of situations where an individual

was not allowed to attend a ceremony to celebrate his culture as the residential care provider deemed it to be too “unchristian” or “devil worshipping”.

ARCH has also been made aware of many situations in which persons who are labelled with intellectual disabilities are barred from developing intimate or sexual relationships. People labelled with intellectual disabilities are often thought of as “less than human” so they are presumed not to have the ability to develop intimate relationships. Many people who work with people with intellectual disabilities hold stereotypical views that people with intellectual disabilities do not have the mental capacity to consent to a sexual act. As a result, people with intellectual disabilities are barred from sexual activity and isolated from those with whom they may have developed an intimate relationship.

People who are gay, lesbian or bi-sexual who also have been labelled with an intellectual disability will often be forced to suppress their sexuality. This forced suppression may be based on stereotypical views that a person with an intellectual disability could not truly understand his or her sexual orientation. As well, those who work with people labelled with intellectual disabilities may believe that the individual needs to be protected from possible harm or ridicule that may result if he or she is allowed to exhibit his or her sexual identity.

In such situations, the loss of choice and freedom could be framed as a breach of a person’s rights under the *Human Rights Code*. The individual is being subjected to differential treatment because of his or her disability and that differential treatment is causing disadvantage.

The Human Rights Legal Support Centre brought a human rights application against a municipality on behalf of group home residents and the owners of the home. The town had denied the owners the zoning compliance they needed to legally provide a supportive residence for people labelled with intellectual disabilities in a residential neighbourhood. The residents were being denied the

right to live in an area of town of their choice. The discrimination claim was eventually settled. The following are news bulletins about the application to the Human Rights Tribunal (HRTTO):

<http://www.newswire.ca/en/story/1017781/town-egged-on-neighbours-taunting-people-with-developmental-disabilities>

<http://www.newswire.ca/en/story/1177981/greater-town-of-napanee-settles-human-rights-claim-with-disabled-residents?relation=org>

In another application brought by a women who is identified as a person with a developmental disability, an employer was found to have violated the Code by paying her significantly less than the employees without disabilities. According to the HRTTO decision⁴⁸:

The applicant and other general labourers with developmental disabilities performed the same duties as the general labourers who did not have developmental disabilities, except for tasks that required fine skills, such as labelling wine bottles.

The applicant and other general labourers with developmental disabilities were paid a training honorarium of \$1.00 per hour. After a few years, the honorarium was increased to \$1.25 per hour. The general labourers who did not have developmental disabilities were paid at the minimum wage level or higher.

2. Failure of the Service Provider in its Duty to Accommodate

People who have been labelled with an intellectual disability are often described as “violent, aggressive, abusive, hard to handle, flight risk” etc. or exhibiting what is described above as “Challenging Behaviour”. As a result of the “violent” and “dangerous” behaviours they are physically restrained, medicated, isolated, deprived of the things they enjoy and denied service.

⁴⁸ *Garrie v. Janus Joan*, 2012 HRTTO 68 (CanLII), <<http://canlii.ca/t/fpm28>>

In ARCH's experience, these "violent" and "dangerous" behaviours can be the result of a failure by the service provider to accommodate the disability related needs of the individual. The person may not communicate verbally and the service provider fails to learn how to facilitate communication by other means such as symbols, communication devices, gestures or touch. It may be out of frustration and disillusion from not being able to make one's choices or needs understood that the person exhibits "aggressive behaviours".

These types of behaviours can also be the result of misuse or overuse of medication, among other things.

A breach of the Code could be established from this failure in the duty to accommodate. However, it is sometimes difficult to distinguish the duty to accommodate from a quality of care issue. In a decision of the HRTO⁴⁹, the Associate Chair, David Wright concluded that the applicant did not make out a claim of discrimination and failure to accommodate in her allegations that she was not provided with appropriate medical care. At paragraph 28 of the decision, he states:

To trigger the duty to accommodate, an applicant must show that there has been direct or indirect discrimination on the basis of one of the *Code* grounds. The mere assertion that the applicant's medical needs have not been properly met does not allege *Code*-based discrimination or suggest a violation of any duty to accommodate. The allegations of discrimination and failure to accommodate related to the manner in which medical services were delivered to the applicant have no reasonable prospect of success.

For more information on advising persons with disabilities on their rights under the Ontario *Human Rights Code* and filing applications at the HRTO, please see Chapter 3 "Human Rights and Disability Law" in this Disability Law Primer.

⁴⁹ *Barber v. South East Community Care Access Centre*, 2013 HRTO 60 (CanLII), <<http://canlii.ca/t/fvm51>

VIII. Issues of Capacity to Instruct Counsel

When taking on cases for clients who have been labelled with an intellectual disability, the questions of whether the client has the capacity to instruct counsel may arise.

In these situations, counsel must ensure that they are fulfilling their duty to accommodate so that the client can engage in a solicitor client relationship, retain counsel and instruct counsel.

Particular attention must be paid to gaining a clear understanding of who is the client and who is providing instructions to counsel. In many situations, it will be a parent or other family member who approaches you for legal advice. The family member will often state that the individual could not possibly talk to you about the legal issues that are being addressed. In ARCH's experience, once we make attempts to understand how the individual communicates and make the appropriate arrangements to accommodate the individual's disability related needs, the individual can often instruct the lawyer. A family member or other person may need to support the individual but the lawyer must be certain that he or she is taking instructions from the individual. Counsel must also be careful that the decisions of the individual are respected even though counsel or a support person may believe that the decision made is not in the "best interests" of the individual.

In other instances, it may be determined that the individual does not have the capacity to instruct counsel. Although a family member or other support person may have been making decisions for the individual for his or her entire life, a valid power of attorney may not exist.

In each of these situations, counsel must clearly establish who is the client in the solicitor-client relationship and determine whether the person providing

instructions has the authority to be making the decisions that may impact another individual's life.

For more on these issues and other issues of capacity, please refer to Chapter 4 on "Capacity to Instruct Counsel" in this Disability Law Primer.

APPENDIX "A"

How does the regulation affect your eligibility for adult developmental services?



if you are an adult
who transitioned from SSAH
to Passport on April 1, 2012

You will automatically be eligible for adult developmental services and supports under SIPDDA.

You will continue to receive the same amount of funding until your needs are re-assessed.

We will give you more information about next steps.

if you are an adult
who was on the waitlist for
SSAH funding

You will automatically be eligible for adult developmental services and supports under SIPDDA.

DSO will contact you in the future to assess your needs.

When services and supports are available **DSO will** let you know.

if you are an adult
who applied for and were found
eligible for adult services and
supports under the DSA between
January 1, 2011, and June 30, 2011

You will continue to be eligible for adult developmental services and supports under SIPDDA.**

When services and supports are available **DSO will** let you know.

For information about how the regulation impacts children, please see reverse side.

DSA – Developmental Services Act

DSO – Developmental Services Ontario

SSAH – Special Services at Home Program

SIPDDA – The Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act

** All adults who received or were on the waitlist for services under the DSA prior to January 1, 2011, have already been deemed eligible under SIPDDA.

How does the regulation affect your child's eligibility for adult developmental services?



if your child receives SSAH funding, and will turn 18 by March 31, 2013

Your child will automatically be eligible for adult developmental services and supports under SIPDDA upon turning 18.*

Until your child turns 18, you will receive the funding through SSAH.

After that, your child will receive it through the Passport Program until their needs are re-assessed.

Your child may also be eligible for support through ODSP upon turning 18.

We will be giving you more information about next steps.

if your child will turn 18 by March 31, 2013 and is on the waitlist for SSAH funding

Your child turning 18 will automatically be eligible for adult developmental services and supports under SIPDDA.*

DSO will contact you to assess your child's needs.

When services and supports are available **DSO will** let you know.

Your child may also be eligible for support through ODSP upon turning 18.

if your child receives or is waiting for SSAH funding, and will turn 18 after March 31, 2013

When your child turns 18, they will no longer be eligible for the SSAH program.

Your child may be eligible for support through ODSP upon turning 18.

Your child may apply for adult developmental services and supports through DSO.*

DSO – Developmental Services Ontario

ODSP – Ontario Disability Support Program

SSAH – Special Services at Home Program

SIPDDA – The Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act

* This only applies to children with a developmental disability.

For information about how the regulation impacts adults, please see reverse side.



Chapter 8

Attendant Services

**Edgar-André Montigny, Staff Lawyer, ARCH Disability Law Centre
September 2013**

Current to September 2013. Anyone intending to rely on this paper should conduct their own research for updates in the legislation and jurisprudence.

A French version of this paper has been prepared by the Centre for Legal Translation and Documentation. The translation is entitled: *Services auxiliaires* and can be found at Chapter 8. The analysis is based on an English version of the law.

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I. Overview

'Attendant services' is a general term for various types of assistance provided to persons with physical disabilities to assist with activities of daily living. These services are also called personal support services. Services can include bathing, washing, transferring, toileting, skin care, essential communications, meal preparation and light housekeeping. Specific types of services included under the title "attendant services" or "attendant outreach services" can vary among agencies and providers.¹

In Ontario, attendant services are provided by both private suppliers and public agencies. Most services are provided in the home but certain types of services can be provided at a place of employment, school or university. In Ontario, most public services are co-ordinated by local Community Care Access Centres (CCAC), although a variety of agencies may provide the services on behalf of the local CCAC, and some agencies provide services independent of the CCAC.

The Ministry of Health and Long-Term Care funds attendant services through Local Health Integration Networks. These are provided at no cost to the recipient.² There are also private agencies providing services for a fee. An important alternative to attendant services provided by agencies is the Direct Funding Program which offers persons with disabilities funding to hire their own attendants. This article deals with public (no cost) services available through the CCAC or other government programs, such as Direct Funding.

Attendant services refer specifically to types of physical assistance with activities of daily living. These services can be provided together with professional services and

¹ This paper uses definitions and terms as outlined in the *Home Care and Community Services Act* and/or CCAC Client Services Policy Manual (Sept. 2006).

² See Home Care Complaints and Appeals (CLEO, 2010) p. 1.

homemaking services, but there are separate eligibility requirements for each category of service.³

Attendant services or Personal Support Services, which include assistance with personal hygiene activities, bathing, eating, dressing, and other basic activities of daily living, are the most common services offered to most recipients.⁴ These services are consumer directed.⁵ Homemaking services which offer assistance with house-cleaning, laundry, banking, bill payment, shopping and meal preparation⁶ are often combined with personal support services, but not always. It is usually necessary to qualify for personal support services in order to obtain homemaking services.⁷ Professional services such as nursing, physiotherapy, occupational therapy, social work, speech therapy and diet advice are offered to those persons who qualify on the basis of a specific need.⁸ Professional services and homemaking services may be provided by providers of personal support workers or through Community Care Access Centres.

A. Purposes and Goals of Attendant Services

The goal of attendant services is to support independent living. As articulated by the Centre for Independent Living in Toronto (CILT), the philosophy of independent living promotes the ideal of people with physical disabilities living with dignity in their chosen community, participating in all aspects of their life, and controlling and making decisions about their own lives.⁹

³ See O Reg 386/99.

⁴ See CCAC Client Services Policy Manual, Chapter 7 (Sept. 2006) p. 6, and *Home Care and Community Services Act, 1994*, s. 2(6) definitions.

⁵ See CILT website - <http://www.cilt.ca/overview.aspx>

⁶ See CCAC Client Service Policy Manual, Chapter 7 (Sept 2006) p. 9, and *Home Care and Community Services Act, 1994* s. 2(5), definitions.

⁷ For more information see CCAC Client Services Policy Manual (Sept. 2006), Chapter 7 "CCAC Home Care Services" pp. 10-11.

⁸ See CCAC Client Services Policy Manual, Chapter 7, (Sept. 2006), p. 1, and *Home Care and Community Services Act, 1994*, s. 2(7).

⁹ See Centre for Independent Living in Toronto, online: <http://www.cilt.ca/what_is_il.aspx>.

Attendant services play an important role in supporting the personal integrity, independence and dignity of persons with physical disabilities.¹⁰ Attendant services are a necessary and vital accommodation for persons with physical disabilities. Without reliable attendant services many people with physical disabilities would be unable to live independently. Instead they would be dependent upon informal services provided by untrained friends or family, or they would be forced to live in nursing homes or other institutional settings to obtain the support they require.

B. Legislative Framework

Most attendant services are funded through the Ministry of Health and Long-Term Care. The *Home Care and Community Services Act, 1994* (prior to 2010, the *Long-Term Care Act, 1994*) and its regulations, particularly O-Reg 386/99, outline the scope of services provided and the rules that apply to the provision of those services. The Direct Funding program is funded by the Ministry of Health and operates within guidelines established under the *Ministry of Community and Social Services Act*, R.S.O. 1990, M 20, 11.1 and Regulation 367/94.¹¹

C. Who is Eligible for Attendant Services?

To receive services a person must:

- be insured under the Ontario Health Insurance Plan (OHIP);

¹⁰ This can include physical disabilities on their own or in combination with other disabilities.

¹¹ Although it is unusual for a program to receive funding from one Ministry while regulations are found under another Ministry's Act. With Direct Funding, this situation seems to have arisen because at the time the Direct Funding Program was being developed, Attendant services were in the process of being transferred from the Ministry of Community and Social Services (MCSS) to the Ministry of Health/Ministry of Health and Long-Term Care (MHLTC), so while the relevant legislation was drafted in the MCSS Act, perhaps because the expertise on attendant services remained at the MCSS at the time, the transfer to MHLTC meant that funding would be provided by that Ministry.

- have a permanent physical disability and require physical assistance with activities of daily living such as bathing, dressing, transferring and/or toileting¹²; and
- be able to direct their own services.

Otherwise, the law is not clear about who should get services. In general the CCAC decides whether a person gets services after performing its own evaluation.¹³

For CCAC services, a person is only able to access services that are available within the person's CCAC catchment area. Not all services may be available in all areas.¹⁴ The CCAC also reserves the right to deny service if the consumer's home is not appropriate in terms of safety, space or privacy to provide the required service. Every effort must be made to adapt the service or the space to allow service to be provided safely before finding a person ineligible.¹⁵

The Attendant Outreach Services Policy Guidelines and Operational Standards state that persons who cease to meet the eligibility requirements for attendant outreach services must not have their services terminated without alternative service options having been arranged.¹⁶

Informed consent is required for an agency to assess a person's requirements, determine their eligibility or provide a community service, which includes community support services, homemaking services, personal support services and professional services.¹⁷ A person authorized under the *Substitute Decisions Act, 1992* to make personal care decisions on behalf of a person found incapable to make such decisions

¹² See s. 2. (1) and 2.1 of O Reg 386/99; for more detail see CCAC Client Services Policy manual, Chapter 3; "Eligibility Criteria for CCAC Services (September 2006); note that these criteria focus largely on the OHIP requirements for various groups of people.

¹³ See Home Care Complaints and Appeals (CLEO 2010) p. 3.

¹⁴ CCAC Client Services Policy Manual (Sept. 2006). Chapter 3, ss. 3.1

¹⁵ CCAC Client Services Policy Manual (Sept 2006). Chapter 3. s. 3.1.1

¹⁶ Ministry of Health, Long-Term Care Division, "Attendant Outreach Services: Policy Guidelines and Operational Standards" (fall 1996) p. 15 (item II (vi)). This document can be accessed using www.champlainhin.on.ca/WorkArea/linkit.aspx?LinkIdentifier=id... <https://www.google.ca/> - #

¹⁷ *Home Care and Community Services Act*, s. 24.

may provide consent on behalf of that individual to an evaluation or assessment of the person and the provision of community services to that person.¹⁸

Consumers are expected to direct their own attendant services and homemaking services. Agencies are expected to explore other services from other ministries for consumers who cannot direct their own services.¹⁹ Refusal to provide services based upon a perceived inability to direct services can be challenged. Service should not be terminated on the basis that a person cannot direct services without exploring all options and forms of accommodation needed to permit services to continue.

II. Assisting Clients with Attendant Services Issues

The goal of defending a person's access to attendant services is to obtain or preserve services at the level required to allow the individual to function independently and with dignity, to their optimal level, within their home and the community. The primary concern is achieving the level of services required by the individual.

The manner in which services are offered is an important component of attendant services. Many individuals require support with intimate personal activities such as toileting and bathing. It can be a major imposition on a person's dignity, personal integrity and overall sense of well-being when disputes arise about such services. Given the nature of the services being provided, it is easy for minor disagreements and personality conflicts to impact upon the relationship between a consumer and an attendant.

III. Types of Attendant Services

¹⁸ See CCAC Client Services Policy Manual (Sept. 2006), Chapter 4, "Consent to Treatment, Admission to Long-Term Care Home and Community Services,"

¹⁹ Ministry of Health: Long-Term Care Division, "Attendant Outreach Services: Policy Guidelines and Operational Standards" (fall 1996) p. 15 (see note 16)

Generally, there are four types of publicly funded attendant services:

- Support Services Living Units/Assisted Living Services in Supportive Housing;
- Shared Living Units;
- Attendant Outreach Services; and
- Direct Funding.

Each service offers certain benefits and advantages as well as challenges.

A. Support Services Living Units/ Assisted Living Services in Supportive Housing

Support Service Living Units (SSLU) or Assisted Living Services in Supportive Housing are accessible apartments in buildings where attendant services are provided to a number of tenants by the same agency. SSLUs usually provide attendant services and homemaking services to residents on a pre-scheduled and on-call basis 24 hours per day. Beyond costs related to the rental of the unit, there is no charge for the attendant services.²⁰

Rental issues are covered under a separate agreement with the landlord rather than the provider of attendant services. An individual's ability to remain in an SSLU unit is usually tied to the fact that attendant services are being provided to that unit by the particular agency operating in the building. This means that if a person wishes to change service providers or wants to switch to paying for their own services through direct funding (see below) or another program, they may not be able to remain in their SSLU unit.

B. Shared Living Units

Shared Living Units provide a communal home setting with attendant services for those persons with more limited ability to self-direct their services or persons with multiple service needs.²¹

²⁰ See Centre for Independent Living Toronto, online: <<http://www.cilt.ca/overview.aspx>>.

²¹ *Ibid.*

C. Attendant Outreach Services

Attendant outreach services are provided in a person's home, workplace or educational setting on a pre-scheduled basis, usually to a maximum of 90 hours of service per month unless special approval has been obtained.²² If further hours are still required, it may be possible to combine attendant services and homemaking services.

Outreach services are not available on an on-call basis. All services must be scheduled or booked in advance and there is usually limited opportunity to alter bookings. In between attendant outreach appointments, recipients must find their own means of obtaining support.

D. Accessing Services

The key way to access Support Service Living Units or Shared Living Services is through the Project Information Centre (PIC) in Toronto²³ – or, outside Toronto, by applying directly to each service provider separately. PIC offers an on-line list of service providers in their Ontario Attendant Services Directory.

E. Direct Funding Program

An important alternative to attendant services provided by the CCAC or other service agencies is the Direct Funding Program. Direct Funding is a distinct program that offers qualified individuals funding to cover the cost of up to 212 hours of attendant services per month. Within this program disputes about the provision of attendant services are

²² See O Reg 386/99 s. 3(1)

²³ Project Information Centre (PIC) – Centre for Independent Living Toronto (telephone: (416) 599-2458; TTY (416) 599-5077; online: <www.cilt.ca>.

less common, largely because the person receiving the service has more control over the provision of services. Most disputes about Direct Funding relate to the application process and the challenges of meeting the requirements of the program on an on-going basis.

Direct Funding is a program of grants for persons with disabilities established under the *Ministry of Community and Social Services Act* (CSSA). The program is intended to offer people with physical disabilities the opportunity to achieve greater independence by providing funding to allow individuals to hire and manage their own attendant services.²⁴ The Direct Funding program is administered by the Centre for Independent Living in Toronto (CILT) in partnership with the Ontario Network of Independent Living Centres (ONILC). The main challenge of the program is limited funding, which means that new applicants face long waiting lists both when qualifying for funding and to actually receive funding.

The requirements of the Direct Funding Program are more onerous than the requirements to qualify for other attendant services or personal support services. Applicants must be able to direct their own care, locate employees, hire and fire employees, manage work schedules and keep accurate financial and other records and accounts. Accepting Direct Funding means that a person becomes an employer and must therefore take on the various legal and administrative obligations related to being an employer, and adhering to legal obligations under the *Employment Standards Act*, *Income Tax Act*, *Ontario Human Rights Code* as well as other relevant legislation including the *Occupational Health and Safety Act*. Direct Funding rules do not allow recipients to hire members of their immediate family.

²⁴Section 11 of the CSSA gives authority to the Minister of Community and Social Services to make a grant to an agency that, in turn, transfers the grant to a person with a disability to assist that person in obtaining “goods and services that they require as a result of that disability”. Section 2(1) of Regulation 367/94 under the CSSA recites that the power given to the Minister of Community and Social Services was transferred to the Minister of Health by Order in Council number 1309/94 dated May 18, 1994.

Information about applying for Direct Funding can be obtained by contacting a local Independent Living Centre for information.²⁵ Direct Funding has its own application process which is outlined in [Appendix 1](#) to this paper.

IV. Service Providers: Community Care Access Centres

While a variety of agencies provide attendant services,²⁶ the majority of services are provided either by or on behalf of a local Community Care Access Centre.²⁷ Given the large role played by CCACs in the provision of attendant outreach services across the province, it is necessary to understand CCAC policies and practices when assisting persons who wish to defend their access to attendant services.

There are 14 CCACs across Ontario, funded by the Ministry of Health and Long-Term Care through Local Health Integration Networks (LHINs).

Community Care Access Centres help people with disabilities find their way through Ontario's health care system, understand their options and connect them to community-based health care and resources. CCACs work with people of all ages to assist them in making informed choices about their care and to ensure that they receive services in the most appropriate setting. For people with physical disabilities, CCACs will co-ordinate personal support services as well as certain professional and homemaking services. Often these services are provided by other agencies on behalf of CCACs.

As noted, CCACs provide a range of services depending upon a person's needs, including professional services, such as physiotherapy, occupational therapy, nursing, social work and nutritional counselling; personal support services, such as assistance

²⁵ Centre for Independent Living in Toronto (CILT): Direct Funding Hotline (CILT) (telephone: 1-800-354-9959).

²⁶ Services by agencies other than a CCAC can be accessed by contacting the Project Information Centre (PIC) in Toronto or, outside Toronto, by applying to each service provider separately. PIC offers an on-line list of service providers in their Ontario Attendant services Directory.

²⁷ Community Care Access Centre (telephone (416) 310-2222); website www.CCAC-Ont.ca. CCAC's often sub-contract with other local agencies to provide the services a person may be eligible for through CCAC.

with personal hygiene and activities of daily living; and, training to carry out personal support services. Services are provided to people in their own homes on a pre-scheduled basis. Services are also available in school settings for children with disabilities.²⁸

CCACs will also co-ordinate the application process for admission to long-term care facilities, co-ordinate and arrange respite care, provide information about other community agencies and services, and in some cases provide equipment and supplies to people who receive home care services.

To qualify for CCAC services a person must be insured under the *Health Insurance Act*. There are no financial eligibility criteria. People can apply directly to their local CCAC office.²⁹ It is not necessary that recipients of the service be able to direct their own care.

CCACs will conduct an initial assessment to determine a person's needs and will prepare a 'Plan of Care' outlining the services for which a person is eligible and the maximum number of hours of service to be provided. Services are assessed on an individual basis. In most cases, unless there are extraordinary circumstances involved, the maximum number of hours of personal support services and homemaking services combined that a person can receive per month is 90 hours.³⁰ Hours of service may also be affected by the availability of personal support workers (PSW) or other staff.

V. Protecting the Rights of Clients who Receive Attendant Services

Persons who receive attendant services can experience a wide range of problems. Generally the issues can be placed into two categories:

²⁸The costs related to CCAC services are covered by the Ontario Health Insurance Plan (OHIP) and services are governed by the *Home Care and Community Services Act, 1994, c. 26* (formerly the *Long-Term Care Act, 1994*) and regulations under 'approved agencies' provisions and the *Community Care Access Corporations Act*.

²⁹Community Care Access Centre, online: <www.CCAC-Ont.ca>.

³⁰O-Reg 386/99 s. 3(1).

- Quantity of Service: questions over the quantity of service, such as the number of hours of service or the types of services offered; or
- Quality of Service: questions about the quality of the services, involving concerns about the manner in which services are delivered or managed, complaints about the behaviour of individual attendants, or the overall quality of the services provided.

A. Questions about Quantity of Services

Decisions about the number of hours of service or the types of services provided are usually based upon the results of the assessments performed by CCACs or other agencies. If there is a question about whether the services provided are adequate to meet the needs of the individual, it may be necessary to seek a further assessment to demonstrate that the individual's need for service is greater than the initial assessment indicated. If a second assessment is refused or the matter cannot be otherwise resolved by dealing directly with the CCAC or service provider, it may be necessary to bring the matter before the Health Services Appeal and Review Board (HSARB) (see below).

The Home Care and Community Services Act, 1994 and its regulations dictate that a CCAC cannot provide more than the legislated monthly maximum hours of service.³¹ Nevertheless, it is sometimes possible to negotiate with the Ministry of Health and Long Term Care to obtain special permission to increase services in extraordinary circumstances.

Even when services have not met the statutory maximums, the CCAC may assert that their ability to provide more service is limited by the staff and resources available at the time. While these issues must be considered, if a person can demonstrate a genuine need for the service, there is no justification for maintaining the hours of service or the

³¹ See O Reg 386/99 s. 3(1)

types of services provided below required levels in order to meet budgetary requirements.

Any denial, termination or reduction of attendant services can have an immediate and serious negative impact upon a person's quality of life, ability to function, health and overall sense of well-being. When consumers seek assistance with these issues they are often in a highly stressful situation. The highly personal and often intimate nature of the services provided can also hamper a person's ability or willingness to discuss their situation in any detail. Having an advocate to engage in discussions and negotiations with the service provider on behalf of the client can greatly assist in securing and maintaining greater levels of services.

B. Questions about Quality of Services

Many disputes related to the provision of attendant services involve the manner in which services are delivered or the quality of service. These issues are more difficult to resolve, not only because the issues involved are often more complex and open to interpretation, but also because the Health Services Appeal and Review Board cannot deal with questions about quality of service. Pursuant to sections 39 and 40 of the *Home Care and Community Services Act, 1994*, HSARB has the jurisdiction to hear appeals dealing with eligibility for community services, exclusions from a community service, the amount of a service and the termination of a service by Attendant Care Outreach Services. While issues about the quality of a community service and alleged violations of the Bill of Rights can be the subject of a complaint to an agency providing attendant services, these are not issues that can be appealed to HSARB.³² This leaves little in the way of a formal mechanism to address common types of complaints raised by clients.

³² See sections 39 and 40 of the *Home Care and Community Services Act, 1994*, S.O. c. 26

Questions about quality of service are often created by staffing shortages, high staff turnover, scheduling conflicts and other organizational issues. These problems can add major tensions to the consumer – service provider relationship.

1. Staff Changes

Staff changes also mean that recipients must devote service hours to training several different attendants to perform the same job. Time spent instructing new attendants means less time is available for the attendant to actually perform the required services. Service providers are often unwilling to add an extra hour or so to a client's services when a new attendant is assigned to them to allow them time to train that attendant without it reducing the time available for regular services. When staff changes are frequent, the imposition on the client can become onerous. Staffing issues can also mean that recipients are forced to cater their activities to their attendants' schedules. Conflicts are also more likely to arise when frequent staff changes mean a client is unable to develop a relationship of trust with their attendant.

2. Gender of Attendants

Another quality of service issue that arises is the question of the gender of attendants. Clients with physical disabilities can feel vulnerable, especially when a client is receiving service while they are alone in their home. Many women prefer to receive services from a female attendant. Similarly, some men prefer to receive services from a male attendant.

There are cases where highly vulnerable women with disabilities are forced to accept services from a male attendant, even when they make it clear that this prospect causes them intense distress. Service providers have asserted that union seniority and other employment rights issues do not allow them to schedule work hours according to gender. Although there is no specific right to receive services from an attendant of the same gender, where it can be demonstrated that service from an opposite gender

attendant will create undue stress or fear, it could be argued that a same sex attendant is a necessary accommodation. Similarly if a client's cultural or religious observances prevent them from accepting intimate services from a person of the opposite sex, it can be argued that the client is entitled to religious or cultural accommodation. From a human rights perspective, the right to religious accommodation should take precedence over union seniority, given the nature of the service being provided and the vulnerability of many recipients.³³ The failure to accommodate a client's religious observations could form the basis for an application to the Human Rights Tribunal of Ontario. In the human rights context, the client would have to demonstrate that the service provider discriminated against him/her and the employer or union would have to prove undue hardship to justify refusing to provide an attendant of the gender of the client's choice.

3. Cultural Background of Attendants

When developing, evaluating and revising a person's plan of service, CCACs are supposed to take into account the person's, including preferences based on ethnic, spiritual, linguistic, familial or cultural factors.³⁴ In most cases, if no attendant of the desired background is available, the client has the choice of accepting service from attendants of other backgrounds or refusing service. If the client can link their request to a clear cultural or religious observance or practice, it could be argued that service providers have an obligation to respect and accommodate that client's cultural observances and provide service as requested. For instance, a Muslim woman should not be forced to accept services of an intimate nature from a male. To force her to make a choice between her cultural observances and receiving vital services would be to discriminate against her on the basis of race, ethnic origin, creed, and/or gender. In such a situation, an application could be brought before the Human Rights Tribunal of Ontario.

³³ See Chapter 3 "Human Rights and Disability Law" in this Primer; also see Human Rights Commission of Ontario, "Policy on Competing Rights, online: http://www.ohrc.on.ca/sites/default/files/policy%20on%20competing%20human%20rights_accessible_2.pdf

³⁴ See section 22(6) of the *Home Care and Community Services Act, 1994*, S.O. 1994, c. 26.

4. Scheduling of Services

The CCAC will generally accommodate services to meet work or school schedules, such as ensuring that a person receives services early enough to allow them to get to work for 9:00 am. CCAC will usually make efforts to co-ordinate service times with medical or other appointments, as long as notice is provided. It is more difficult to ensure services at specific times for people who do not have particular scheduling demands to meet, such as a person who wants to get out of bed at 8:00 AM, but does not need to get up at that time to meet employment or other obligations.

The CCAC or other agencies are expected to make every effort to meet a client's needs. However, it is not likely that HSARB or the Human Rights Tribunal of Ontario (HRTTO) will order a CCAC or agency to hire a new worker to meet the scheduling preferences of a client. If the client can demonstrate that the scheduling demands relate to specific disability related needs, the agency would have an obligation to respond positively to the request. If no agreement can be reached through informal discussion, formal mediation may provide the most effective means to resolve these types of disputes. If a duty to accommodate can be made out, an application to the Human Rights Tribunal of Ontario may be possible.

5. Limits on Provision of Medical Supplies and Services

Other concerns raised by clients include rules or limitations on the amount or frequency of some medical services, such as changing catheters or certain incontinence aids. Where it can be shown that the client needs more services or more frequent services to prevent health complications, the increased frequency of service should be considered an accommodation for the individual's precise disability related needs. An agency that refuses to increase services as required would have to prove undue hardship to defend

against a human rights application based on the failure to accommodate the client's specific disability related needs.³⁵

VI. Responding to Client Concerns

While the ideal would be to ensure that every person with a physical disability received reliable attendant services as required, under current circumstances the reality for many people falls short of the ideal. Few people receive the support they require to perform all of the activities of daily living they would like. Once necessary routine activities are completed, there is often little support time left for 'optional' social activities or entertainment. Getting out of their home to perform even essential activities such as banking or grocery shopping can be challenging for people who require attendant services to participate in the community. Even if attendant services were available to assist people in travelling within the community, accessible transportation services for persons with disabilities are often not available, particularly in regions outside Toronto.

Agencies often claim that they do not have the resources required to hire enough workers to ensure every consumer obtains all required services. When this is combined with absences, illnesses, injuries and high staff turn-over, it becomes clear that few agencies feel they have the ability to meet effectively all the needs of all their consumers all of the time.

Clients who rely on services for essential activities of daily living and have the right to expect services will be provided in a predictable and professional manner by attendants who are respectful and treat them with dignity. When services are interrupted, reduced or re-scheduled, consumers may become angry or mistrust the service provider. In such cases, independent third party mediation or negotiation can help to work toward developing solutions that ensure the client continues to receive the services they require to maintain their health, dignity and sense of security.

³⁵ See *Barber v. South East Community Case Access Centre* 2013 HRTO 60 (Canlii) for discussion of related issues.

The situation is further complicated by the fact that the Bill 168 amendments to *The Occupational Health and Safety Act*, effective since June 2010, can be interpreted by service agencies as meaning that attendants and personal support workers have the right to refuse to accept appointments with consumers if they feel the consumer has been verbally or otherwise abusive or threatening. Disputes can arise if services are provided in a manner that is uncomfortable or awkward, causing a client to lose patience. These disputes can be challenging to resolve. In these cases, mediation may offer an opportunity for the parties to meet and resolve their conflict with the assistance and support of a trained mediator.

If the CCAC is offering services but a client is refusing to accept them for any variety of reasons, it may be difficult to resolve the situation, since it is unlikely that HSARB or any other body will intervene as long as the client is refusing the service. Agencies such as CCACs will usually make efforts to find a new worker. However, staff shortages, high turn-over rates or other considerations may limit their ability to find a new worker who is available when the client needs service. In most cases, this can mean that the client goes without service until a new attendant becomes available to provide service to the client. It may be possible in such cases to convince the CCAC to enter into mediation with the client to resolve the issue in order that the client not to be left without service.

VII. Tools for Promoting Access to Services

In addition to holding agencies and service providers to the basic requirements of the relevant legislation, Ontario's *Human Rights Code* and the *Accessibility for Ontarians with Disabilities Act (AODA)*, there are two other key tools to use to promote the principles of dignity and autonomy for persons receiving attendant services. These are the Home Care Bill of Rights and the United Nations *Convention on the Rights of Persons with Disabilities*.

A. Home Care Bill of Rights

In addition to the relevant legislation, the provision of attendant services is also guided by the Home Care Bill of Rights, set out in Part III of the *Home Care and Community Services Act, 1994* c. 26. This document outlines how people must be treated when they receive attendant services, supportive housing and outreach services. All people who receive attendant services through a Community Care Access Centre are protected by the Home Care Bill of Rights. It could be argued that the Home Care Bill of Rights may also apply if a person is receiving services through a program paid for by the Ministry of Health and Long-Term Care.

Unfortunately, formal mechanisms available to enforce the Home Care Bill of Rights are limited. Consumers can file complaints with service providers if they feel their rights under the Home Care Bill of Rights have been violated.³⁶ Unfortunately, if a consumer is not satisfied with the service providers response to the situation, there are no clear avenues to pursue the matter further. HSARB does not have the jurisdiction to hear appeals related to violations of the Home Care Bill of Rights.³⁷

If a Home Care Bill of Rights violation cannot be dealt with internally, a complaint can be filed with the Ministry of Long-Term Care Action Line.³⁸ The Long Term Care Action Line may in some cases facilitate the referral of CCAC client complaints to an independent third party called an “Independent Complaint Facilitator” who may help to mediate disputes between clients and their CCAC or service provider.³⁹

B. Convention on the Rights of Persons with Disabilities

³⁶ Also see Home Care Bill of Rights (CLEO 2011)

³⁷ See Section 40 of the *Home Care and Community Services Act, 1994*, S.O. 1994, c. 26

³⁸ Ministry of Long-Term Care Action Line (telephone: 1-866-876-7658; TTY: 1-800-387-5559; online: http://www.health.gov.on.ca/english/public/contact/ccac/itc_actionline.html).

³⁹ The Long-Term Care Action Line can be contacted at (1-866-876-7658 or 416-326-6777 (outside of Ontario))

The *Convention on the Rights of Persons with Disabilities* (CRPD) was ratified by the Government of Canada on March 11, 2010, and supports the right of persons with disabilities to live independently and be included in the community. Article 19 of the CRPD specifically requires state parties to take effective and appropriate measures to help persons with disabilities live in the community, including the provision of personal assistance.⁴⁰ It is still unclear exactly what impact the CRPD will have upon the provision of attendant services. However, the CRPD at the very least offers people key principles and specific articles to cite when advocating for improvements in government services.⁴¹

VIII. Tools for Enforcing Clients' Rights

A. Complaints

Generally the first step in challenging a reduction or denial of services or dealing with a quality of service issue is to file a complaint with the service provider.⁴² All service providers are required to have a complaints policy and to provide copies of the policy and any required forms to a client upon request. If the client requires the information in an alternative format as an accommodation, the service provider shall provide all necessary materials in that alternative format.⁴³ If an agency refuses to provide a copy of their complaints policy, a client can contact the Ministry of Long-Term Care Action Line.

Consumers are expected to initiate the complaint. It is necessary to pursue an internal complaint with the relevant service provider before any external complaints processes can be accessed. It is best to request a written response to a complaint since this clarifies the issues and allows for more effective negotiation.

⁴⁰ See Convention on the Rights of Persons with Disabilities, Article 19, online: <www.un.org/disabilities/convention/conventionfull.shtml>.

⁴¹ See Chapter 10 *Convention on the Rights of Persons with Disabilities* in this Primer.

⁴² Also see Home Care Complaints and Appeals (CLEO 2010).

⁴³ Pursuant to section 12 of Ontario Regulation 191/11 under the *Accessibility for Ontarians with Disabilities Act, 2005*

Although policies can vary from agency to agency, in most cases the basic steps are similar. Consumers are urged to speak directly to the attendant or staff person involved and attempt to resolve the dispute informally. If a consumer feels it is not possible to approach the attendant they can speak to a supervisor and manager about the problem. If this does not resolve the matter, a consumer can bring their issue to the Executive Director of the agency. If the problem persists a consumer can make a complaint to the Board of Directors of the agency.

If the complaint involves physical, sexual or financial abuse the police should be contacted. If discrimination is involved it may also be possible to file a human rights application.⁴⁴

Agencies such as ARCH Disability Law Centre⁴⁵ or the Centre for Independent Living in Toronto (CILT)⁴⁶ can offer general advice and guidance to assist consumers filing a complaint.

B. Options if Complaint Does Not Resolve Matter

If a dispute is not resolved through the complaints process a person must pursue other avenues to resolve the matter. As a lawyer you have three basic alternatives to deal with disputes related to the provision of attendant services: negotiation, mediation or litigation.

⁴⁴ Human Rights Legal Support Centre (telephone: (416) 314-6266; toll-free: 1-866-625-5179; TTY: 1-866-612-8627; online: <www.hrlsc.on.ca>; or ARCH Disability Law Centre (telephone: (416) 482-2855; toll free 1-866-482-2724; TTY (416) 482-1254; Toll-free TTY: 1-866-482-2728; online: <www.archdisabilitylaw.ca>.

⁴⁵ ARCH Disability Law Centre (telephone: (416) 482-2855; toll free 1-866-482-2724; TTY (416) 482-1254; Toll-free TTY: 1-866-482-2728; online: <www.archdisabilitylaw.ca>.

⁴⁶ Centre for Independent Living (Toronto)(CILT) (telephone: (416) 599-2458; TTY: (416) 599-5077; Direct Funding Hotline: 1-800-354-9959; online: <www.cilt.ca>.

1. Negotiation

In many cases it will be possible to contact the relevant CCAC or agency and speak to a case manager about the problems listed by the client. Usually, this will provide a lawyer with a fuller understanding of the situation, a better idea of any challenges the service provider faces and, in many cases, greater insight into problems in the relationship between the client and the service provider.

In some cases, a case manager may be willing to work co-operatively with a client's lawyer to develop creative solutions to a problem. At the very least a conversation with a case manager can help identify what the barrier(s) to receiving or increasing service may be and what can be done to remove those barriers.

2. Mediation

If negotiation does not resolve a dispute, it may be useful to consider mediation services such as those offered by the Ontario March of Dimes.⁴⁷ The March of Dimes has expertise with disability issues. They offer a mediation service, at a reasonable cost that, after offering both parties a chance to be heard, helps to identify potential solutions to produce a resolution acceptable to both parties.

The nature of the disputes that can arise in relation to attendant services often involves a variety of frustrations over issues such as the manner in which services are provided. Some of these issues, although serious to the client, do not, in and of themselves, amount to a legal issue serious enough to justify taking formal legal action.

In such cases, it may be useful to pursue mediation. Often face to face meetings between the parties and a third party neutral which allow everyone to express their concerns under the guidance of mediator, can go a long way to reducing tensions and

⁴⁷ Ontario March of Dimes – Mediation Services (telephone: (416) 425-3463 ext. 7725; toll free 1-800-263-3463; online: <www.marchofdimes.ca>.

opening the door to more productive dialogue. March of Dimes provides an accessible and affordable mediation service with a special emphasis on attendant services issues.

3. Litigation

If the parties cannot reach a resolution, it is sometimes possible to bring a formal appeal to the Health Services Appeal and Review Board.⁴⁸ In some cases, where a failure to accommodate argument can be made out, an application to the Human Rights Tribunal of Ontario may be possible.

Health Services Appeal and Review Board

The HSARB process allows for and encourages mediation, so it may be possible to resolve most matters without a hearing or formal decision being required. The mediation process can help achieve results that did not seem possible earlier. If mediation does not produce the desired result, bringing a dispute to a hearing before HSARB is possible.

The key problem is the limited jurisdiction of HSARB. A large number of complaints about attendant services relate to the quality or nature of the service provided or violations of the Home Care Bill of Rights. HSARB lacks the jurisdiction to hear appeals about either of these,⁴⁹ so many important issues raised by clients cannot be brought before HSARB. For more detail on HSARB and its processes see **Appendix 2** to this paper.

Human Rights Tribunal of Ontario

⁴⁸ Health Services Appeal and Review Board (HSARB)(telephone: 1-866-282-2179; TTY: 1-877-301-0889; website: <http://www.hsarb.on.ca>)

⁴⁹ See sections 39 and 40 of the *Home Care and Community Services Act, 1994*, S.O. 1994, c. 26.

If the issue in question relates more to a failure to accommodate a disability, rather than hours or quantity of services, it may be possible to file an application with the Human Rights Tribunal of Ontario. The recent *Barber*⁵⁰ case makes it clear that it is not discrimination when a government program does not offer individualized services catered to the specific *medical* needs of a particular individual. Nevertheless, if a person requires accommodation of a disability to allow them to access attendant services, and that accommodation is denied, or services are cut as a result, then discrimination may have occurred.⁵¹

Accommodation must be provided to persons with disabilities, particularly when the accommodation is required to allow that person to access a vital service. A service provider must find ways to provide accommodation up to the point of undue hardship. This is a high standard to meet. Even when the accommodation involves extra expenditures, a service provider would have to demonstrate that those expenditures seriously compromised the financial viability of the agency or seriously impeded the agency's ability to serve its other clients before they could justify the refusal to accommodate.⁵²

For example, CCACs have a policy that clients must be able to direct their own care. In some instances "direct own care" has been interpreted very narrowly to mean using your own voice to direct care in a manner that an attendant can easily understand. This interpretation can lead to individuals who use alternative forms of communication, such as bliss boards, to be denied service on the basis that they cannot direct their own care. The duty to accommodate would require that clients who use alternative forms of communication be accommodated, which could involve providing training to attendants to allow them to interact properly with and take instruction from the client. A failure to provide such accommodation could amount to discrimination under the *Human Rights Code*.

⁵⁰ *Barber v. South East Community Case Access Centre* 2013 HRTO 60 (Canlii).

⁵¹ For more detail on filing an application before the Human Rights Tribunal of Ontario see <http://www.hrto.ca/hrto/>.

⁵² See Chapter 3 "Human Rights and Disability Law" in this Primer.

In other cases the rights of a client and those of an attendant may come into conflict. For instance, a Muslim attendant may not want to enter a home with a dog or they may not feel comfortable preparing meals with pork. In such cases the rights and obligations of the parties must be balanced, but it can be argued that the needs of the client should prevail and the service agency should have to provide an attendant who was able to meet those needs. The Ontario Human Rights Commission has published a policy outlining processes and procedures to employ when attempting to resolve disputes involving competing or conflicting rights.⁵³

C. Other Possible Avenues to Resolve Matters

In some cases a consumer can contract the Ministry of Health and Long-Term Care Action Line⁵⁴ or the Ontario Ombudsman⁵⁵ for assistance with their problem.

The Action Line can be contacted anytime a client is unhappy with a CCAC service. The Ministry can provide an 'independent complaints facilitator' to provide mediation services to the client and CCAC.

The Ombudsman will accept a complaint only if the complainant has already pursued all other processes, such as internal complaints processes, available to them. The Ombudsman will not get involved in HSARB matters. Even if the Ombudsman is willing to accept a complaint, there is no guarantee the Ombudsman will deal with any particular complaint. However, if the Ombudsman receives a high number of individual complaints about a particular service the office may decide that an investigation is warranted.

⁵³ See Ontario Human Rights Commission, online: <<http://www.ohrc.on.ca/en/policy-competing-human-rights>>.

⁵⁴ Ministry of Long-Term Care Action Line (telephone: 1-866-876-7658; TTY: 1-800-387-5559; online: <http://www.health.gov.on.ca/english/public/contact/ccac/ltc_actionline.html>.

⁵⁵ Ontario Ombudsman (telephone: 1-800-263-1830; TTY: 1-866-411-4211; online: <<http://www.ombudsman.on.ca>>.

APPENDIX 1: DIRECT FUNDING

Application Process and Requirements

The application process for Direct Funding is consumer driven and detailed. Applications can be made directly through the Centre for Independent Living Toronto or through local Centres for Independent Living in Ontario. Applications are pre-screened for clear ineligibility and follow-up. If an applicant makes it through the pre-screening process, the applicant is then placed on a waiting list for an interview.

Waiting Lists and Limitations on Funding

Given that limited funding is available relative to the high number of applications, applicants can expect to remain on a waiting list for as long as 3 to 5 years. Unless the program receives a substantial influx of new money there is little hope of increasing the number of persons receiving direct funding.

Interview Process

Once it is likely that new applicants may be able to access funding, CILT will contact the first applicants on the waiting list to schedule a detailed interview to determine the applicant's ability to meet the eligibility requirements of the program. CILT will help to prepare applicants for the interview, providing information on employment standards, human rights and income tax obligations to applicants in advance of the interview.

At the interview the applicant is expected to discuss their own proposed plan of service and budget and to demonstrate an ability to meet the various obligations of an employer under the Direct Funding Program.

After the interview, if the applicant remains eligible for Direct Funding, he or she can expect to receive funding within 12 months or less. It is necessary to comply with all requirements of the program on an on-going basis in order to maintain the funding.

Challenging Denial of Direct Funding

If, after being interviewed, an applicant is declared ineligible for Direct Funding, the applicant can seek a review of the decision by making a request in writing to CILT. The request will be sent by CILT to an independent third party for review. The review will determine whether the applicant was treated fairly in terms of both procedural and substantive fairness. CILT strives to ensure that applicants receive a reply within 60 days.

Appeals to the Health Services Appeal and Review Board

If an applicant is not satisfied with the response they receive after the CILT independent review, he or she can appeal the decision to the Health Services Appeal and Review Board (HSARB).⁵⁶

Human Rights Tribunal of Ontario

In some cases, if an applicant feels that CILT failed to accommodate their disabilities during the application or interview process, it may be possible to file an application with the Human Rights Tribunal of Ontario.

Challenges of Direct Funding

Aside from the rather onerous requirements relating to reporting and accounting, Direct Funding can pose other challenges. While most recipients agree that direct funding provides them with a far more flexible regime that allows them to better cater their attendant services to their own needs, receipt of Direct Funding does not always guarantee that a person can obtain the services they require. In some, but not all, locations, various agencies may offer higher wages and better benefits to personal support workers, making it difficult to find or retain qualified persons willing to work for

⁵⁶The jurisdiction of HSARB to hear these appeals is unclear. In a 2005 decision, HSARB found that such an appeal was within the jurisdiction of the Appeal Board, however, HSARB decides on a case by case basis whether they have jurisdiction to hear appeals related to decisions about eligibility for Direct Funding. See B-J K v. Centre For Independent Living Toronto, 2005 CanLII 77462 (ON HSARB), <http://canlii.ca/t/2cfb0>.
found that HSARB had jurisdiction to hear such appeals, however, HSARB decides on a case by case basis whether they have jurisdiction to hear appeals related to decisions about eligibility for Direct Funding.

the wage levels Direct Funding recipients can offer. In other locations, regardless of wage levels, there may not be a sufficient number of personal support workers available.

For people living in a Support Service Living Unit there is an additional challenge. Given that their ability to remain in the Support Service Living Unit is tied to the receipt of attendant services from the agency attached to that particular location, anyone obtaining attendant services from another source, such as their own employee, is no longer eligible to remain in the unit. They are usually forced to move within three months of accepting Direct Funding. Given the shortage of accessible apartments in many locations in Ontario, this means that people are often not able to claim their Direct Funding, since they cannot find a new place to live.

APPENDIX 2: HEALTH SERVICES APPEAL AND REVIEW BOARD

About HSARB

The Health Services Appeal and Review Board (HSARB) is an independent quasi-judicial tribunal created by the *Ministry of Health Appeal and Review Board Act, 1998* S.O. 1998, Chapter 18, Schedule H. The Board has jurisdiction over 14 different statutes, including the *Home Care and Community Services Act, 1994*, c. 26 (formerly *Long-Term Care Act, 1994*), the *Nursing Homes Act* and the *Charitable Institutions Act*.

All internal or other complaint processes must be exhausted before bringing a complaint to HSARB.

Filing an appeal with HSARB will not ‘stay’ or suspend the decision under appeal. This means that, in most cases, the reduction or termination of service under review will take effect while the decision is being appealed to HSARB. It is possible however to make a special request that the Board order a “stay” in certain cases. It is not necessary to have a representative (lawyer) to appear before HSARB, although having representation can make the process easier and might increase the chance of success. While it may be possible in some cases to obtain a legal aid certificate to allow a person to hire a lawyer to pursue an appeal, there is no guarantee that a certificate will be provided.

What Issues Can be Brought to HSARB

HSARB receives and hears complaints, conducts hearings and reviews, makes decisions, issues orders and recommendations. Under sections 39 and 40 of the *Home Care and Community Services Act, 1994*, HSARB hears appeals concerning eligibility for community services, exclusions from a community services, the amount of service and the termination of a service by Attendant Care Outreach Services or Support Service Living Units.

In order to appeal to HSARB there must have been an actual formal decision to refuse, reduce or terminate services. If services have been reduced because a provider is

unable to supply a service this will not be deemed a 'decision to terminate or reduce services'.

HSARB will not hear appeals about the quality of services or violations of the Home Care Bill of Rights. It may, however, be possible in some cases to characterize some quality of service or Bill of Rights issues as amounting to a reduction or denial of service.

HSARB does not have the authority to compel a CCAC to provide more services than permitted under the regulation.

HSARB has the authority to consider violations of the Ontario *Human Rights Code*, but, pursuant to s. 6(3) of the *Ministry of Health and Long-Term Care Appeal Review Boards Act, 1998*, HSARB cannot inquire into or make a decision concerning the constitutional validity of an Act or Regulation.

There is currently some debate about whether HSARB has jurisdiction to hear appeals of decisions regarding eligibility for the Direct Funding Program.

Remedies at HSARB

The remedies that HSARB can offer in attendant services cases are limited. HSARB can order the restoration of services or can reverse a decision finding an individual ineligible for services. HSARB cannot however impact the quality or nature of services, resolve staffing shortages or restore damaged relationships with the service provider. Services can still be affected at a later date by staffing, funding or other issues.

Procedures before HSARB

HSARB rules of practice are available on-line.⁵⁷ Some forms are not available on the website. Once a written request for a hearing is sent to HSARB, the necessary forms will be forwarded to the complainant/appellant.

⁵⁷ See <http://www.hsarb.on.ca>

Usually a hearing will be held within 30 days after HSARB receives the Notice Requiring a Hearing, unless the parties agree otherwise. Hearings may be held orally, in writing or electronically.

Decisions will be rendered within three days after a hearing concludes. Written reasons will follow as soon as possible afterward. Pursuant to s. 48(5) of the *Home Care and Community Services Act, 1994* (formerly *Long-Term Care Act 1994*), decisions of HSARB made under that Act are final and binding. However, parties to the appeal may bring an application for judicial review of the decision before the Divisional Court.

Challenges of Bringing Attendant Services Issues before HSARB

Bringing an appeal related to attendant services before HSARB is a challenging endeavour, despite the relatively straight forward processes involved. It is worthwhile to take advantage of the mediation stage of the process to resolve disputes since at that stage of the process a wider range of creative solutions may be possible. Once a matter goes to a hearing, the options may be more limited. The Board is bound by the legislation. It may be useful to consider non-HSARB forms of mediation, such as March of Dimes, before turning to HSARB.⁵⁸

⁵⁸ Ontario March of Dimes – Mediation Services (telephone: (416) 425-3463 ex. 7725; Toll-free 1-800-263-3463; online: <www.marchofdimes.ca>.



Chapter 9

Accessibility Legislation: A Primer on the Accessibility for Ontarians with Disabilities Act, Accessible Customer Service Standards, and Integrated Accessibility Standards

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September 2013

Current to September 2013. Anyone intending to rely on this paper should conduct their own research for updates in the legislation and jurisprudence.

A French version of this paper has been prepared by the Centre for Legal Translation and Documentation. The translation is entitled: *Législation relative à l'accessibilité: Guide d'introduction à la Loi de 2005 sur l'accessibilité pour les personnes handicapées de l'Ontario, aux Normes d'accessibilité pour les services à la clientèle et aux Normes d'accessibilité intégrées* and can be found at Chapter 9. The analysis is based on an English version of the law.

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I. Introduction

This paper provides an introduction to Ontario’s most recent accessibility legislation, the *Accessibility for Ontarians with Disabilities Act* (“AODA”) and its regulations. Practitioners should note that, in addition to the AODA, there are several other statutes that deal with disability-specific and/or accessibility-related requirements. As a primer, this paper is intended to provide a starting point for lawyers, paralegals and advocates who are representing or advocating on behalf of people with disabilities.

II. AODA Framework

On June 13, 2005 the *Accessibility for Ontarians with Disabilities Act* received Royal Assent and became law in Ontario. The purpose of the Act is to achieve accessibility for Ontarians with disabilities in the areas of goods, services, facilities, accommodation, employment, buildings, structures and premises by January 1, 2025.¹

The impetus for the development of the AODA was a recognition that Ontarians with disabilities are subject to substantial disadvantage and exclusion from mainstream Ontario society. Numerous barriers stand in the way of full participation for people with disabilities. For example, people with disabilities face barriers when accessing employment, information, education, public transit, services and facilities that are readily accessible to people without disabilities. Despite the existence of legislation aimed at preventing discrimination on the basis of disability, such as Ontario’s *Human Rights Code*, and legislation aimed at increasing accessibility in certain social areas, such as the *Building Code Act*,²

¹ *Accessibility for Ontarians with Disabilities Act, 2005*, SO 2005, c 11 [AODA] s 1.

² *Building Code Act, 1992*, SO 1992, c 23.

the *Blind Persons' Rights Act*,³ and the *Ontarians with Disabilities Act*,⁴ people with disabilities continued to face systemic barriers. It was felt that Ontario needed legislation to pro-actively remove these barriers in a timely and effective manner, and prevent new barriers from being created.

The AODA establishes the following framework: the Act itself requires the Lieutenant Governor in Council to create regulations that set out requirements for the identification, removal and prevention of barriers in the areas of goods, services, facilities, accommodation, employment, buildings, structures, and premises.⁵ Each regulation is referred to as an Accessibility Standard. The Act sets out to whom the Accessibility Standards apply, details the manner in which Accessibility Standards are to be developed, and establishes enforcement mechanisms. There are currently two Accessibility Standards: the *Accessibility Standards for Customer Service* ("Customer Service Standard") and the *Integrated Accessibility Standards* ("Integrated Standards"). The latter combines several Standards into one regulation, setting out requirements in the areas of information and communications, employment, transportation, and the built environment.⁶

The Accessibility Directorate of Ontario is part of the AODA framework.⁷ Part of the Ministry of Economic Development, Trade and Employment, its mandate is to lead the implementation of the AODA through the development and enforcement

³ *Blind Persons' Rights Act*, RSO 1990, c B 7.

⁴ *Ontarians with Disabilities Act*, SO 2001, C 32. The AODA provides for repeal of the *Ontarians with Disabilities Act* on a day to be named by proclamation. However the *Ontarians with Disabilities Act* remains in effect since no date has been proclaimed. The first independent review of the AODA canvassed the views of some disability organizations on this point and recommended the development of a repeal strategy for the *Ontarians with Disabilities Act*. See note 10, *infra* at 33-34, 42. For a history of the *Ontarians with Disabilities Act* see: M. David Lepofsky, "The Long, Arduous Road to a Barrier-Free Ontario for People with Disabilities: The History of the Ontarians with Disabilities Act – The First Chapter" (2004) 15:2 *National Journal of Constitutional Law* 125-33.

⁵ AODA, *supra* note 1 at s 6.

⁶ *Integrated Accessibility Standards*, O Reg 191/11 s 1.

⁷ AODA, *supra* note 1 at 32. The Directorate was initially established under the *Ontarians with Disabilities Act* to manage the implementation of that legislation. The AODA continued the Directorate and expanded its mandate.

of Accessibility Standards. It is also responsible for providing public education and guidance for accessibility planning and programming. Other functions include advising the Minister on the composition of the committees empowered to develop Accessibility Standards; preparing training materials for members of these committees; advising the Minister on various aspects of enforcement of the Act and regulations; reviewing Accessibility Standards and advising the Minister on their effectiveness and implementation; and making recommendations to the Minister on making changes to or establishing new legislation or programs to improve opportunities for people with disabilities.⁸

The AODA required that a review of the effectiveness of the Act and regulations be undertaken within four years of the coming into force of the legislation.⁹ The Government appointed Charles Beer to conduct this review. His report, entitled “Charting a Path Forward”, was delivered in February 2010 and can be accessed online.¹⁰ Further similar reviews are required to be done every three years.¹¹ The Government has appointed Mayo Moran, Dean of the Faculty of Law, University of Toronto to lead the next review.

In response to some of the recommendations in Beer’s report, the Government recently established the Accessibility Standards Advisory Council. The Council has a mandate to review the existing Accessibility Standards and develop new Standards based on advice and feedback from stakeholders.¹² It is therefore likely that additional Accessibility Standards will be developed and that there will

⁸ *Ibid.*

⁹ AODA, *supra* note 1 at s 41(1).

¹⁰ Charles Beer, *Charting A Path Forward: Report of the Independent Review of the Accessibility for Ontarians with Disabilities Act, 2005* (February 2010), online: Ministry of Community and Social Services
<http://www.mcscs.gov.on.ca/en/mcscs/publications/accessibility/charles_beer/tableOfContents.aspx>.

¹¹ AODA, *supra* note 1 at s 41(5).

¹² Information on the Accessibility Standards Advisory Council is available online: Ministry of Economic Development, Trade and Employment
<<http://www.mcscs.gov.on.ca/en/mcscs/programs/accessibility/partnerships/asac/index.aspx>>.

be opportunities for lawyers, people with disabilities and the general public to provide input.

AccessON is a government website that provides information about the AODA and Accessibility Standards. Its focus is to promote compliance with the AODA by providing information, tools and resources to public and private sector organizations. AccessON can be found at:

<http://www.mcass.gov.on.ca/en/mcass/programs/accessibility/>

III. Customer Service Standard

The Customer Service Standard sets out requirements for removing and preventing barriers in the provision of services to people with disabilities.

The Standard applies to the private and public sectors, and sets out timelines for a phasing-in approach. In the private sector, every person or organization that provides goods or services to the public or third parties and has at least one employee in Ontario must comply with the Standard effective January 1, 2012.¹³ This includes organizations that provide goods and services only to members of the public who meet certain eligibility criteria, such as social assistance programs or attendant care service providers. Providing goods or services to third parties should be interpreted to include provision of services to other businesses, government or other organizations, such as consulting services, manufacturing, and training.¹⁴

In the public sector, the following designated organizations were to have complied with the Standard effective January 1, 2010:

- The Ontario Legislature;

¹³ *Accessibility Standards for Customer Service*, O Reg 429/07 at ss 1, 2.

¹⁴ Ministry of Economic Development, Trade and Employment, online: <<http://www.mcass.gov.on.ca/en/mcass/programs/accessibility/customerService/>>.

- Every Ontario Government ministry;
- Every municipality in Ontario;
- Provincial and municipal boards, commissions and agencies, such as Cancer Care Ontario, administrative tribunals and boards (such as the Social Justice Tribunals), Greater Toronto Transit Authority, Royal Ontario Museum, etc.;¹⁵
- Every district school board;
- Every hospital;
- Every college of applied arts and technology;
- Every university and its affiliated colleges that receive grants from the Ontario Government;
- Every public transit organization, including municipally operated transportation services;¹⁶

The Standard requires relevant organizations and individuals to establish policies, practices and procedures governing the provision of goods and services to people with disabilities. Goods and services must be provided in a manner that respects the dignity and independence of people with disabilities. They must be integrated unless an alternate measure is necessary, and people with disabilities must be given an equal opportunity to use or benefit from the service or good. Organizations and individuals must take into account disability-related needs when communicating with people with disabilities. Every designated public sector organization and private organizations that have at least 20 employees must document its policies, practices and procedures and make these available upon request.¹⁷

¹⁵ Schedule 1 of the Customer Service Standard provides a list of the boards, commissions, authorities and agencies to which the Standard applies. See *Accessibility Standards for Customer Service*, *supra* note 13.

¹⁶ *Accessibility Standards for Customer Service*, *supra* note 13 at ss 1, 2.

¹⁷ *Ibid* at s 3.

Generally, people with disabilities who are accompanied by service animals must be permitted to enter a business premises and keep the animal with them. Support persons must also be permitted to enter a business premises and accompany the person with a disability. The Standard defines the terms “guide dog”, “service animal” and “support person” for the purposes of this provision. Service animals do not need to be certified. An animal is a service animal if it is readily apparent that a person with a disability is using the animal for reasons related to his/her disability.¹⁸

If there are temporary disruptions in facilities or services that people with disabilities generally use, the organization or individual must give notice of the disruption to the public.¹⁹

Organizations must ensure that training is provided to their staff who deal with the public or third parties on their behalf and their staff who develop policies regarding the delivering of goods and services. This training must include a review of the AODA and accompanying regulations, how to interact with people with various kinds of disabilities and what to do if a person with a disability is having difficulty accessing goods and services. Designated public sector organizations and private organizations with 20 or more employees must document these trainings.²⁰

Organizations and individuals must establish a process for receiving and responding to feedback about the manner in which they provide services to people with disabilities. This process must specify what actions will be taken if a complaint is received. Again, designated public sector organizations and private organizations with 20 or more employees must document this process and provide a copy upon request.²¹

¹⁸ *Ibid* at s 4.

¹⁹ *Ibid* at s 5.

²⁰ *Ibid* at s 6.

²¹ *Ibid* at s 7.

As will be evident from the above description of the Customer Service Standard requirements, the Standard does not create any new rights for people with disabilities. Rather, it sets out steps that public and private organizations and businesses must take in order to remove certain specific barriers that people with disabilities may encounter when accessing goods and services. For requirements such as providing training and developing feedback procedures, lawyers and/or individuals with disabilities are able to determine whether a particular organization is complying with its Customer Service Standard obligations by requesting copies of documentation that organizations are required to keep. Organizations and businesses that have not already developed complaint policies and procedures are now required to do so under the Standard.

There are other laws related to accessibility that may apply to organizations covered by the Customer Service Standard, such as the *Building Code Act* and Ontario's *Human Rights Code*. The AODA and the Customer Service Standard do not replace or change what organizations must do under these and other statutes related to accessibility.

IV. Integrated Accessibility Standards

The *Integrated Accessibility Standards* establish the Accessibility Standards for information and communications, employment, transportation, and the built environment. Like the Customer Service Standard, they set out a timeline for a phased-in approach to compliance and apply to public and private sector organizations.

In the public sector the Integrated Standards applies to:

- The Government of Ontario
- The Ontario Legislature

- Every municipality
- Every organization listed in Column 1 of Table 1 of a regulation entitled *Public Bodies and Commission Public Bodies – Definitions*, made under the *Public Service of Ontario Act*. This includes provincial and municipal boards, commissions and agencies, similar to those included under the Customer Service Standard.²²

In the private sector the Integrated Standards apply to people or organizations that provide goods, services or facilities to the public or other third parties and have at least one employee in Ontario.

All organizations must develop and implement policies regarding how the organization will meet its obligations under the Standards. Public sector organizations and large organizations (defined as those with 50 or more employees) must prepare written documents; make these publicly available; and make documents available in accessible formats on request.²³ The Standards also require the same organizations to establish, implement and document multi-year accessibility plans, outlining a strategy to prevent and remove barriers to accessibility. These must be posted on the organization's website and made available in accessible format on request.

Public sector organizations must incorporate accessibility design and features when acquiring goods, services or facilities. The exception to this requirement is where it is not practicable to do so, as determined by the organization itself.²⁴

Public and private sector organizations must provide their employees, volunteers, and people who participate in developing organizational policies with training on the Integrated Standards and on the *Human Rights Code* as it applies to people

²² *Integrated Accessibility Standards*, O Reg 191/11 at ss 1(3), 2.

²³ *Ibid* at s 3.

²⁴ *Ibid* at s 5.

with disabilities. Public sector organizations and large private organizations must keep records of trainings provided, including dates and number of participants.²⁵

Organizations must comply with these provisions in 2012, 2013, 2014 or 2015, depending on their size and nature.²⁶

In addition to the above requirements, the Integrated Standards set out requirements specific to information and communications, employment, transportation, and the built environment. Since these requirements are lengthy and quite technical, the sections that follow discuss just a few of the obligations. Please consult the regulation for detailed and fulsome information on the *Integrated Accessibility Standards* requirements.

A. Information and Communications

Under the Information and Communications provisions of the Integrated Standards, obligated organizations must, upon request, provide or arrange for the provision of accessible formats and communication supports for people with disabilities. This must be done in a timely manner and at a cost that is no more than what is charged to people without disabilities. Organizations must consult with the person who made the request to determine whether a particular format or support is suitable.²⁷

The Ontario Government and Legislature must ensure that their internet, intranet and web content published after January 1, 2012 conforms to specific international standards for web accessibility. Beginning January 1, 2012, most new internet and intranet sites were to have conformed to these international standards. January 1, 2016 most internet and intranet sites must conform. Other public sector organizations and large private organizations must ensure

²⁵ *Ibid.* at s 7.

²⁶ *Ibid.* at ss 3(4), 4(4), 5(3), 7(6).

²⁷ *Ibid.* at s 12.

that most of their websites conform by January 1, 2021.²⁸ This requirement applies to websites, web content and web-based applications that organizations control directly or through a contractual relationship that allows for modification of the sites. Organizations may determine that this requirement is not practicable. However in doing so they must consider the availability of commercial software or tools.²⁹

In the education context, elementary and secondary schools, private career colleges, post-secondary degree programs, and organizations that provide diploma or certificate programs must, upon request, provide educational resources or materials in accessible formats. This can be accomplished by purchasing or acquiring an accessible electronic format or arranging for the provision of a comparable resource in an accessible or electronic format.³⁰

The Information and Communications provisions also set out obligations in relation to public libraries, libraries of educational institutions, and training of educators.³¹

B. Employment Standards

The Employment Standards provisions set out an employer's obligations with respect to employees. Volunteers and non-paid individuals are not included.³²

Employers must notify the public and their employees of the availability of accommodation throughout the job recruitment processes. Employers must provide or arrange for the provision of accessible formats and communication supports for information that is needed to perform the job and information that is generally available in the workplace. Employers must provide individualized

²⁸ *Ibid* at s 14.

²⁹ *Ibid* at s 14.

³⁰ *Ibid* at s 15.

³¹ *Ibid* at ss 16-19.

³² *Ibid* at s 20.

workplace emergency response information to employees with disabilities if the nature of the person's disability warrants an individualized approach.

Employers, other than those with fewer than 50 employees, must develop and have in place written processes for the development of individual accommodation plans for employees with disabilities. Employers, other than those with fewer than 50 employees, must have in place return to work processes for employees who are absent from work due to disability and require accommodations to return to work.

Employers must consider an employee's disability-related needs when using performance management techniques. It is important to note that employers in Ontario have significant obligations under the *Human Rights Code*, including the duty to accommodate disability-related needs of employees, up to the point of undue hardship. For more information on the duty to accommodate, see chapter 3 of this Primer.

C. Transportation Standards

The Transportation Standard defines conventional transportation providers as those that carry public passengers on transit buses, coaches or rail and operate only in Ontario and are provided by public sector transportation organizations. Transit services operated by municipalities, such as TTC and London Transit, are therefore covered by the Standard. Public school boards, hospitals and universities that provide transportation services are also covered. Specialized transportation providers are defined as those that are provided by public sector transportation organizations, operated only in Ontario and designed to transport people with disabilities.³³ This would include para transit services such as Wheel-Trans (in Toronto) and Mobility Plus (in York Region).

³³ *Ibid* at s 33.

Both conventional and specialized transportation providers must conduct employee and volunteer accessibility training, including training on the safe use of accessibility equipment, emergency preparedness that ensures the safety of people with disabilities, and acceptable modifications to procedures when accessibility equipment fails. Records of this training must be kept.

No conventional or specialized provider may charge a fare to a support person who is accompanying a person with a disability where the person with the disability requires such support. It is the person with the disability's responsibility to demonstrate their need for support. This requirement must be met by January 1, 2014.

Conventional transportation service providers who, as of June 30, 2011, have existing contracts to purchase vehicles that do not meet the Standard's accessibility requirements are entitled to maintain those contracts. These same providers are not required to retrofit vehicles that were part of their fleet on July 1, 2011.³⁴

At sections 44 to 62, the Integrated Standards set out detailed requirements for conventional transportation service providers regarding accessibility of vehicles and transportation systems, including requirements related to fares, transit stops, storage of mobility aids, provision of courtesy seating, dealing with service disruptions, announcements, grab bars and handrails, floors and carpets, allocated spaces for mobility aids, stop requests and emergency response controls, lighting, signage, steps, and alarm systems. Compliance is required at different times, depending on the particular obligation.

At sections 63 to 74, the Integrated Standards set out requirements that specialized transportation service providers must fulfill. By January 1, 2017 para transit providers must implement changes to their eligibility requirements so that

³⁴ *Ibid* at ss 39, 40.

there are 3 categories of eligibility. By January 1, 2014, eligibility application processes must include independent appeal processes to review decisions within 30 days of receiving the appeal. Procedures must be developed to provide temporary services for emergencies or on compassionate grounds. Other requirements relate to fee parity between conventional and specialized transportation service providers, co-ordinating services between para transit providers in regions that are geographically connected, booking procedures, and service delays. Para transit providers are prohibited from restricting the number of trips a person with a disability can request or implementing any policies or procedures that would unreasonably limit the availability of the service. As of January 1, 2012, companions and children must be permitted to travel with a person with a disability unless this would result in denial of service to another person with a disability.

Public school boards must ensure that accessible school transportation services for students with disabilities are integrated with regular services. Where this is not possible or safe, as determined by the school board, alternate accessible transportation must be provided. By January 1, 2014, boards must, in consultation with parents or guardians, develop individual school transportation plans for each student with a disability that detail the student's transportation needs and how these needs will be met by the Board.³⁵

Hospitals, colleges and universities that provide transportation services must provide accessible vehicles or equivalent services, upon request of a person with a disability.³⁶

Municipalities that license taxicabs must ensure that taxi owners and operators do not charge higher or additional fares to passengers with disabilities. Taxis may not charge fees for storing mobility aids and devices. Municipalities must

³⁵ *Ibid* at s 75.

³⁶ *Ibid* at s 76.

consult with the public to determine the proportion of accessible taxis required in the community.³⁷

D. Design of Public Spaces Standards/ Accessibility Standards for the Built Environment

Sections 80.1 to 80.44 set out detailed technical requirements for ensuring that public spaces, such as recreation trails, outdoor public eating areas, outdoor play areas, parking, service counters, and waiting areas are accessible for people with disabilities. Most of these requirements apply to public spaces that are newly constructed or redeveloped, beginning on the following dates: January 1, 2015 for the Ontario Government and Legislature; January 1, 2016 for public sector organizations; January 1, 2017 for large private sector organizations; January 1, 2018 for small private sector organizations. Construction contracts that were entered into on or before December 31, 2012 are not required to meet the Standard.

V. Enforcement of AODA and Accessibility Standards

Section 13 of the AODA requires organizations and people to whom Accessibility Standards apply to comply with the requirements of the Standards within the timeframe set out therein. The Act sets out various enforcement mechanisms and powers, including inspections, administrative procedures and monetary penalties, which will be described in more detail below. However, to date, the approach of the Government has been to promote and emphasize voluntary compliance by organizations and assist organizations to fulfill their reporting obligations under the AODA. To this end, through its own website and AccessON, the Ministry provides significant information to the public and private sector organizations regarding the requirements they must meet under the AODA

³⁷ *Ibid* at s 79, 80.

and Accessibility Standards.³⁸ Much of this information is in clear, non-legal language, aimed at promoting voluntary compliance with the legislation.

Importantly, the AODA framework **does not** include any recourse for individuals with disabilities who are prevented from accessing goods, services, transportation, employment or public spaces as a result of an organization's failure to comply with the AODA or Accessibility Standards. The AODA does not empower the Ministry to investigate complaints from individuals or resolve disputes between individuals and businesses or organizations. In addition, there are no mechanisms to challenge a decision by the Ministry that an organization has fulfilled its obligations under the AODA. The AODA framework has been criticized as a result.

Nevertheless, if a person discovers that an organization has not complied with the AODA, he or she should be advised to report this to the Accessibility Directorate of Ontario. The Ministry will track complaints regarding non-compliance.³⁹ Although it is not clear what, if any, actions the Ministry would take, it is important to ensure that the Ministry is aware of situations of non-compliance since the AODA does provide powers of inspection, auditing, monetary penalties and administrative procedures.

A. Reporting

Section 14 of the AODA requires organizations and people to whom Accessibility Standards apply to file accessibility reports.⁴⁰ The exception to this is that private organizations that have fewer than 20 employees are exempted from filing accessibility reports regarding the Customer Service Standard.⁴¹ The Ontario Government and Legislature are required to file annually, while other public

³⁸ AccessON can be found at: <<http://www.mcass.gov.on.ca/en/mcass/programs/accessibility/>>.

³⁹ Interview of Accessibility Directorate (Feb 28, 2013).

⁴⁰ AODA, *supra* note 1 at s 14(1).

⁴¹ *Exemption from Reporting Requirements*, O Reg 430/07.

sector organizations are required to file every two years. Large public sector organizations are required to file every three years.⁴²

The Ministry requires accessibility reports to be filed electronically. To this end, the Ministry has created an online Accessibility Compliance Reporting tool, which must be used to complete, certify and submit accessibility reports. Completing the online report is not particularly onerous. For example, the Customer Service Standard report consists of answering 15 yes/no questions.

The Ministry has the power to review an accessibility report to determine whether it complies with the Accessibility Standards.⁴³

Most organizations to which the AODA framework applies must make accessibility reports available to the public. Lawyers can, therefore, request or advise clients to request copies of accessibility reports.

B. Inspections

The AODA requires at least one inspector to be appointed to carry out inspections to determine whether organizations are complying with the AODA and Accessibility Standards. At the time of writing, one inspector had been appointed to the Accessibility Directorate's Compliance Assurance Unit; however, additional staff were involved in conducting audits.⁴⁴

Except for dwellings, inspectors are empowered to enter premises where the inspector believes there may be documents or things relevant to the inspection. No warrant is required. A warrant must be obtained in order to enter dwellings. Inspectors may require the production of relevant documents, records or things, or question people in relation to the inspection.

⁴² *Integrated Accessibility Standards*, *supra* note 22 at s 86.1.

⁴³ AODA, *supra* note 1 at s 16.

⁴⁴ Interview of Accessibility Directorate (Feb 28, 2013).

C. Orders and Administrative Penalties

A Director appointed by the Deputy Minister may conclude that a person or organization has contravened a provision of an Accessibility Standard or has failed to comply with their reporting obligations. The Director may then order the person or organization to comply with the Standard or file an accessibility report within a certain period of time or pay an administrative penalty.⁴⁵ A Director is not permitted to make an order unless s/he has given the person or organization notice and an opportunity to make submissions in respect of the order.⁴⁶

Failure to comply with an order to pay an administrative penalty may result in the order being filed with the Superior Court of Justice. The order is then enforceable in the same vein as an order of the Court.⁴⁷

Directors have the power to determine the amount of the administrative penalty, depending on the severity of the contravention, the person or organization's history of compliance, and the size of the organization. The Integrated Standards set out the factors that a Director must consider when making these determinations.⁴⁸

The penalty for individuals or unincorporated organizations ranges from \$2,000 to \$200, depending on the history and severity of the contravention. The penalty for corporations ranges from \$15,000 to \$500, depending on the same factors. For major contraventions, the Director may order an individual or organization to pay a daily penalty, up to a maximum of \$100,000 for corporations or \$50,000 for individuals and unincorporated organizations.⁴⁹

⁴⁵ AODA, *supra* note 1 at ss 21 (3), 21(4).

⁴⁶ *Ibid* at s 22. Section 22(3) requires submissions to be filed within 30 days of receipt of the notice or another period of time specified in the notice.

⁴⁷ AODA, *supra* note 1 at s 23.

⁴⁸ *Integrated Accessibility Standards*, *supra* note 22 at s 83.

⁴⁹ *Ibid* at s 83(1)5 and Schedules 1, 2.

A person or organization may seek a review of a Director's order by providing a written submission within 30 days after the order was made. A different Director must review the order. S/he may reduce the amount of the penalty but may not increase it.⁵⁰

D. Appeals to the License Appeal Tribunal

Appeals of Director's order can be made to the License Appeal Tribunal.⁵¹ A notice of appeal must be filed within 15 days after the order was made. Generally the Tribunal will conduct the appeal in writing, and may confirm, vary or rescind an order. The Tribunal may employ mediation to resolve an appeal.

VI. AODA and Human Rights Legislation

Ontario's *Human Rights Code* guarantees people with disabilities the right to be free from discrimination and harassment on the basis of their disability. It applies to employment, housing, goods, services, contracts, and membership in vocational associations.⁵² The concomitant obligation to this right is the duty to accommodate disability. Employers, landlords, transit providers, educational institutions, restaurants, government offices, public services, and others have a legal obligation to accommodate a person with a disability unless doing so would cause undue hardship.⁵³

Unlike the AODA and Accessibility Standards, the Code does not enumerate specific requirements to remove or prevent barriers to accessibility for people with disabilities. Rather, the Code sets out broad rights and obligations that have

⁵⁰ *Ibid* at s 84.

⁵¹ AODA, *supra* note 1 at s 27. *Integrated Accessibility Standards*, *supra* note 22 at s 86.

⁵² *Human Rights Code*, RSO 1990, c H.19 at ss 1,2, 3, 5, 6.

⁵³ *Ibid* at ss 11, 17. See the Chapter on Human Rights in this Disability Law Primer for a more detailed explanation of rights and obligations under the *Human Rights Code*.

been interpreted by Ontario's human rights tribunals and courts. In this respect the Code is more flexible and dynamic than the AODA. As our understanding of disability changes and new technologies are created, new forms of accommodation are required. Code rights and obligations can be interpreted to apply to emerging disabilities and future forms of accommodation.

Another important difference between the AODA and the Code is with respect to enforcement. As described above, the AODA does not create any mechanisms for individuals to seek enforcement of AODA requirements. The License Appeal Tribunal will not hear complaints from individuals. Conversely, under the Code, individuals can file a human rights application with the Human Rights Tribunal of Ontario if they believe their human rights have been infringed. The Human Rights Tribunal resolves individual applications by conducting mediations and/or hearings. Individuals have attempted to bring their complaints regarding AODA non-compliance to the Human Rights Tribunal. The Tribunal has clearly ruled that it does not enforce the AODA.⁵⁴ However, where a failure to comply with an Accessibility Standard can be framed as a breach of the Code, an application may be brought to the Human Rights Tribunal.

Perhaps because the AODA framework is relatively new, some confusion exists regarding the relationship between the AODA and the Code. A misperception exists that the AODA sets out the full and complete set of legal obligations and requirements which organizations must meet in order to ensure that they are accessible to people with disabilities. Another way of stating this same misperception is that compliance with the AODA guarantees compliance with the Code and renders an organization immune from liability for discrimination. An example of this is apparent in *Wozenilek v. 7-Eleven Canada*, where the

⁵⁴ *Baltrano v. Ontario (Community and Social Services)*, 2010 HRTO 268 (CanLII). *Bishop v. Hamilton Entertainment and Convention Facilities Inc.*, 2012 HRTO 708 (CanLII).

respondent argued that a systemic remedy was not needed, since under the AODA it was required to ensure that its stores were accessible by 2012.⁵⁵

The AODA addresses this misperception as follows: section 3 of the Act states that nothing in the AODA or Accessibility Standards diminishes the legal obligations imposed by other legislation. The Integrated Standards state that the requirements set out therein are not a replacement or substitution for the obligations that exist under the *Human Rights Code*.⁵⁶ Further, section 38 of the AODA states that where a provision of the AODA or an Accessibility Standard conflicts with a provision of another Act, the provision that provides the highest level of accessibility shall prevail. As a result, organizations and individuals who comply with the AODA and Accessibility Standards still have legal obligations to accommodate people with disabilities under the *Human Rights Code*. The AODA framework has not changed human rights requirements.

The *Integrated Accessibility Standards* provide that every obligated organization must ensure that training on the Code is provided to employees, volunteers, those who participate in developing policies, and all other people who provide goods, services or facilities on behalf of the organization.⁵⁷ In this regard, the Ontario Human Rights Commission provides a training module which can be accessed at: <http://www.ohrc.on.ca/en/learning/working-together-ontario-human-rights-code-and-accessibility-ontarians-disabilities-act>.

Organizations that have complied with the AODA may still be in breach of their human rights obligations. In *Palangio v. The Corporation of the Town of Cochrane* the respondent Town submitted that it was in the process of developing policies, practices and procedures on accommodating people with disabilities in order to comply with its AODA obligations. Despite this, the Human

⁵⁵ *Wozenilek v. 7-Eleven Canada*, 2010 HRTO 407 (CanLII). The Tribunal did not rule on this submission, given that the scope of the application was narrowed to exclude this issue. However, the case demonstrates the type of arguments respondents may make.

⁵⁶ *Integrated Accessibility Standards*, *supra* note 22 at s 1(2).

⁵⁷ *Ibid* at s 7.

Rights Tribunal of Ontario found that at the time of the hearing the Town had not fully accommodated people with hearing loss in its Council Chambers and meeting rooms. As a result the Town was ordered to review its policies and complaint procedures related to discrimination on the basis of disability and ensure that these complied with the Code.⁵⁸ Individuals whose disabilities have not been accommodated appropriately are entitled to file human rights applications and request systemic remedies, despite the fact that the respondent may have implemented its AODA requirements.

In *McMahon v. U-Haul Co.* the Human Rights Tribunal ordered the respondent to produce records of trainings it had conducted under the AODA. The Tribunal found that these documents were relevant to the issues in the Application, including the issue of remedy.⁵⁹

VII. Impact of the AODA on Other Legislation

The AODA was used by the Superior Court as a tool for statutory interpretation of a provision of the *Retail Sales Tax Act*. The issue in the case was whether the purchase of low floor buses by Wheel-Trans fell within a statutory tax exemption for equipment designed solely for the use of people with disabilities. The Court cited the AODA, together with the Code and s.15 of the Charter as evidence that society has resolved to address and remove barriers to accessibility for people with disabilities. The Court found that the *Retail Sales Tax Act* must be interpreted so as to advance these goals.⁶⁰

In a similar vein, the AODA was cited by an Ontario Grievance Settlement Board to determine what was appropriate under a collective agreement. A dispute arose between ODSP workers and the Ministry of Community and Social

⁵⁸ *Palangio v. The Corporation of the Town of Cochrane*, 2011 HRTO 1491 (CanLII).

⁵⁹ *McMahon v. U-Haul Co. (Canada) Ltd.*, 2012 HRTO 543 (CanLII).

⁶⁰ *Toronto Transit Commission v. Ontario (Finance)*, 2008 CanLII 67910 (ON SC).

Services regarding whether a physical barrier should be erected in ODSP offices to prevent contact between ODSP workers and recipients. The Board determined that the Ministry's proposal, which did not include physical barriers, was consistent with the collective agreement and applicable legislation. In making this determination the Board stated that the creation of a physical barrier would be inconsistent with the intent of the AODA.⁶¹

Aside from the AODA, several laws exist in Ontario in relation to accessibility issues; the *Blind Persons Rights Act* and the *Building Code Act* are two examples. The AODA and Accessibility Standards do not replace or change existing legal obligations under other statutes.

VIII. Conclusion

Despite criticism of the AODA and Accessibility Standards, the legislation has important symbolic value for Ontario's disability community. It provides public recognition of the history of disadvantage and exclusion that Ontarians with disabilities endured, and makes accessibility an important public policy goal. It is hoped that the accessibility requirements set out in the Standards will provide practical tools and guidance for improving accessibility in the public and private sector.

Lawyers, paralegals and advocates advising persons with disabilities must be aware that the AODA framework does not create new rights, nor does it provide for individual relief in the event that an organization or individual has failed to comply. However, it can be used to provide legal support for requests for disability accommodation, and may be useful in providing guidance when crafting human rights remedies.

⁶¹ *Ontario Public Service Employees Union v. Ontario (Community and Social Services)*, 2008 CanLII 70515 (ON GSB).



Chapter 10

United Nations *Convention on the Rights of Persons with Disabilities*: A Primer

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Current to September 2013. Anyone intending to rely on this paper should conduct their own research for updates in the legislation and jurisprudence.

A French version of this paper has been prepared by the Centre for Legal Translation and Documentation. The translation is entitled: *Convention des Nations Unies relative aux droits des personnes handicapées: guide d'introduction* and can be found at Chapter 10. The analysis is based on an English version of the law.

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I. History and Introduction

The United Nations General Assembly adopted the *Convention on the Rights of Persons with Disabilities (CRPD)* on December 13, 2006.¹ The adoption of the *CRPD* is lauded as an historic development in the struggle for global disability rights; the Convention was the first new comprehensive human rights treaty in 16 years and the first in the 21st century.² For the international disability community, adoption of the treaty marked the end of a very long journey spent pressing for a new human rights instrument that dealt specifically with the rights of persons with disabilities, separate from existing instruments.³ States and civil society worked together to develop the *CRPD* and achieved "the most rapidly negotiated human rights treaty in the history of international law; and the first to emerge from lobbying conducted extensively through the Internet."⁴

Several UN human rights instruments that predate the *CRPD* declare that all persons have a right to be free from discrimination and enshrine rights that are applicable to persons with disabilities, along with those who do not have disabilities. The *Universal Declaration of Human Rights*⁵, the founding human rights document, states that everyone, regardless of status, has the right to be free from discrimination; the *International Covenant on Civil and Political Rights (ICCPR)*⁶ and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*⁷ both set out important human rights guarantees that apply also to persons with disabilities. Nonetheless, for human rights advocates and scholars it was clear

¹ *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) [*Convention on the Rights of Persons with Disabilities*].

² Don MacKay, "The United Nations Convention on the Rights of Persons with Disabilities" (2006-2007) 34 *Syracuse J Int'l L & Com* 323 at 323.

³ *Ibid.*

⁴ The Secretary-General, "Message of the Secretary-General on the adoption of the Convention on the Rights of Persons with Disabilities, delivered by Deputy Secretary-General", UN.Doc SG/SM/10797, HR/4911, L/T/4400 (December 13, 2006), online: <<http://www.un.org/News/Press/docs//2006/sgsm10797.doc.htm>>.

⁵ GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc 1st A/810, (1948) 71, Article 7.

⁶ 19 December 1966, 999 UNTS 171, 6 ILM 368 (entered into force 23 March 1976) [*ICCPR*].

⁷ 16 December 1966, 993 UNTS 3, 6 ILM 360 (entered into force 3 January 1976) [*ICESCR*].

that these rights have not been universally applied to all people; some groups have been less of a priority for governments in the enforcement of their rights over the years.^{8 9}

The United Nations began negotiation of a new convention, dedicated to the rights of persons with disabilities, in 2001. This was as a result of tenacious and persuasive lobbying by non-governmental organizations, disability organizations and advocacy by governments such as Mexico and New Zealand.¹⁰

Action by all involved was critical to address the alarming situation of persons with disabilities throughout the world. Some of the statistics which ignited this action were the following:

- Twenty percent of the world's poorest people were disabled, and tended to be regarded in their own communities as the most disadvantaged;¹¹
- The mortality rate for children with disabilities may have been as high as 80% in countries where under-five mortality as a whole had decreased below 20%;¹²
- According to UNICEF, 30% of street youths have disabilities;¹³
- Persons with disabilities are more likely to be victims of violence or rape, according to a 2004 British study, and less likely to obtain police intervention, legal protection, or preventive care;¹⁴
- Women and girls with disabilities are particularly vulnerable to abuse. A small 2004 survey in Orissa, India, found that virtually all of the women and girls with disabilities were beaten at home, 25% of women with intellectual

⁸ *Supra* note 2 at 324.

⁹ Early on, it was recognized that some groups of people who suffer discrimination needed their own specific conventions to enshrine in more detail the rights that apply to those groups. The need for group-specific coverage was recognized by, for example, the adoption of the *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13, 19 ILM 33 (entered into force 3 September 1981); the *International Convention on the Elimination of all Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195, 5 ILM 350 (entered into force 4 January 1969); and, the *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, 28 ILM 1456 (entered into force 2 September 1990).

¹⁰ *Supra* note 2 at 324.

¹¹ UN Web Services Section, Department of Public Information, "Some Facts about Persons with Disabilities," online: <<http://www.un.org/disabilities/convention/facts.shtml>>.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

disabilities had been raped, and six percent of disabled women had been forcibly sterilized;¹⁵

- Research indicates that violence against children with disabilities occurs at annual rates at least 1.7 times greater than for their non-disabled peers;¹⁶
- Ninety percent of children with disabilities in developing countries do not attend school, according to UNESCO;¹⁷
- The global literacy rate for adults with disabilities was as low as three percent, and one percent for women with disabilities, according to a 1998 UNDP study;¹⁸
- Unemployment amongst disabled persons is as high as 80% in some countries.¹⁹

Louise Arbour, the United Nations Commissioner for Human Rights and former Supreme Court of Canada Justice, told the Ad Hoc Committee on January 27, 2006, when it was moving towards the final phase of its negotiations:

There is no doubt that the existing human rights system was meant to promote and protect the rights of persons with disabilities. There is also no doubt that the existing standards and mechanisms have in fact, failed to provide adequate protection in the specific case of persons with disabilities. It is clearly time for the United Nations to remedy this shortcoming.²⁰

The *CRPD* broke new ground with the inclusion in its negotiation of persons directly affected by the treaty. Civil society participated at an unprecedented level for such a negotiation, with over 400 representatives pre-registered at some meetings.²¹ The Ad Hoc Committee tasked an Expert Working Group with developing a comprehensive draft Convention and was comprised of representatives from government and civil society

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Louise Arbour, UN High Commissioner for Human Rights, "Statement at the General Assembly Ad Hoc Committee", 7th Session (January 27, 2006), online <<http://www.un.org/esa/socdev/enable/rights/ahc7stathchr.htm>>.

²¹ *Supra* note 2 at 328.

participating together equally and without distinction.²² The Working Group's product emphatically reflected the real-life experiences of persons with disabilities and became the working text of the Ad Hoc Committee and the basis for the eventual Convention.²³ The Convention truly enshrined the slogan of the international disability movement, "nothing about us without us."²⁴

The *CRPD* is a hybrid convention, containing civil and political rights as well as economic, social and cultural rights. The Convention does not lay out a hierarchy of rights, and many of the individual articles contain both categories of rights.²⁵ State Parties are obligated to guarantee civil and political rights upon ratification of the Convention, but it is acknowledged that State Parties may not be in a position to guarantee economic, social and cultural rights immediately.

The standard of implementation for economic, social, and cultural rights is "progressive realization" to the maximum of a State's available resources.²⁶ This means that those rights must be progressively implemented. Two important elements of implementation of those rights are immediately binding, however. First, governments must ensure that those rights are applied on a non-discriminatory basis and, governments must undertake concrete steps to implement those rights.²⁷

II. Optional Protocol and Monitoring

The *CRPD* is accompanied by an Optional Protocol, which establishes the competence of the Committee on the Rights of Persons with Disabilities²⁸ along with its mandate to receive

²² See UN Enable, Ad Hoc Committee on a Comprehensive and Integral International Convention on the protection and Promotion of the Rights and Dignity of Persons with Disabilities, online <<http://www.un.org/esa/socdev/enable/rights/adhoccom.htm>>.

²³ *Ibid.*

²⁴ "Nothing about Us without Us? Recognizing the Rights of People with Disabilities" UN CHRONICLE, 2004, online <<http://www.un.org/Pubs/chronicle/2004/issue4/0404pl0.html>>.

²⁵ *Supra* note 2 at 330.

²⁶ *Supra* note 1, Article 4(2).

²⁷ *Ibid.*

²⁸ *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UNGAOR, 61st Sess, UN Doc A/Res/61/106 (13 December, 2006), Article 1(1).

and consider communications from or on behalf of individuals or groups who claim to be victims of violation by the State Party of the provisions of the Convention. The Committee on the Rights of Persons with Disabilities is also responsible for international monitoring and receives and considers periodic reports from States Parties along similar lines to those under other human rights treaties.²⁹ It is important to note that although Canada has ratified the *CRPD*, it has not ratified the Optional Protocol.

III. Themes

The *CRPD* outlines in considerable detail the rights of persons with disabilities under international law and sets out a code of implementation for governments. It is a practically focused convention closely informed by the experiences of persons with disabilities worldwide, as represented by their organizations in the negotiations. People with disabilities clearly articulated the challenges, difficulties, and requirements of persons with disabilities in their interaction with society at large, and it is that myriad of areas on which the Convention focuses.³⁰

The *CRPD* spans a wide range of issues, including accessibility, personal mobility, health, education, employment, adequate standard of living and social protection, habilitation and rehabilitation, and participation in political life, equality and non-discrimination. The Convention marks a "paradigm shift" from thinking about disability as a social welfare matter to dealing with it as a human rights issue, which acknowledges that societal barriers and prejudices are themselves disabling.³¹

Three recurring themes can be drawn from the Convention:³²

The central element of **inclusiveness in the community** accepts the tenet that segregation and institutionalization are not normally in the interests of the person

²⁹ *Supra* note 1, Articles 34-35.

³⁰ *Supra* note 2 at 327.

³¹ *Supra* note 2 at 328.

³² *Supra* note 2 at 329.

concerned, nor of the community as a whole. Persons with disabilities flourish best within the community, rather than outside it, and have contributions to make.³³

The *CRPD* sets out various actions to be taken by States in bringing about a **change of attitudes and elimination of discrimination and stereotyping**.³⁴

Accessibility, a third recurring theme, includes physical accessibility to buildings, as well as other forms of accessibility. The promotion of the use of universal design, from which we all benefit, encourages enhanced accessibility through signage in Braille, providing accessible information and ensuring the use of accessible communication technologies, among other forms of accessibility. The Convention also deals with related issues such as ensuring personal mobility, where that is a problem, and facilitating independent living.³⁵

The need to address systemic discrimination has also been recognized at the international level. The *Convention on the Rights of Persons with Disabilities* expressly incorporates **universal design**, and defines this concept as:

...the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. “Universal design” shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.³⁶

Universal design is a proactive approach towards ensuring that services, products and environments are accessible and usable by the broadest possible community without the need for specialized adaptations, additional modifications or after-the-fact redesign.

Universal design reflects a focus on ensuring that the environment is equally available, appealing and useful to a diverse population by providing the same means of use to all

³³ *Supra* note 2 at 329.

³⁴ See *supra* note 1, Article 4.

³⁵ *Ibid*, Article 9(1).

³⁶ *Convention on the Rights of Persons with Disabilities*, *supra* note 1, Article 2.

users and avoiding the segregation or stigmatization of any users.³⁷ Initially developed in the context of architecture and the built environment, universal design and its principles have been applied in contexts far removed from architecture.³⁸ Universal design can be applied to social planning in order to proactively redress barriers, prevent future barriers and create more inclusive social environments. Universal design does not eliminate the need for individual accommodation, although the need for such accommodation will be reduced if the environment is inclusive.³⁹

The existing legal framework for adjudicating human rights applications has been criticized for failing to adequately develop the legal concept and application of universal design to disability discrimination claims.⁴⁰

IV. Articles

³⁷ Universal design, as conceived by the Centre for Universal Design at North Carolina State University, espouses seven principles that are aimed at ensuring the most number of users are considered when designing new spaces. The seven principles are:

1. Equitable use: the design is useful and marketable to people with diverse abilities;
2. Flexibility in use: the design accommodates a wide range of individual preferences and abilities;
3. Simple and intuitive use: use of the design is easy to understand, regardless of the user's experience, knowledge, language skills, or current concentration level;
4. Perceptible information: the design communicates necessary information effectively to the user, regardless of ambient conditions or the user's sensory abilities;
5. Tolerance for error: the design minimizes hazards and the adverse consequences of accidental or unintended actions;
6. Low physical effort: the design can be used effectively and comfortably and with a minimum of fatigue; and
7. Size and space for approach and use: appropriate size and space is provided for approach, reach, manipulation, and use regardless of user's body size, posture, or mobility.

North Carolina State University, "Guidelines for the Use of the Principles of Universal Design" (1997), online: North Carolina State University, The Centre for Universal Design <http://www.ncsu.edu/ncsu/design/cud/about_ud/docs/use_guidelines.pdf>. See also Molly Follette Story, "Principles of Universal Design" in Wolfgang FE Preiser et al, eds, *Universal Design Handbook* (New York: McGraw-Hill, 2001) 4.3 at 10.3.

³⁸ For examples of a variety of contexts that universal design can be applied to, see online: University of Washington <<http://www.washington.edu/doit/Brochures/Programs/ud.html>>.

³⁹ Wendy Bailey, Disability and Universal Design, online: SNOW: Special Needs Ontario Window <http://snow.utoronto.ca/index.php?option=com_content&task=view&id=409&Itemid=380>.

⁴⁰ See Dianne Pothier, "Tackling Disability Discrimination At Work: Toward A Systemic Approach" (2010) 4:1 McGill JL & Health 17 at 17.

The *CRPD* is a lengthy convention with over thirty substantive articles, including monitoring mechanisms at both the national and international levels. For the purposes of this Primer, the following Articles are highlighted as arising most often in the practice of disability law:

- *Preamble, Article 1 Purpose, Article 2 Definitions, Article 3 General principles, Article 4 General obligations and, Article 5 Equality and non-discrimination* are all important and useful articles for understanding the Convention itself, for developing persuasive submissions in support of implementation of the Convention, and in aid of statutory interpretation in domestic law.
- Article 8 *Awareness-raising.*
- Article 9 *Accessibility.*
- Article 12 *Equal recognition before the law* which speaks to the exercise of legal capacity and the equal right to control one's own financial affairs.
- Article 13 *Access to justice* which is particularly useful for clinic or poverty law practice and in support of promoting access to justice.
- Article 14 *Liberty and security of the person.*
- Article 16 *Freedom from exploitation, violence and abuse.*
- Article 17 *Protecting the integrity of the person.*
- Article 19 *Living independently and being included in the community.*
- Article 20 *Personal mobility.*
- Article 21 *Freedom of expression and opinion, and access to information.*
- Article 22 *Respect for privacy.*
- Article 23 *Respect for home and the family.*
- Article 24 *Education* which provides for the assurance of inclusive education.
- Article 25 *Health.*
- Article 26 *Habilitation and rehabilitation.*
- Article 27 *Work and employment.*
- Article 28 *Adequate standard of living and social protection.*
- Article 29 *Participation in political and public life.*
- Article 31 *Statistics and data collection.*
- Article 33 *National implementation and monitoring.*
- Article 34 *Committee of the Rights of Persons with Disabilities.*
- Article 35 *Reports by States Parties.*

V. Canada's Role in Creating the CRPD

Canada became a Member State of the United Nations on November 9, 1945.⁴¹ Since then, Canada has ratified six UN human rights conventions and acceded to four others, including the *CRPD*, which was signed on March 30, 2007.⁴² On March 11, 2010, “Canada renewed its commitment to people with disabilities, about 14.3% of the Canadian population, by ratifying the [*CRPD*].”⁴³ “In 50 articles, the *CRPD* clearly articulates the meaning of human rights within a disability context and establishes reporting and monitoring procedures for States Parties.”⁴⁴

Bolstered by the disability rights refrain of “nothing about us, without us,” the Canadian delegation for the *CRPD*, along with other representatives of the worldwide disability community, worked together to draft the *CRPD*.⁴⁵ This process took place between 2002 and 2006, over the course of nine or ten meetings at the UN in New York and at regional meetings around the world.⁴⁶ According to some, by the passage of the *CRPD*, “the most excluded group of people in society became the most included in the history of the United Nations.”⁴⁷

Throughout the elaboration and ratification stages, the Canadian government was dedicated to communicating and collaborating with the provinces, territories, and the Canadian disability rights community.⁴⁸ As a result, Canada was more influential than many other Member States, which culminated in the *CRPD* having a “uniquely Canadian feel.”⁴⁹ For example:

⁴¹ The United Nations, Office of the High Commissioner for Human Rights, *Human Rights in the World*, online: <<http://www.ohchr.org/EN/Countries/Pages/HumanRightsintheWorld.aspx>>.

⁴² The United Nations, Enable, *Convention and Optional Protocol Signatures and Ratifications*, online: <<http://www.un.org/disabilities/countries.asp?navid=12&pid=166#C>>.

⁴³ Council of Canadians with Disabilities, *CRPD - 10 Facts Canadians Should Know*, online: <http://www.ccdonline.ca/en/international/un/canada/10-facts>.

⁴⁴ CCD-CACL Working Paper, *UN Convention on the Rights of Persons with Disabilities: Making Domestic Implementation Real and Meaningful*, (February 2011), online: Council of Canadians with Disabilities <<http://www.ccdonline.ca/en/international/un/canada/making-domestic-implementation-real-and-meaningful-feb2011>>.

⁴⁵ Steven Estey, *The Road to the UN Convention*, (March 29, 2011), online: Council of Canadians with Disabilities, <<http://www.ccdonline.ca/en/international/un/canada/road-to-the-un-convention-march2011>>.

⁴⁶ *Ibid.*

⁴⁷ Dulcie McCallum, “Up the Basics: the Right to Decide” in *Celebrating our Accomplishments: A voice of our own* (Winnipeg: Council of Canadians with Disabilities, 2011) 145 at 149 [McCallum].

⁴⁸ *Supra* note 44.

⁴⁹ *Supra* note 44.

Article 5 (equality and non-discrimination) is very consistent with [Section] 15 of the Canadian Charter of Rights and Freedoms; Article 12 (equal recognition before the law) was facilitated by the Canadian delegation and secures a progressive approach to legal capacity and, for the first time in international law, recognizes a right to use support to exercise one's legal capacity-- a made-in-Canada solution; Article 24 (education) secures a right to inclusive education—a concept which Canada, in particular, New Brunswick, is seen as a national leader on.⁵⁰

VI. Canada's Commitment to the CRPD

By signing and ratifying the *CRPD*, Canada bound itself to the treaty and assumed the responsibility of ensuring respect for its obligations under the treaty.⁵¹ Ratification of the *CRPD* was therefore a significant step in confirming Canada's commitment to the principles and obligations set out in the *CRPD*, namely to promote, protect and ensure the full enjoyment of human rights by persons with disabilities.

The *CRPD* is unique both internationally and domestically for Canada. The *CRPD* was:

the first human rights treaty of the 21st Century; the fastest negotiated human rights Convention in UN history and the first time in history civil society actively participated in the development and negotiation of the text; the first human rights Convention with an explicit social development dimension; and, with 82 signatories on March 30, 2007, it has the highest number of signatories in history to a UN Convention. Domestically, it is also the first time Canada has signed a UN Convention on its opening day.⁵²

Such gestures demonstrate Canada's and the other UN Member States' dedication to expanding the human rights and full access of persons with disabilities.

⁵⁰ *Supra* note 44.

⁵¹ Armand de Mestral & Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53 McGill L.J. 573 at para 48.

⁵² *Supra* note 44.

On the other hand, thus far, Canada has not ratified the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*⁵³ and signals no intention to do so. The Optional Protocol supplies a concrete form of legal redress in that it “provides a mechanism for individuals and groups, who have exhausted all domestic avenues of redress, to have claims of discrimination heard by the UN Committee on the Rights of Persons with Disabilities.”⁵⁴ Until Canada ratifies the Optional Protocol, people with disabilities in Canada do not have access to this legal redress.

VII. Interpreting the CRPD

“[T]o understand the full implications of the *CRPD* rights and obligations it is necessary to read its articles in relationship to each other, rather than in isolation.”⁵⁵ The foundational aspects of the *CRPD*, including the Preamble, Article 3 and Article 4, inform a full understanding of all more specific articles. While one must read the *CRPD* in relation to all articles, according to the International Disability Alliance, some articles are inextricably intertwined with others, for example Article 28 which recognizes the right of persons with disabilities to an adequate standard of living is linked to Article 19, which discusses living independently and being included in community and Article 23, which discusses respect for home and family.⁵⁶ Articles 31 and 33 discuss details that are essential for implementation of that standard of living.⁵⁷

The General Principles of the Convention set out in Article 3 apply to all articles in Convention. These principles are particularly important and useful in the interpretation of other Articles. They are:

- Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

⁵³ *Supra* note 42.

⁵⁴ Council of Canadians with Disabilities, *UN Convention on the Rights of Persons with Disabilities*, online <<http://www.ccdonline.ca/en/international/un>>.

⁵⁵ People with Disability Australia, “Accommodating Human Rights: A Human Perspective on Housing, and Housing and Support, For Persons with Disabilities” (2010) at 21, online: <<http://www.pwd.org.au/documents/pubs/AccommodatingHumanRights2003.pdf>>.

⁵⁶ International Disability Alliance, “Report of the Workshop to Establish a Roadmap for CRPD Implementation Guidelines” (14-15 November 2011), online: <http://www.internationaldisabilityalliance.org/sites/disalliance.e-presentaciones.net/files/public/files/Workshop%20to%20Establish%20a%20Roadmap_Report.pdf>.

⁵⁷ *Convention on the Rights of Persons with Disabilities*, *supra* note 1, Articles 31, 33.

- Non-discrimination;
- Full and effective participation and inclusion in society;
- Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- Equality of opportunity;
- Accessibility;
- Equality between men and women; and
- Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.⁵⁸

As articulated in a CRPD Monitoring Guide, released by the Office of the High Commissioner for Human Rights (OHCHR), these eight principles “guide the interpretation and implementation of the entire Convention, cutting across all issues. They are the starting point for understanding and interpreting the rights of persons with disabilities, providing benchmarks against which each right is measured.”⁵⁹

When considering the rights of persons with disabilities with low incomes, Preamble Article (t) is most salient in that it highlights the fact that a majority of people with disabilities live in poverty and recognizes the critical need to address the negative impact of poverty on persons with disabilities⁶⁰. In light of Preamble Article (t), articles such as Article 28 should be viewed as creating obligations relating to poverty alleviation.

Article 4 sets out State Party obligations, instructs States Parties to adopt all appropriate legislative, administrative and other measures for implementation, refrain from any act or practice inconsistent with the *CRPD*, ensure that public authorities and institutions are in conformity with the *CRPD*, promote development of universally designed services and promote universal design in development of standards and guidelines.⁶¹ With respect to economic, social and cultural rights, Article 4 directs States Parties to take measures to the maximum of their available resources with a view to progressively achieving the full

⁵⁸ *Ibid* art 3.

⁵⁹ The United Nations, Office of the High Commissioner for Human Rights, *Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors, Professional training series No. 17* (New York: United Nations, 2010), online: <http://www.ohchr.org/Documents/Publications/Disabilities_training_17EN.pdf>.

⁶⁰ *Supra* note 1, Preamble (t).

⁶¹ *Supra* note 1, Article 4.

realization of these rights.⁶² Lastly, Article 4 also insists upon continuous consultation with people with disabilities.⁶³

Article 19 describes standards of living that will give effect to the principles of..., such as living independently and being included in the community: having the opportunity to choose place of residence and with whom to reside⁶⁴; having access to a range of supports for community living⁶⁵, access to community services and facilities⁶⁶.

Article 33 “embodies the Convention’s architecture for change. The Article sets out governmental coordination, independent monitoring and public participation.”⁶⁷ The Article discusses the obligation of States Parties to designate one or more focal points within the government for implementing the obligations of the *CRPD*.⁶⁸ It specifies that consideration must be given to establishing or designating a coordination mechanism within the government to facilitate action at various levels.⁶⁹ It also speaks to an obligation to establish or maintain a framework, including independent mechanisms, to promote, protect and monitor the implementation.⁷⁰ It is essential that people with disabilities and all consumers are involved in this monitoring process.⁷¹ As of yet, the Canadian government has not designated a monitor. The federal Office for Disability Issues has been designated as a focal point.

VIII. Enforceability of CRPD Obligations in Canada

While Canada’s ratification of the *CRPD* demonstrates a clear commitment to the rights of people with disabilities and binds Canada to comply with the rights in the Convention under

⁶² *Ibid*

⁶³ *Ibid.*

⁶⁴ *Supra* note 1, Article 19 (a).

⁶⁵ *Supra* note 1, Article 19 (b).

⁶⁶ *Supra* note 1, Article 19 (c).

⁶⁷ Mental Disability Advocacy Center, “Building the Architecture for Change: Guidelines on Article 33 of the UN Convention on the Rights of Persons with Disabilities” (March 2011), online: <http://mdac.info/sites/mdac.info/files/Article_33_EN.pdf>.

⁶⁸ *Supra* note 1, Article 33.

⁶⁹ *Ibid*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

international law, the way in which these obligations will be interpreted in Canadian courts has yet to be fully understood.

Traditionally, Canada has employed a “dualist” model, meaning that once a treaty has been signed and ratified by the federal executive it still requires incorporation into domestic law to be enforceable at the national level.⁷² “Canadian courts, like those of England and other Commonwealth countries, have repeatedly affirmed that a treaty is not itself a source of domestic law. [In other words], no Canadian treaty is self-executing. All require legislative implementation if they are to enjoy direct legal effect in Canadian law.”⁷³

Unincorporated international conventions can be used as interpretive tools by Canadian courts, as determined by the Supreme Court of Canada in *Baker v Canada*.⁷⁴ Although unincorporated Conventions have no direct application in Canadian law, the values reflected therein can inform the approach to statutory interpretation and judicial review by Canadian courts.⁷⁵

To date, this is the approach that Canadian courts and tribunals have taken with respect to the *CRPD*. For example, the Ontario Superior Court ruled that

the affected individual should be provided with the support required to exercise their legal capacity, and should not be considered incompetent to make decisions merely because of their disability. (See the *United Nations Convention on the Rights of Persons with Disabilities*.)⁷⁶

The Human Rights Tribunal of Ontario has cited the *CRPD* as an authoritative source for interpreting provisions of Ontario’s *Human Rights Code*. In a 2011 case, the Tribunal referred to Article 13 of the *CRPD* to support an interpretation of the *Human Rights Code* that allowed the Tribunal to appoint a litigation guardian for a person with an intellectual disability who would otherwise be barred from bringing a human rights application. This

⁷² Gib van Ert, “Dubious Dualism: The Reception of International Law in Canada” (2010) 44 Val U L Rev 927; de Mestral & Fox-Decent, *supra* note 14 at para 48.

⁷³ *Ibid.*

⁷⁴ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 [*Baker*].

⁷⁵ See also *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 39, [2005] 2 SCR 91 [*Mugesera*].

⁷⁶ *Cole v Cole*, 2011 ONSC 4090 at para 6 [*Cole*].

interpretation facilitated access to the Tribunal's process in accordance with the *CRPD* obligation to ensure effective access to justice for people with disabilities.⁷⁷ In another 2011 case the Tribunal dealt with three models of disability (the medical, social/independent living and economic models) and then stressed that the social/independent living model is the model preferred by the *CRPD* and the Human Rights Tribunal of Ontario.⁷⁸

In January 2008, before Canada had ratified the *CRPD*, the Human Rights Tribunal of Quebec precociously quoted two passages from the *CRPD*, saying that “the Tribunal is always concerned with ensuring that its jurisprudence is in tune with international law, and considers it highly relevant to cite here a few passages from the [*CRPD*], which can but shed light on the dispute in this case.”⁷⁹

In June 2010, the Federal Court made a brief mention of the *CRPD*, creating a comparison between the *CRPD* and the *UN Convention on the Rights of the Child*:

It is clear that Article 1 of the *Convention on the Rights of Persons with Disabilities* is an inclusive definition which can be expanded; however, the distinction drawn between children with disabilities and adults with disabilities, with the added emphasis on the best interests of the former, shows that an adult with a disability remains an adult with a disability and ought not to be deemed a ‘child’ for the purposes of the *Convention on the Rights of the Child*.⁸⁰

In an April 2011 Ontario Consent and Capacity Board decision, one of the parties raised the *CRPD* in his submissions, “specifically a portion of Article 25 stating ‘that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.’” However, the Board “did not believe the [*CRPD*] had applicability in this matter. It is unclear what applicability the [*CRPD*] has here absent ‘transformation’ into Canadian law.”⁸¹

⁷⁷ *Yuill v Canadian Union of Public Employees*, 2011 HRT0 126 [Yuill].

⁷⁸ *Hinze v Great Blue Heron Casino*, 2011 HRT0 93 [Hinze].

⁷⁹ *Commission des droits de la personne et des droits de la jeunesse c. Coopérative d'habitation L'Escale de Montréal*, 2008 QCTDP 1 [L'Escale de Montréal].

⁸⁰ *Saporsantos Leobrera v Canada (Citizenship and Immigration)*, 2010 FC 587, [2011] 4 FCR 290 [Saporsantos].

⁸¹ *BS (Re)* (2011), CanLII 26315 (OCCB) [BS (RE)].

The Supreme Court of Canada had occasion to consider the *CRPD* in a 2008 case. The Council of Canadians with Disabilities intervened in the case and,

In both written and oral submissions argued that at the heart of the duty to accommodate lays the presumption of the duty to consult with peoples with disabilities. This presumption stems from Canada's national policies in the field and its international obligations as signatory of the *UN Convention on the Rights of Persons with Disabilities*.⁸²

While the Court acknowledged this submission, no other mention of the *CRPD* was made in the rest of the decision.

Generally, the method of implementing international human rights treaties in Canada is to rely on existing Canadian legislation and policies.⁸³ State parties are generally required to enact legislation, policies and practices in order to implement an international treaty. However, as observed by scholars, Canada generally ratifies international human rights treaties after it has determined that existing legislation, policies and programs already conform and comply with the principles and obligations set out in the treaty. On that basis, by ratifying the *CRPD*, it can be presumed that Canada was agreeing to comply, and felt it was capable of complying, with its obligations under the *CRPD*. If Canada did not have this intention, then it could have ratified the *CRPD* with a reservation with respect to a particular provision as it did with Article 12 of the *CRPD*.⁸⁴

Federal government officials examine the provisions of a given treaty and determine whether existing federal laws and policies already conform to the treaty obligations. A similar review is conducted at the provincial and territorial level. Before ratifying a treaty the

⁸² *National Capital Commission v Brown*, 2008 FC 733 at para 114, 330 FTR 67 [*National Capital Commission*].

⁸³ *van Ert*, *supra* note 68.

⁸⁴ Canada made the following declaration and reservation upon ratification: Canada recognises that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives. Canada declares its understanding that Article 12 permits supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law. To the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective safeguards. With respect to Article 12(4), Canada reserves the right not to subject all such measures to regular review by an independent authority, where such measures are already subject to review or appeal.

federal government seeks formal support from the provinces and territories. Typically, no new legislation is enacted to specifically implement the treaty into Canadian domestic law. In circumstances where new federal, provincial or territorial legislation is required, such new legislation will be passed prior to ratification.⁸⁵

This is the approach that the Canadian government has taken with respect to the *CRPD*. Between signing the *CRPD* in March 2007 and ratifying it three years later, the federal government sought the views of the provinces and territories on the extent to which provincial and territorial laws conform to the *CRPD*.^{86 87} Upon ratifying the *CRPD* the federal government announced that it had done so with the full support of the provincial and territorial governments.⁸⁸ The Government of Canada's "Explanatory Memorandum on the *CRPD*" states that upon ratification the *CRPD* would not form part of Canadian domestic law but may have an interpretive influence in cases brought before Canadian courts.⁸⁹ Rob Nicholson, Minister of Justice and Attorney General of Canada, stated that upon ratification, the *CRPD* will complement domestic laws.⁹⁰ This approach signals Canada's significant position that the *CRPD* was ratified on the basis that existing Canadian law and policy conforms to and complies with the treaty.

It is important to note that even when Conventions are not incorporated into domestic legislation, they can be recognized as incorporated by implication into the Charter and/or relevant federal or provincial legislation. This is based upon a common law presumption that courts ought to comply with Canada's international obligations at the provincial and

⁸⁵ de Mestral & Fox-Decent, *supra* note 46 at paras 48-49; See also Parliament of Canada, *Canada's Approach to the Treaty-Making Process* by Laura Barnett (Ottawa: Library of Parliament, 2008).

⁸⁶ Foreign Affairs and International Trade Canada, News Release, No. 368, "Government of Canada Tables Convention on Rights of Persons with Disabilities" (3 December 2009) online: Foreign Affairs and International Trade Canada < <http://www.international.gc.ca/media/aff/news-communiqués/2009/368.aspx>>.

⁸⁷ Due to the nature of Canadian federalism, responsibility for implementing the *CRPD* falls to both the federal and provincial/territorial governments. The federal government can legislate to implement the *CRPD* in areas that fall within federal jurisdiction, but cannot do so in areas within provincial/territorial jurisdiction.

⁸⁸ Canada, "Explanatory Memorandum on the United Nations Convention on the Rights of Persons with Disabilities", Tabled before the House of Commons, Parliament of Canada (December 2009), online: Canadian Human Rights Commission <http://www.chrc-ccdp.ca/pdf/memorandum_ratification_note.pdf>.

⁸⁹ *Ibid.*

⁹⁰ Foreign Affairs and International Trade Canada, News Release, No. 99, "Canada Ratifies UN Convention on the Rights of Persons with Disabilities" (11 March 2010) online: Foreign Affairs and International Trade Canada <<http://www.international.gc.ca/media/aff/news-communiqués/2010/99.aspx?lang=eng>>.

federal levels.⁹¹ In *R v Hape*, the Supreme Court of Canada held that the ratification of an international convention reflects an important limit on state sovereignty and Conventions should be applied where ambiguity exists in Canadian law.⁹² Although the Court in *Hape* stopped short of giving full effect to Canada's international obligations, it is clear that the Court accepted the principle of incorporation by implication.

The principle of incorporation by implication can be used when interpreting Canadian or provincial law. Support for the principle can be found in the strong foundation that was established by the Canadian delegation in the negotiation process leading up to the enactment of the *CRPD*; the approach and support of the federal and provincial governments to ratification; and, Canada's position that existing Canadian law and policy complies with our *CRPD* obligations. Greater acceptance by Canadian courts of this principle will be important for strengthening the extent to which *CRPD* obligations are enforced in Canada.

A. *CRPD* in Canadian Charter Jurisprudence

The purpose and goals of the *CRPD* are to promote, protect and ensure the rights, dignity and full inclusion of persons with disabilities.⁹³ The equality provisions of the *Charter* share many of the same values and principles advanced in the *CRPD*.⁹⁴

The Supreme Court of Canada has held that international human rights obligations are a relevant and persuasive factor in *Charter* interpretation, and their content is an important indicator of the meaning of the full benefit of the *Charter's* protection. These obligations should therefore inform the content of the rights guaranteed by the *Charter*. In *Baker v Canada*, the Supreme Court discussed "the important role of international human rights law as an aid in interpreting domestic law" and that it "is also a critical influence on the

⁹¹ *Daniels v White*, [1968] SCR 517 at 539-540, 2 DLR (3d) 1 [*Daniels*].

⁹² *R v Hape*, [2007] 2 SCR 292 [2007] 2 SCR 292 [*Hape*].

⁹³ *Supra* note 1, Article 1.

⁹⁴ *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

interpretation of the scope of the rights included in the *Charter*.⁹⁵ In *Canada (Justice) v Khadr*, the Supreme Court relied on *R v Hape* to state that in interpreting the scope and application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law.

The *CRPD* can be used as an interpretive tool in the context of the *Charter* by giving content to the rights and freedoms expressed. Justice Dickson of Supreme Court of Canada in *Slaight Communication* referred to his ruling in *Reference Re Public Service Employee Relations Act (Alta)* where he stated:

The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the "full benefit of the *Charter's* protection". I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.⁹⁶

IX. Progressive Realization with Respect to Economic, Social and Cultural rights

As a ratifying state, Canada has undertaken and committed to ensuring and promoting the full realization of all human rights and fundamental freedoms for persons with disabilities without discrimination of any kind on the basis of disability and to implement the rights recognized in the *CRPD*.⁹⁷ For example, with respect to Article 28, Canada has a legal obligation to ensure that people with disabilities have access to social protection, including poverty reduction programs, assistance with disability related expenses, public housing, and retirement benefits, as well as a standard of living adequate to live independently and be included in the community. The obligations contained in the *CRPD* are binding on Canada, both as a matter of international law and to the extent that they have been incorporated by implication into existing domestic law.

⁹⁵ *Baker, supra note 75* at para 70; *Canada (Justice) v Khadr*, 2008 SCC 28, [2008] 2 SCR 125 at para 18, citing *R v Hape, supra note 88 [Khadr]*.

⁹⁶ *Slaight Communications Incorporated v Davidson*, [1989] 1 SCR 1038 at paras 1056-57, 59 DLR (4th) 416 [Slaight].

⁹⁷ *Supra note 1*, Articles 4.1-4.1(a).

Further, with respect to economic, social and cultural rights, such as those contained in Article 28, Canada has undertaken to take measures to achieve the full realization of these rights.⁹⁸

Pursuant to Article 4 of the *CRPD*, Canada has undertaken, to the maximum of its available resources, to take measures with a view to achieving progressively the full realization of these economic, social and cultural rights. Article 4 directs that Canada's obligation be assessed relative to the available resources and stage of development of institutions and programs within the State. Some components of the rights laid out in the *CRPD* may be realized over time rather than immediately. Future-oriented obligations arise in the *CRPD* that provide for fulfilling the right to adequate income within a reasonable time and to address broader structural patterns of disadvantage.⁹⁹ An immediate obligation is the requirement to design and implement appropriate strategies through legislation and programs aimed at achieving full compliance in the future.¹⁰⁰

The UN Committee on Economic, Social and Cultural Rights has produced a series of General Comments intended to assist States in their understanding of the rights set out in the *International Covenant on Economic Social and Cultural Rights*.¹⁰¹ The meaning of progressive realization in the context of the *International Covenant on Economic Social and Cultural Rights* is considered in the General Comments which also discuss steps that States must take to create strategies for progressive realization. The General Comments stress an overriding obligation to develop clearly stated and carefully targeted policies.¹⁰² The UN Committee notes that while the *ICESCR* rights are subject to progressive realization, there are two overriding obligations which are of immediate effect: the obligation to ensure non-discrimination and the obligation "to take steps." The General Comment No 3 states that these steps "should be deliberate, concrete and targeted as clearly as possible

⁹⁸ *Ibid*, Article 4.2.

⁹⁹ Bruce Porter & Martha Jackman, "International Human Rights and Strategies to Address Homelessness and Poverty in Canada: Making the Connection", Social Rights Advocacy Centre (September 2011) at 39.

¹⁰⁰ *Ibid*.

¹⁰¹ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security (art 9)*, UNESCOR, 39th Sess, 2007, UN Doc E/C.12/GC/19 [General Comment 19].

¹⁰² Porter & Jackman, *supra* note 94 at 40.

towards meeting the obligation recognized in the Covenant.”¹⁰³ The Committee further calls upon States to create national strategies based on human rights principles to ensure that rights such as adequate food, the right to social security, the right to work, and the right to health and water are fulfilled.¹⁰⁴

The General Principles in Article 3 of the *CRPD* and the General obligations in Article 4 outline the responsibilities of States Parties to ensure non-discrimination and to undertake a number of measures to achieve that end.¹⁰⁵ The General Comments that speak to the *ICESCR* are applicable to Canada’s obligations under the *CRPD*.

The notion of ‘progressive’ realization using ‘available resources,’ contained in some economic, social and cultural rights treaties such as Article 2 of the *ICESCR*, has given rise to uncertainty with regard to the nature and extent of states’ obligations. Some have interpreted this provision as meaning that economic, social and cultural rights are mere ‘aspiration’, without creating real obligations for states.¹⁰⁶

Certainly, economic, social and cultural rights involve progressive realization to a greater extent than civil and political rights.¹⁰⁷ The full realization of all human rights requires states to progressively develop policies and targets. While compliance with the principle of ‘progressive realisation’ depends on the availability of resources in each state, this notion also imposes legally binding obligations on states.¹⁰⁸

The Icelandic Human Rights Centre concludes some of these obligations include taking steps to continuously improve the conditions¹⁰⁹ and abstaining from deliberately taking

¹⁰³ United Nations Committee on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties Obligations (art. 2, para. 1 of the Covenant)*, UNESCOR, 5th Sess, 1990, UN Doc E/1991/23 [*General Comment 3*].

¹⁰⁴ Porter & Jackman, *supra* note 94 at 42.

¹⁰⁵ *Supra* note 1, Articles 3-4.

¹⁰⁶ Icelandic Human Rights Centre, *The Right to an Adequate Standard of Living*, online: <<http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightsconceptsideasandfora/substantivehumanrights/therighttoanadequatestandardofliving/>>.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

retrogressive measures except under specific circumstances.¹¹⁰ A ‘deliberate retrogressive measure’ means any measure that implies a step back in the level of protection accorded to the rights contained in the Covenant, which is the consequence of an intentional decision by the state.¹¹¹ An interesting question to contemplate in the Canadian context is whether Canada would be in breach of its obligation to abstain from taking a deliberate retrogressive measure if it imposed a reduction in public expenditures devoted to implementing economic, social and cultural rights, in the absence of adequate compensatory measures aimed to protect the injured individuals.

According to its ordinary meaning, the term ‘progressive’ means ‘making continuous forward movement.’ Thus, States Parties are required to take steps forward continuously in order to achieve the full realisation of the rights recognised in the instruments.¹¹² The Icelandic Human Rights Centre considers this obligation to be immediately applicable and not subject to limitation. States, regardless of their level of development, must take steps immediately to achieve the full realization of the rights enshrined in the Convention. Persons with disabilities living in Canada are entitled by virtue of the CRPD, to expect that Canada, a nation with relatively ample resources, will progress quickly to achieve the full realization of the rights enshrined in the CRPD.

X. Legal Professionalism in Light of the CRPD

In a thought provoking article, H. Archibald Kaiser has articulated a moral dimension of legal professionalism in the wake of the CRPD. Kaiser argues that the primary responsibility for ensuring compliance with *CRPD* Article 4(1)(e), that is to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise, falls upon individual members of the legal profession, its law societies and federations.¹¹³ Kaiser considers it a reasonable expectation that lawyers

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ H Archibald Kaiser, “The Convention on the Rights of Persons with Disabilities: Beginning to Examine the Implications for Canadian Lawyers’ Professional Responsibilities” (2012) 20 Health L Rev No 2 26.

will become familiar with the *CRPD* as the treaty is a source of law, broadly conceived.¹¹⁴ Lawyers must understand the *CRPD* as law, in view of the Convention being used as an interpretive guide in construing legislation and the *Charter*.¹¹⁵

Lawyers must not only be aware of this branch of the law as part of their duty to be competent. The *CRPD* principles of equality participation and inclusion must be incorporated in other ethical responsibilities.¹¹⁶

¹¹⁴ *Ibid* at para 12.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*