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ARCH *Alert*

ARCH's Quarterly Newsletter on Disability and Law in Ontario.

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ARCH Disability Law Centre

Updates to the Law Regarding Addictions Disabilities

By Karen R. Spector, Staff Lawyer

On December 9, 2016, the Supreme Court of Canada heard the case of *Brent Bish on behalf of Ian Stewart v. Elk Valley Coal Corporation, Cardinal Operations, et al.* ARCH represented the Council of Canadians with Disabilities (CCD) and the Empowerment Council (EC) as joint interveners in the case. This case involves an employee who was terminated from his safety sensitive employment after a minor accident when he, as a result of his disability, was only able to disclose his addiction disability following the incident. The CCD and EC made submissions regarding the barriers in the workplace faced by persons with addictions disabilities including the challenges of disclosing their disability-related needs for accommodation. The CCD and EC also made arguments regarding the scope and content of an employer's duty to accommodate including in circumstances where an employee's failure to disclose their disability is itself disability-related or due to stigma and discrimination. The decision is currently on reserve.

The Canadian and Ontario Human Rights Commissions have updated their guide and policy relating to the law impacting persons with addictions disabilities. On Feb. 21, 2017, the Canadian Human Rights Commission (CHRC) released a guide entitled *Impaired at work: A Guide to Accommodating Substance Dependence.* On October 13, 2016, the Ontario Human Rights Commission (OHRC) released its updated *Policy on Drug and Alcohol testing.*

The CHRC's guide addresses the application of human rights legislation to addictions disabilities in the workplace. The *Canadian Human Rights Act* (*CHRA*) recognizes dependence on drugs or alcohol as a disability. As such, employees with addictions disabilities are entitled to be accommodated in the workplace by their employer. The guide indicates that an employer's duty to accommodate an employee with substance dependence arises upon (i) disclosure by the employee, (ii) observation of signs of substance dependence, or (iii) a positive drug or alcohol test. The *CHRA* applies to federally-regulated employers.

The guide recognizes that while an employee is generally required to disclose their accommodation needs, persons with addictions disabilities may not admit that they have a disability or an accommodation need. In addition, stigma and fear of losing their job may make someone reluctant to disclose their substance dependence. Employers should create a workplace culture of respect and inclusion by building accommodation into the way they do business.

Given the stigma around the disclosure of an addiction disability, an employer has a legal obligation to initiate a discussion with the employee about their need for accommodation when an employer observes changes in an employee's attendance, performance or

behaviour that may indicate possible substance dependence. This is called the *duty to inquire*.

The guide acknowledges that denial is often characteristic of substance dependence, hence an employer may need to have more than one conversation with the employee. The guide further states that in a safety sensitive workplace, where there is drug and alcohol testing, an employer's *duty to inquire* is also triggered upon a positive test result.

If an employee does not initially disclose a disability despite an employer's concerns regarding their attendance, performance or other behaviour issues, but the employee later provides a disability-related explanation, the employer must reconsider the appropriateness of any disciplinary or other action it may have taken against the employee.

In order to accommodate an employee with substance dependence, the employer requires information from a medical professional indicating that the employee has a disability and the nature of the employee's accommodation needs. The employer is not usually entitled to the specific diagnosis.

An employee may need to be removed from the workplace if (i) they are involved in a workplace accident, or near incident, and impairment is suspected, (ii) their behaviour or work performance is having a serious impact on the workplace due to suspected impairment; (iii) their behaviour puts their own safety or the safety of others at risk.

An employee with an addiction disability has the right to be accommodated to the point of undue hardship. An employee must be accommodated on an individualized basis. An employee may need to move to a non-safety sensitive position as part of an accommodation plan. Furthermore, relapse is often a symptom of substance dependence and must be part of the accommodation plan.

Finally, on the issue of drug and alcohol testing, the guide states that a positive drug or alcohol test triggers an employer's *duty to inquire* about possible substance dependence and any workplace accommodation needs. A positive test does <u>not</u> constitute concrete evidence of substance dependence or that the person has or will come to work unable to perform their duties. As such, taking disciplinary action without initiating a conversation about substance dependence may run contrary to the *CHRA*.

The OHRC's recently updated *Policy on Drug and Alcohol Testing* addresses the human rights implications of drug and alcohol testing in the workplace on persons with addictions disabilities. The policy specifically focuses on workplaces where safety is a goal. Addictions to drugs or alcohol are considered "disabilities" under the Ontario *Human Rights Code* (*Code*). The Policy states that persons with addictions disabilities are entitled to the same human rights protections as persons with other disabilities.

Drug and alcohol testing is sometimes used by employers in a safety sensitive workplace to address safety concerns from drug and alcohol use.
Drug and alcohol testing policies may be contrary to the *Code* where a positive test leads to negative consequences for a person based on addiction or perceived addiction, such as automatic discipline and not accommodating to the point of undue hardship.

The policy states that the primary reasons for conducting drug and alcohol testing should be to measure impairment rather than monitoring moral values among employees. Testing should be restricted to determining actual impact of an employee's ability to perform or fulfill the essential requirements of the job at the time of the test. Testing should not be conducted for the purpose of identifying the presence of drugs or alcohol. Employment policies on drug and alcohol testing must accommodate employees with addictions disabilities on an individualized basis. As such, blanket rules that do not provide for individual circumstances will likely be found to be discriminatory. Any drug and alcohol testing program should be part of a broader health and safety policy including proper training, and reducing workplace hazards and distraction.

The policy discusses the human rights implications with respect to testing at various stages of employment: pre-employment, random, reasonable grounds and post-incident, and as part of a rehabilitation plan.

The OHRC's policy states that following a positive drug test, employers should offer a process of individualized assessment of drug or alcohol addiction and must accommodate employees with addictions to the point of undue hardship. A positive test must not result in automatic employment consequences.

Finally, employers should explore other measures beyond drug and alcohol testing to address safety concerns in the workplace including safety checks, health promotion and substances awareness programs, and peer monitoring.

For the facta and other materials in the Supreme Court case *Brent Bish on behalf of Ian Stewart v. Elk Valley Coal Corporation, Cardinal Operations, et al.*, go to: http://www.scc-csc.ca/case-dossier/info/af-ma-eng.aspx?cas=36636

For the Canadian Human Rights Commission's publication *Impaired at Work – A Guide to Accommodating Substance Dependence*, go to: http://www.chrc-ccdp.gc.ca/sites/default/files/impaired_at_work.pdf

For the *Ontario Human Rights Commission's Policy on Drug and Alcohol Testing*, go to: http://www.ohrc.on.ca/sites/default/files/Policy%20on%20drug%20and%20alcohol%20testing_revised_2016_accessible_1.pdf

Ontario Human Rights Commission Releases Policy Statement on Provision of Medical Documentation

By Mariam Shanouda, Staff Lawyer and Jami Lenis, Law Student

The Ontario Human Rights Commission (OHRC) has released its policy statement on the provision of medical documentation when a disability-related accommodation request is made. When a person with a disability requires accommodation, the accommodation request should be taken by the provider in good faith. Sometimes supporting documentation will be required to provide more information about the kinds of accommodation a person with a disability needs, and this information may come in the form of medical documentation. The provision of medical documentation is often a matter of concern for persons with disabilities, whether the accommodation being sought is in the workplace, in housing or in service sector contexts.

Employers, housing providers and service providers all have a duty to accommodate an employee, a tenant and/or a customer with a disability when that person makes a request to be accommodated. The duty to accommodate has a high threshold and the employer, housing provider or service provider has a duty to accommodate up to the point of undue hardship. Only three factors are considered when determining whether or not a request for accommodation reaches the point of undue hardship. These factors are: whether the accommodation is too costly, whether there are outside sources of funding and whether there are any health and safety concerns.

When a person with a disability requests disability-related accommodation, they may be asked to produce a medical note from a doctor explaining the needs associated with their disability or disabilities, and the appropriate accommodation that should be provided. At the same time, a doctor's note does not have to state the diagnosis or the nature of the disability itself. By only stating the needs of the person and not their diagnosis, the medical documentation protects the person's dignity and their privacy interests. A person or company providing the accommodation is not entitled to ask for or to receive more medical information than is necessary to understand the needs of the person with the disability. This means that an employer, a landlord or a service provider is not allowed to ask a person with a disability to provide private medical information. Any requests for further medical information must be the least intrusive as possible.

More specifically, the type of medical information that can be provided in support of a disability-related accommodation request includes: the person has a disability, the needs associated with that disability, "whether the person who is requesting accommodation can perform the essential duties of the job, of being a tenant, or of being a service user, with or without accommodation", and what types of accommodations are needed to ensure that the person with a disability is able to perform the essential duties of the job, of being a tenant, or of being a service user. If the person has been on leave from their job, they

should provide medical documentation updating the employer on when they expect to return to work.

For the OHRC policy statement on medical documentation, go to: http://www.ohrc.on.ca/en/ohrc-policy-position-medical-documentation-be-provided-when-disability-related-accommodation-request

For more detailed information on your rights with respect to producing medical documentation, you can refer to the OHRC's *Policy on ableism and discrimination based on disability*, "Section 8.7 Medical Information to be Provided." For this policy go to: http://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability.

If Inclusion Means Everyone, Why Not Me?

By Luke Reid, Staff Lawyer

As many of you may know, inclusive education for many students with disabilities is often elusive. In Ontario, there are 72 Boards of Education. A small number of those boards operate fully segregated schools for children who have a disability. Of the remaining school boards, a significant number (approximately 80 - 85%) continue to segregate students in self-contained classes, where they spend the majority of the day.

In an effort to address these issues, ARCH Disability Law Centre, in partnership with Community Living Ontario, Inclusive Education Canada, the University of Western Ontario, and Brock University, has launched a research project titled "If Inclusion Means Everyone, Why Not Me?" This research is designed to survey some of the experiences of students with intellectual disabilities in Ontario's public school system. The goal is to identify current practices and barriers to inclusive education, which students with intellectual disabilities face in Ontario's public schools.

You can lend your support by filling out the survey if it applies to your family and by sharing it with others who may also be facing these issues. The greater the participation in the survey, the more we will be able to illuminate the barriers to inclusion and the more we can press for effective change.

If you wish to participate, please complete our survey about your child's experiences in school. The survey will take 20-30 minutes to complete. Once it has been submitted, you cannot redo the survey. The deadline to complete the survey is March 31, 2017. If you have any questions or concerns please contact Amina Patel, Assistant Project Coordinator,

Community Development, Community Living Ontario at 416-447-4348 ext. 241 or Amina@communitylivingontario.ca.

To complete the survey go to:
https://uwo.eu.qualtrics.com/SE/?SID=SV_250xUkF2YLFV0rj

Toronto Star Argues for Easier Access to Information about Cases at Ontario Tribunals

By Mariam Shanouda, Staff Lawyer and Brie Mantynen, Law Student

On February 6, 2017, Toronto Star Newspapers Ltd. (the Star) filed a Notice of Application against the Attorney General of Ontario at the Ontario Superior Court of Justice. In the Notice of Application, the Star argues that quasi-judicial tribunals, such as the Human Rights Tribunal of Ontario (HRTO), should make any documents that are filed as part of a complaint or case available to the public.

Quasi-judicial tribunals are administrative bodies which exercise adjudicative functions. These tribunals differ from courts in a number of ways. For example, the adjudication process is specialised, faster, and less expensive than adjudication at court. There are more than 200 tribunals in Ontario, including: the HRTO, the Landlord and Tenant Board, the Social Benefits Tribunal, the Workplace Safety and Insurance Appeals Tribunal, the Criminal Injuries Compensation Board, and the Pay Equity Hearings Tribunal.

One of the biggest differences between courts and tribunals in Ontario is that every piece of evidence filed with the courts is available to the public. This means that generally, anyone is allowed to go down to the courthouse and ask to see and review the record from a specific case. One exception is cases in which there is a publication ban in effect.

The practice with respect to accessing and reviewing records is different at the tribunals. The *Freedom of Information and Protection of Privacy Act* (FIPPA) is provincial legislation which protects the privacy of individuals. One of the regulations under FIPPA refers to 16 different Ontario tribunals including, among others, the HRTO, the Landlord and Tenant Board, the Workplace Safety and Insurance Appeals Tribunal, the Criminal Injuries Compensation Board, and the Pay Equity Hearings Tribunal. The inclusion of these 16 tribunals in the FIPPA regulation means that, as opposed to the availability of records to the public at Ontario Courts, the records at the 16 tribunals are not automatically available to the public. In order for a member of the public to access records filed at one of the listed tribunals, they must file a Freedom of Information (FOI) Request and the Request must be

granted by the institution that holds those records. The reason for this is that tribunals are trying to strike a balance between allowing the public to access information and at the same time protecting the privacy of complainants who file applications at the tribunals, many of whom have to reveal personal information which may be private and sensitive.

Although the process for accessing records from courts is different than from the tribunals, one similarity exists between the two fora. Generally, all hearings at the tribunals and at courts abide by the "open court principle" which mandates that all hearings are open and accessible to the public. This means anyone, at any time, can walk into a courtroom or tribunal room and watch the hearing unfold. Sometimes hearings are private or are subject to a publication ban, but the general rule of thumb is that all hearings must be open to the public.

Along with their Notice of Application, the Star also filed a Notice of Constitutional Question. A constitutional question is a challenge to an existing law. Generally an argument is made that the law in question violates or is inconsistent with the Constitution of Canada, which includes the *Canadian Charter of Rights and Freedoms* (*Charter*). In this particular case, the Star is arguing that the inclusion of the tribunals in FIPPA, and the requirement that a FOI Request must be made in order to access tribunal case records, violates s. 2(b) of the *Charter*, which provides for "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

ARCH will continue to monitor this case and will report further as the matter unfolds.

Court Challenges Program Restored and Expanded

By Julia Munk, Student-at-Law

On February 7, 2017 the Federal Government announced that funding for the Court Challenges Program (CCP) would be reinstated in an effort to increase access to justice for people with disabilities and other vulnerable groups, including official-language minority communities. Since it began funding human rights cases in 1985, the objective of the CCP has been to protect and advance substantive equality and access to justice for disadvantaged groups. CCP funding has allowed disability issues to be brought to Canadian courts, resulting in a positive impact on the lives of people with disabilities.

The CCP was eliminated in 2006 by executive order, however in February 2017 the Government of Canada announced that it would update and reinstate the program. While the CCP will continue to be implemented by an independent organization to avoid any real or perceived conflict of interest on the part of the Government of Canada, the accountability

framework that will be used is unclear. What is known is that the Government has decided not to use the internationally recognized community based framework under which the CCP previously operated.

The types of cases that will be considered for funding under CCP will no longer focus exclusively on advancing substantive equality and access to justice for disadvantaged groups and official language minority communities. In addition to cases that focus on equality and language rights, the CCP will now consider funding cases that address:

- Fundamental freedoms such as freedom of religion and freedom of expression;
- Democratic rights including the right to vote;
- Gender equality; and
- Multiculturalism;

.
Cases that address the rights of indigenous people protected under section 35 of the *Charter* and those that are outside of federal jurisdiction will not be considered for funding by the CCP in its current form.

While some of the changes to the program are concerning, the reinstatement of the CCP is a positive step towards increasing access to justice for vulnerable and historically disadvantaged communities, including disability communities.

Updates on Institutional Class Actions

By Yedida Zalik, Staff Lawyer

Schedule 1 Class Action

April 28, 2017 is the new deadline to apply for money from the settlement of *Clegg v. Ontario*, the Schedule 1 class action lawsuit. A class action is a type of lawsuit. Lawsuits start when someone makes a claim in court. In a class action, a few people start a lawsuit for a large group or 'class'.

The Government of Ontario was in charge of Schedule 1 facilities or institutions. The law about these institutions was called the *Developmental Services Act*. The names of these places were written in a part of that law called Schedule 1. Many people with disabilities lived at Schedule 1 institutions, and they were often abused at these places.

There were many Schedule 1 institutions, but only 12 of them are in the *Clegg v. Ontario* settlement. For a list of those 12 institutions, go to http://www.archdisabilitylaw.ca/new_deadline_Schedule_1_class_action_claims_Clegg_v_Ontario.

The Huronia, Rideau and Southwestern Regional Centres were also Schedule 1 facilities. Lawsuits about those institutions settled several years ago. The deadline to apply for money from those institutions passed in November 2014.

CPRI Class Action

There is a new class action about another Schedule 1 facility, the Child and Parent Resource Institute. That lawsuit is called *Templin v. Ontario*. The Child and Parent Resource Institute was in London, Ontario. It used to be called the Children's Psychiatric Research Institute. It is often called CPRI.

The CPRI lawsuit was certified as a class action on December 22, 2016. This means the Court gave permission for this lawsuit to argue for everyone in the class. The class is people who were alive on February 22, 2014, and who were inpatients living at CPRI from September 1, 1963 until July 1, 2011. This does not include any time that these people were inpatients living in Glenhurst or Pratten wards.

Now that the CPRI class action is certified, it will likely go to trial, unless the lawyers can agree to a settlement. For more information about the CRPI class action, go to https://kmlaw.ca/cases/cpri-class-action/

Crown Ward Class Action

There may be another class action for children who were Crown Wards. That lawsuit is called *Papapassay et al v. Ontario*. Crown Wards are children who are taken away from their family permanently. They are taken care of by child welfare agencies, or children's aid societies. Child welfare agencies sometimes put children in Schedule 1 institutions.
The Ontario Superior Court is still deciding whether to give permission for the Crown Ward lawsuit to be a class action. For more information about that possible class action, go to https://kmlaw.ca/cases/crown-ward-class-action/

Ontario Introduces New Legislation about Medical Assistance in Dying

By Tess Sheldon, Staff Lawyer

In the last *ARCH Alert* from December 20, 2016, we wrote about the Ontario government's proposed law called *Medical Assistance in Dying Statute Law Amendment Act*. Also called Bill 84, it is supposed to address issues related to medical assistance in dying that fall within the provincial government's power and responsibilities.

In February 2015, the Supreme Court of Canada decided that the prohibition on medical assistance in dying was unconstitutional. The Supreme Court also decided that "it is for Parliament and the provincial Legislatures to respond, should they so choose, by enacting legislation consistent with the constitutional parameters set out." In June 2016, the federal government passed Bill C-14, which set out how medical assistance in dying can be provided.

Bill 84 proposes changes to several provincial laws, so that they are in keeping with the federal Bill C-14. For example, it will ensure that work-related benefits like workplace safety benefits are not denied to someone (or their survivors), only because of a medically-assisted death. It will also protect physicians and nurses from civil law suits when they provide medical assistance in dying. It will require that the Coroner be notified of all medically assisted deaths and will allow the Coroner to decide whether to investigate the death. For the full text of Bill 84 go to: http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=4460

Bill 84 is not about who is excluded by the federal Bill C-14 from access to medical assistance in dying "where mental illness is the sole underlying medical condition".

Bill 84 is not yet law. Before a bill can become a law, it goes through three "readings". On March 9, 2017, Bill 84 passed Second Reading and was referred to the Ontario government's "Standing Committee on Finance and Economic Affairs". The Committee is a small working group of MPPs who will review Bill 84 in detail. The provincial government has said that patients, health care providers and others will have opportunities to provide feedback on Bill 84. More information will be posted about how to make submissions to the Committee. To find this information go to: http://www.ontla.on.ca/web/committee-proceedings/committee_business.do?locale=en&BillID=4460+&CommID=144&BusinessType=Bill&detailPage=references

Expanded Eligibility for Toronto Wheel-Trans

By Dianne Wintermute, Staff Lawyer

The new year brought good news for persons with disabilities who want access to TTC Wheel-Trans services. As of January 1, 2017, eligibility criteria for Wheel-Trans was expanded to include any passenger with a disability, if they can show that their disability prevents them from using conventional transportation services.

The TTC revised the Wheel-Trans eligibility criteria in order to comply with the accessible *Transportation Standards* under the *Accessibility for Ontarians with Disabilities Act (AODA).* There are three kinds of services available to passengers with a disability:

1. **Unconditional Service**. This means that a person's disability "always" prevents them from using TTC services like buses, subways or streetcars.
2. **Conditional Service**. This means that a person's disability sometimes affects their ability to use other TTC services. For example, someone can use TTC services other than Wheel-Trans for part of their travel, or some of the time, but not all of the time.
3. **Temporary Service**. This means that a person cannot use TTC services for a specific period of time because he or she has a temporary disability.

There is a new application form and a new application process. For more details go to: www.ttc.ca/wheeltrans, or call Wheel-Trans Customer Service at 416-393-4111.

Library Corner: What's New on our Shelves

By Mary Hanson, Librarian

Recent additions to our collection include new titles on advancing inclusive education, access to justice and independent living. We welcome you to browse these in the Resource Centre outside the ARCH office on the 15th floor.

- Ajodhia-Andrews, Amanda. ***Voices and Visions from Ethnoculturally Diverse Young People with Disabilities.*** Sense Publishers, 2016. (on ARCH shelves at 371.9 CA Ajo 2016)
  The stories and experiences of six middle-year children in Toronto and their understandings of differences, learning and inclusion. The author investigates how

the insights of marginalized students through such participatory research can advance inclusive learning, teaching, and a sense of belonging.

- Craven, Rhonda G. , Alexandre J. S. Morin and Danielle Tracey, eds. ***Inclusive Education for Students with Intellectual Disabilities***. Charlotte, NC: Information Age, 2015. (on ARCH shelves at 371.9 INT Cra 2015)
  Examples of new directions from ten different countries (including Canada) in theory, research and practice that offer insights and useful strategies for improving educational outcomes and promoting social justice. Chapters also address the role of parents and educators as advocates for inclusive education.

- Flynn, Eilionoir. ***Disabled justice? Access to justice and the UN Convention on the Rights of Persons with Disabilities***. Routledge, 2016. (on ARCH shelves at 342.087 INT Fly 2016)
  A comprehensive examination, international in scope, of just how effective and inclusive access to justice really is for persons with disabilities. The author looks at their experiences through the entire justice system (from making a complaint to the court/tribunal process), their participation in a variety of roles – and barriers still faced.

- Greenstein, Anat. ***Radical Inclusive Education: Disability, Teaching and Struggles for Liberation***. Routledge, 2016. (on ARCH shelves at 371.9 INT Gre 2016)
  How current educational practices such as standardized tests exclude and fail many students with disabilities – and why we need to change our understanding of learning. Based on research into good practices and interviews with activists in the United Kingdom, United States and Canada, the author proposes that for education to be really inclusive it must take into account the relationship of the individual and society, and think beyond the school and the classroom. * To access the author's 2014 Youtube presentation "Radically Changing Education" (19 minutes), go to https://www.youtube.com/watch?v=sqPD5CEeA70

- Kelly, Christine. ***Disability Politics and Care: The Challenge of Direct Funding***. Vancouver: UBC Press, 2016. (on ARCH shelves at 362.4048 CA-ON 2016)
  An examination of Ontario's Direct Funding Program to explore what happens when persons with disabilities take control of their own care arrangements. Documenting multiple voices of persons engaged in the independent living program, the author discusses policy and broader social implications of self-determination, interdependence and justice.

- Tomlinson, Sally. ***A Sociology of Special and Inclusive Education: Exploring the Manufacture of Inability.*** Routledge, 2017. (on ARCH shelves at 371.9 INT Tom 2017)
  A critical analysis of the power dynamics surrounding inclusive education, with a focus on the social, political and economic policies and interests that influence educational practices in England and the U.S.A.

ARCH on Social Media

ARCH is on social media, you can find us at:

https://twitter.com/ARCHDisability

https://www.facebook.com/ARCHDisabilityLawCentre

https://www.youtube.com/channel/UCZl_6YpK8XB7LJ_dQxdonlg

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Or you can send your donation cheque to:

Office Manager
ARCH Disability Law Centre
55 University Avenue, 15th Floor
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Co-Editor: **Kerri Joffe**
Co-Editor: **Amanda Ward**
Production & Circulation: **Theresa Sciberras**

We welcome your comments, questions and feedback. We will endeavour to include all information of general interest to the community of persons with disabilities and their organizations, but reserve the right to edit or reject material if necessary. Please address communications regarding **ARCH *ALERT*** to: Theresa Sciberras, Program and Litigation Assistant, ARCH Disability Law Centre, 55 University Avenue, 15th Floor Toronto, ON M5J 2H7, Fax: 416-482-2981 or 1-866-881-2723, TTY: 416-482-1254 or 1-866-482-2728, e-mail: scibert@lao.on.ca **Website: http://www.archdisabilitylaw.ca/**

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ARCH Disability Law Centre
55 University Avenue, 15th Floor
Toronto, ON M5J 2H7
www.archdisabilitylaw.ca

Voice
Telephone: 416-482-8255
Telephone Toll-free: 1-866-482-2724

TTY
TTY: 416-482-1254
TTY Toll-free: 1-866-482-2728

Fax
Fax: 416-482-2981
Fax Toll-free: 1-866-881-2723

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