ARCH *Alert* Volume 20, Issue 1 March 28, 2019

ARCH *Alert*

ARCH's Quarterly Newsletter on Disability and Law in Ontario

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ARCH is Seeking Board Members

ARCH Disability Law Centre (ARCH) is a specialty legal clinic dedicated to defending and advancing the equality-rights of people with disabilities who live in Ontario. ARCH promotes the full social justice of persons with disabilities, and their realization of equal opportunities and full participation on an individual and systemic basis.

ARCH's Nominating Committee invites applications from across Ontario from those interested in serving on the governance Board of Directors of ARCH. The Board of ARCH provides strategic leadership and general direction, makes policy, oversees the organization's general performance, and ensures overall accountability.

The Committee is seeking, in particular, someone with finance and non-profit governance expertise. According to the by-laws, the ARCH Board is to be composed of 13 directors and a majority of the directors must be persons with disabilities. We strongly encourage applications from persons with disabilities.

Prospective directors should know that ARCH provides legal services throughout Ontario for persons with disabilities. Applicants should have up to 10 hours a month to dedicate to ARCH. This includes preparation for (reading, reviewing and commenting on materials) and attendance at Board meetings, Committee meetings, in person or by telephone conference call, and participation at occasional day-long events including planning meetings, and Annual General Meetings. ARCH reimburses directors for travel costs and covers disability accommodation expenses.

Each member of the Board of Directors is expected to do the following:

- Participate in annual and long range planning for the organization;
- Monitor the performance of the organization in relation to the strategic plan;
- Read and understand a set of financial statements;
- Develop, amend and approve by-laws and governing policies; and
- Be a member of at least one ARCH Board committee.

The Nominating Committee will review the list of prospective directors, interview selected applicants and do its best to nominate a slate of individuals who collectively cover as many of the skills, experience and geographic coverage it has identified to strengthen the Board's capacity to effectively lead ARCH over the next two years. ARCH welcomes applications from persons from equity seeking groups including indigenous persons, immigrants, young adults, people with lived poverty experience, and persons with disabilities. Accommodations

are available on request for candidates taking part in all aspects of the selection process. ARCH is a scent-free environment.

The Nominating Committee requests that interested applicants send an email expressing interest together with a resumé or short biography by May 3, 2019 to Doreen Way, Office Manager at wayd@lao.on.ca. Only those selected for an interview will be contacted.

CANADIAN CENTRE FOR ELDER LAW

CANADIAN CENTRE FOR ELDER LAW

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INVESTING with SUPPORTED DECISION MAKING

- Do you have Alzheimer's, dementia or an intellectual disability?
- Do you invest your money in one or more of the following?
  - **Bonds**
  - **RDSP** (Registered Disability Savings Plan)
  - **RRSP** (Registered Retirement Savings Plan)
  - **GIC** (Guaranteed Investment Certificate)
  - **RESP** (Registered Education Savings Plan)
  - **Stocks**
  - **Mutual Funds**
  - **RRIF** (Registered Retirement Income Fund)
  - **TSFA** (Tax-Free Savings Account)
- Do you support a person (with the above) with their investing?

The **Canadian Centre for Elder Law** wants to learn how people with disabilities make investment decisions with support. We want to hear from you about how to help people use supported decision making when investing their money.

We want to hear:

- What you know about supported decision making?
- How you use supported decision making to make investment decisions?
- Your experience working with investment (your money) advisors when trying to use supported decision making.

We are running a focus group on
Friday April 5, 2019 from 1:00 pm to 3:00 pm at 55 University Avenue, 15th Floor.
Honourariums will be provided.

Please arrive scent free. Do not wear perfumes, cologne, or any other scented products.

To register or request disability related accommodations, please contact: Theresa by March 29, at ARCH at 1-866-482-2724 ext. 2229 or by email at scibert@lao.on.ca

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Save the Date!

ARCH and the Law Society of Ontario will be hosting an Access Awareness event this year on June 5th, 2019 at the Law Society of Ontario in Toronto.

Space will be limited, however the event will also be available via live webcast. Check your inbox or our website for more details in the coming months.

Bill C-81 – *Accessible Canada Act* – now at Senate SOCI Committee

By Kerri Joffe, Staff Lawyer

Bill C-81, the *Accessible Canada Act*, is federal accessibility legislation aimed at achieving a barrier-free Canada. Since our last update on this Bill, in the December 2018 issue of ARCH *Alert*, the Bill passed first and second reading at the Senate and has now been referred to the Standing Senate Committee on Social Affairs, Science and Technology (SOCI). SOCI, chaired by Senator Chantal Petitclerc, will study the Bill and may recommend that the Senate adopt changes to it.

SOCI's study of the Bill provides an important opportunity for people with disabilities and disability organizations to share their views about Bill C-81 with Senators. SOCI will likely begin its study of the Bill at the beginning of April. Persons with disabilities and disability organizations who wish to send written comments or appear before SOCI can contact the clerk of the Committee, Daniel Charbonneau, at (613) 301-7565 or SOCI@sen.parl.gc.ca

In October 2018, ARCH, together with the Council of Canadians with Disabilities (CCD) and the AODA Alliance, wrote an Open Letter setting out 9 key concerns and changes that are necessary to strengthen Bill C-81. These include having timelines in the Bill, using language that requires accessibility standards to be made, eliminating exemptions from complying with accessibility requirements, and a number of other important concerns. To date, over 95 disability organizations and groups from across Canada have signed on to support the Open Letter, showing how important these changes are to disability communities. ARCH has produced a series of short briefing notes providing more detailed information about these 9 key concerns, as well as a template letter to Senators. People with disabilities and disability organizations can use these briefing notes and template letter as advocacy tools to share their views about Bill C-81 with Senators. The Open Letter, 9 briefing notes, and template letter to Senators can be found on ARCH`s website by going to:
https://archdisabilitylaw.ca/initiatives/advocating-for-accessibility-in-canada/

Although Bill C-81 has not yet become law, the Government of Canada has already begun the process of developing technical regulations to support the Bill if it gets passed into law. These technical regulations will set out a framework and specific requirements for federal organizations to follow when they develop accessibility plans, feedback processes and progress reports. The Government will also develop regulations about penalties for organizations who don't comply with accessibility standards. As part of the regulatory development process, the Government of Canada is required to consult with people in Canada about the regulations before they become law. The Government of Canada has already begun a pre-consultation process about the technical regulations. People with disabilities and disability organizations who are interested in being part of this pre-

consultation process can write to the Accessibility Secretariat at: accessible-canada@hrsdc.gc.ca

The Government of Canada recently announced opportunities for staff and Board of Director positions within the new Canadian Accessibility Standards Development Organization (CASDO). CASDO has not yet been established. If Bill C-81 becomes law, CASDO will be a new organization charged with developing accessibility standards in federal employment, the built environment, communication, the procurement of goods, services and facilities, the design and delivery of programs and services, some aspects of information and communication technologies, and some aspects of transportation. For more information about the anticipated opportunities at CASDO, go to: https://pcogic.njoyn.com/cl3/xweb/XWeb.asp?tbtoken=ZVpYSxkXCBJwYC4lLkAuJF4FRV0nCFdIAmxEcFVZcUhZW1EMExJYX0EcXEobdRcHeAkbURdTSXYqWA%3D%3D&chk=dFlbQBJe&clid=52106&page=joblisting

The Government of Canada is also recruiting for the position of Chief Accessibility Officer, who will be a special advisor to the Minister responsible for Accessibility if Bill C-81 becomes law. For more information about this opportunity, go to: https://pcogic.njoyn.com/CL3/xweb/Xweb.asp?tbtoken=ZVpbQxkXCGkBFARyMldTCFFNdGdEcFkoekggUFAKE2ItUUVpLUcTdWt1BAkbURdTSXYqWA%3D%3D&chk=dFlbQBJe&CLID=52106&page=jobdetails&JobID=J0219-1038&brid=14016&lang=1

The Federal Government Commits to Holding Accessible Elections

By Lila Refaie, Staff Lawyer

On December 13 2018, a new law affecting federal elections received Royal Assent. Bill C-76, also known as the *Elections Modernization Act*, will change the previous *Canada Elections Act*. While Bill C-76 has become law, the changes it makes to the *Canada Elections Act* will only be in force in June 2019. Consequently, the newly amended *Canada Elections Act* will be in force for the next general election, in October 2019. Reportedly, Elections Canada has already begun the process to implement the new rules, ahead of the next general federal election.

Bill C-76 introduces a great number of changes to the rules governing federal elections. Among many of these changes, some relate to the rights of electors with disabilities.

While the previous legislation mandated Elections Canada to ensure that polling stations were on “level access”, the new legislation will extend this mandate to secure “accessible” polling stations, both for the official polling day and advance polling days. Further, the

previous law limited requests for accommodations and transfer certificates to an accessible polling station (when the designated station is inaccessible) to persons with physical disabilities. These rules have been changed. The new legislation will remove this limit and states that requests for accommodations and for transfer certificates to a different polling station are available for any elector with a disability.

As a final important change, the new legislation also includes a commitment to develop, obtain, or adapt voting technologies to enable electors with disabilities to vote independently. This means that Elections Canada will now have an explicit obligation to develop ways to make the voting process more accessible for electors with disabilities.

Persons with disabilities, particularly persons in the blind and vision disability communities, have been advocating for years for the right to vote independently and in secret. The use of appropriate technology within Canada's voting process would greatly help achieve this goal. ARCH is currently analyzing this new piece of legislation and its impact on electors with disabilities. A more fulsome analysis will be published in our next ARCH Alert, in June 2019.

For more information about Bill C-76 and other changes it makes to the *Canada Elections Act*, go to: http://www.elections.ca/content.aspx?section=med&dir=c76&document=index&lang=e

For more information about accommodations available to electors with disabilities, go to: http://www.elections.ca/content.aspx?section=vot&dir=spe/tools&document=index&lang=e

To read Elections Canada's current accessibility policy, go to: http://www.elections.ca/content.aspx?section=vot&dir=spe/policy&document=index&lang=e

New Consultation on Exclusions in School

By Luke Reid, Staff Lawyer

As some readers may know, ARCH has been working on a recurring concern for students with disabilities in our school system – namely, exclusions. Students with disabilities are often excluded from Ontario's school system when appropriate accommodations have not been made available to them. These exclusions can be "formal" in that a student is officially told they cannot come to school, or they can come in the guise of an informal "request" that a student stay home. Exclusions can also occur when a student's school day is 'modified' – which means they are not allowed to attend school for the whole day.

In many cases, exclusions are inappropriate and ARCH has long condemned this practice. Exclusions often contribute to situations in which students with disabilities are denied access to a meaningful education. Most disturbingly, it has become clear that the absences from school caused by exclusions are not tracked in any meaningful way. No one knows exactly how much school students with disabilities miss as a result of exclusions.

The prevalence of this problem was previously identified by a research study carried out by ARCH and its partners. That study found that students with intellectual disabilities were often excluded from the school system. In particular, the report found that:

- Approximately 45% of parents in the study reported that they had to keep their child home at one time or another as a result of a lack of accommodation;
- 25% of parents have been told not to send their child to school; and
- More than half of parents had children with a shortened school day and these children lost on average approximately 4 hours of school out of their 6 hour school day.

To read the full report, go to: http://www.archdisabilitylaw.ca/sites/all/files/If%20Inclusion%20Means%20Everyone,%20Why%20Not%20Me.pdf

Since the publication of that study, news coverage of this issue has begun to increase. ARCH, as well as a number of other community advocates, have been speaking out on behalf of students with disabilities. In particular, advocates have been demanding that the government:

- Take action to restrict this practice;
- Take steps to ensure that Ontario's attendance tracking system captures information about exclusions; and
- Convene a consultation with parents, students and other stakeholders to address this issue more broadly.

To read some recent news articles about this issue, go to: https://www.theglobeandmail.com/canada/education/article-educating-grayson-are-inclusive-classrooms-failing-students/, and https://www.theglobeandmail.com/canada/article-advocates-call-on-ford-government-to-help-special-needs-children-who/.

Thanks to the support of the community and the recent news coverage, it appears that the Government of Ontario has begun to look into this issue. Recently, the government announced that they would be conducting "virtual" consultations on this issue. While the exact form and scope of the consultations remain to be seen, this is a promising step towards addressing an issue of perennial concern for students with disabilities. We encourage all those who are interested to participate in the consultations and share their experiences on this problematic practice with the Government of Ontario.

Supreme Court: Henson Trusts are not Considered Assets when Deciding if a Person is Eligible for Rent Subsidy

By Dianne Wintermute, Staff Lawyer

On January 25, 2019, the Supreme Court of Canada released its decision in *S.A. v Metro Vancouver Housing Corp*, 2019 SCC 4. This case is of national importance and significance because it ensures that many persons with disabilities can continue to access vital social programs they rely on to maintain an adequate standard of living.

S.A. is a person with a disability who lives in subsidized housing operated by Metro Vancouver Housing Corp (the "Housing Corp"). She received a rent subsidy for many years. When her father died, S.A. became the beneficiary of a Henson Trust. A Henson Trust is also known as an absolute trust – the beneficiary is not entitled to receive any money from the trust. Whatever sums the beneficiary receives is within the total control of the trustees. A Henson Trust is designed so that families can put aside money for persons with disabilities without affecting their entitlement to social assistance.

Every year, the housing authority where S.A. lives reviews the income and assets of a renter to determine if they are still eligible for a rent subsidy. S.A. told the Housing Corp that she was the beneficiary of a Henson Trust. The Housing Corp wanted to know the value of the Henson Trust so they could take its value into account when deciding if S.A. continued to be eligible for a rent subsidy. S.A. refused to disclose the value of the Henson Trust stating that it was not an asset that belonged to her. She could not access the Henson Trust because the sole authority for releasing funds was within the total discretion of the named trustees.

The Supreme Court of Canada agreed with S.A. on two essential points. First, the trust has the essential features of a *Henson* trust: the trustee has the absolute discretion to decide whether, how much and when payments out of the trust would be available to the beneficiary (person with a disability). The effect of this is that a person with a disability cannot force the trustee to make payments to him or her. The Court said that because of this feature of a Henson Trust, S.A. has "no enforceable right to receive any of the trust's income or capital. Her interest in the trust is akin to a mere hope that some or all of its property will be distributed to her at some point in the future."

Second, the word "assets" must be considered in context. In this case, a reasonable person would understand the word "assets" to mean an applicant's property that can actually be used to pay for debts or other obligations, like monthly rent. S.A. did not have access to the assets in a Henson Trust and therefore could not use it to pay rent. For these reasons, the Court found that the value of the trust is not relevant when deciding whether S.A. was eligible to receive the rent subsidy. Therefore, there was no reason for the Housing Corp to require that S.A. disclose the value of the Henson Trust.

This case is specifically about whether a Henson Trust can be taken into account for determining a person's eligibility for a rent subsidy. However, it can be argued that the exemption of Henson Trusts from the calculation of "assets" has a broader application extending to all kinds of social assistance benefits. Beneficiaries of a Henson Trust are not required to disclose the value of the Trust in order to be eligible for social assistance benefits such as a rent subsidy. The benefit provider, like the housing authority, cannot require that a Henson Trust be taken into account when deciding whether a person with a disability is entitled to social assistance benefits.

ARCH Disability Law Centre represented the Council of Canadians with Disabilities as an intervener before the Supreme Court. Our arguments focused on the application of the *Convention on the Rights of Persons with Disabilities* (*CRPD*) to the facts at hand. Specifically, we argued that the right to an adequate standard of living, guaranteed under Article 28 of the *CRPD*, requires that Canada ensure access to appropriate services for persons with disabilities. This includes helping persons with disabilities to meet disability-related expenses, such as affordable housing. We argued that these principles should guide the Court in its interpretation of assets and the role of discretionary trusts.

To read the Supreme Court's full decision in this case, go to: http://canlii.ca/t/hx61p

Bill 64 - Noah and Gregory's Law: Proposed Changes to the *Social Inclusion Act*

By Madison Randall, Disability Law Intensive Student

**Editor`s Note: we use the term 'developmental disability' in this article as that is the language used in legislation.*

In November 2018, Member of Provincial Parliament (MPP) Lisa Gretzky introduced Bill 64 - Noah and Gregory's Law (Transition to Adult Developmental Services and Supports). If it becomes law, this Ontario Bill will change the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008* (the "*Social Inclusion Act*"). It aims to make the transition from children's developmental services to adult developmental services in Ontario easier and more effective. On February 21, 2019, Bill 64 passed second reading and has been referred to the Standing Committee on Regulations and Private Bills for further study.

Currently, when a child is diagnosed with a developmental disability, their family or caregiver can apply to the Ministry of Children, Community and Social Services (MCCSS) to receive access to funding, services, and supports, including Special Services at Home (SSAH), Out-of-Home Respite, and specialized community supports. In most cases, once

these children turn 18 they are cut off from these services (except in certain situations such as where the school board will continue providing services until age 21). Upon turning 18, they need to apply for adult developmental services according to the process established under the *Social Inclusion Act*. This process requires people to apply to their regional Developmental Services Ontario (DSO) office. If they qualify for adult developmental services, the DSO will assess their needs and place them on a waitlist for funding, services, and supports. These waitlists are lengthy, often leaving many people without access to developmental services or funding for years.

If Bill 64 becomes law, the *Social Inclusion Act* will require the Minister of Children, Community and Social Services to consult with the person receiving children's developmental services or their caregiver at least six months before their 18th birthday. With consent, the Minister is then responsible for submitting an application for adult developmental services to the person's regional DSO.[1]

The Bill also amends the *Social Inclusion Act*'s eligibility requirements. The way the Act is currently written requires people to provide proof of their developmental disability when applying for adult developmental services. Even if the person was receiving children's developmental services up until they turned 18, they must still go through the process of proving that they have a developmental disability in order to qualify for developmental services, supports, and funding as an adult. Bill 64 would change this by providing that people with developmental disabilities are eligible for services, supports, and funding (without providing proof of their disability) if they were receiving children's developmental services immediately before turning 18. Bill 64 does not change the other existing eligibility criteria for adult developmental services. This means that if Bill 64 becomes law, people will still need to be over age 18 and live in Ontario in order to qualify for adult developmental services.[2]

Currently, persons with developmental disabilities lose access to all of their children's services, supports, and funding at age 18. After applying to the DSO for adult developmental services, they are placed on indeterminate waitlists until services and/or funding become available. Meanwhile, these individuals are left without access to any services, supports, or funding for an indefinite amount of time. Bill 64 tries to correct this gap by requiring the DSO to continue providing services that are "equivalent" to the children's developmental services if the DSO has received an application from the Minister on the person's behalf, and 1) a decision has not been made about the application, or 2) they have been approved, but services, supports or funding have yet to be provided.[3] The

[1] Bill 64, *Noah and Gregory's Law (Transition to Adult Developmental Services and Supports), 2018*, 1st Sess, 42nd Leg, cl 13.1 ["Bill 64"]
[2] Services *and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008,* S.O. 2008, c 14 at s 14(2)(b) – (c) ["SIPDDA"].
[3] *Ibid* at cl 17.1.

amendments to the Act would also require the DSO to continue providing these "equivalent" services from the day the individual turns 18 until they start receiving services, supports, and funding, or until they are deemed ineligible by the DSO for adult developmental services.[4] The Bill does not specify whether "equivalent" services would be a continuation of children's services, comparable adult services, a combination of the two, or something else entirely.

While Bill 64 could offer positive changes to the way that adult developmental services and funding are currently provided, it still leaves uncertainty about how these changes will be implemented in practice. It does not address any plans to input more money into children's or adult developmental services so "equivalent" services can be provided to individuals on waitlists, nor does it mandate the creation of more adult services. This may lengthen the time others need to wait for services, supports, and funding if limited resources are now being dispersed among more people.

The introduction of Bill 64 is evidence that the government recognizes some of the challenges faced by persons with developmental disabilities when it comes to transitioning to adult developmental services. It is an acknowledgement that being left on an indeterminate waitlist for adult services without access to anything in the interim is inadequate and unacceptable. However, there is still uncertainty about how these equivalent services will be funded and implemented if the Bill is passed, as well as the impact upon people currently waiting for or receiving adult developmental services.

The Bill has been referred to the Standing Committee on Regulations and Private Bills, but no meetings have been scheduled yet. This Committee may hold public hearings or allow members of the public to send written comments about Bill 64. For more information about the Standing Committee on Regulations and Private Bill and its study of Bill 64, go to: https://www.ola.org/en/legislative-business/committees/regulations-private-bills/parliament-42

[4] *Ibid* at cl 17.1(2).

Third Independent Review of the *Accessibility for Ontarians with Disabilities Act* (*AODA*)

By Dianne Wintermute, Staff Lawyer

In 2018, David Onley, former Lieutenant Governor of Ontario, was asked by the provincial government to conduct the third Independent Review of the *AODA*. The role of the Review is to look at how effectively the *AODA* and its Standards are operating to achieve the goal of a barrier-free Ontario by 2025.

Under the law, the *AODA* is reviewed every five years to ensure that obligated public and private organizations are fulfilling their obligations to remove barriers preventing the full participation and inclusion of persons with disabilities in customer service, transportation, employment, design of public spaces, information and communication in Ontario. The two previous reviewers were Charles Beer (2010) and Mayo Moran (2014).

In order to determine the impact of the *AODA* throughout Ontario, Mr. Onley held focused consultations with persons with disabilities, their families and supporters and with organizations required to implement the *AODA*. His conclusion was that very little has changed since Moran's last review; that progress is slow; that previous recommendations by the first two reviewers have not been adopted or implemented; and that Ontario is not in a position to meet its legislated accessibility goal of 2025.

In his Review, Mr. Onley traced the history of the *AODA* and described complementary legislation like Ontario`s *Human Rights Code* and the *Convention on the Rights of Persons with Disabilities.* He reviewed the operation of the existing Standards and their impact on accessibility. He identified additional Standards that are necessary to improve accessibility, and he described problematic issues with the lack of enforcement of Accessibility Standards.

One of the key issues Mr. Onley identified is the "compliance" mentality in Ontario. He believes that there needs to be a cultural change, and that accessibility needs to be embraced as a part of everyday conversation. Another issue he identified is the pitfalls of having the Built Environment Standard contained in the *Building Code*. He recommended an overhaul of the 2013 *Building Code* to introduce new accessibility standards for new construction and existing renovations. He also wants to see new standards for retrofitting buildings. Finally, he calls for revisions to the Design of Public Spaces.

Mr. Onley's recommended priorities for immediate action include:

- Recalling the Secondary, Post-secondary and Health Care Standards Development Committees (the Education and Health Care Standards Committees have now been restarted);
- Adopting an all government/all Ministry approach to accessibility;

- Introducing tax incentives to retrofit existing buildings;
- Establishing a complaint system for reporting *AODA* violations;
- Reforming public-sector infrastructure projects to prevent barriers; and
- Beginning work on the Built Environment Standards.

Mr. Onley was extremely critical of the snail-pace progress of the *AODA* and the implementation of its Standards. Importantly, he said that: "(f)or most persons with disabilities, Ontario is not a place of opportunity, but one of countless, dispiriting and, soul-crushing barriers."

To read Mr. Onley`s full report go to: https://www.ontario.ca/page/2019-legislative-review-accessibility-ontarians-disabilities-act-2005

Legal Updates on Solitary Confinement in Federal Prisons

By Lila Refaie, Staff Lawyer

ARCH wrote about court decisions related to administrative segregation (commonly known as solitary confinement) in Canada in the April 2018 issue of ARCH Alert. That article discussed important developments regarding the rights of prisoners with mental health disabilities in administrative segregation in both federal and provincial prisons. Following those court decisions, this article summarizes legal developments regarding the status of administrative segregation in federal prisons that have occurred in the last year.

Brief Summary of the Current Framework Governing Administrative Segregation in Federal Prisons

Federal prisons are governed by the *Corrections and Conditional Release Act*[1] ("Federal Act") and its regulations, and each prison is managed by the Institutional Head. In federal prisons, there are two types of segregation placements. A prisoner can be placed in disciplinary segregation or administrative segregation.

Placing a prisoner in disciplinary segregation serves as a punishment when a prisoner has acted in violation of a rule while incarcerated. The procedure behind placing a prisoner in disciplinary segregation follows a strict process, and the law limits the length of time a prisoner can be in segregation to a maximum of 30 days.

[1] S.C. 1992, c. 20

On the other hand, administrative segregation[2] provides much more discretion to the Institutional Head. A prisoner may be placed in administrative segregation if it is believed that such placement is for the safety or security of either the prisoner in question or other prisoners in the prison. There are no limits to the length of stay in administrative segregation. The Institutional Head holds the power to place a prisoner in administrative segregation, and has the final word on any review of the prisoner's placement. While reviews of a prisoner's placement are held before the Segregation Review Board, the Institutional Head is not obligated to follow this board's recommendations to release the prisoner from segregation. An initial review of the placement must be held within five days, followed by at least one review every thirty days.[3]

Summary of Court Decisions that Found Administrative Segregation in Federal Prisons Unconstitutional

In December 2017, the Ontario Superior Court delivered a ruling on the constitutionality of administrative segregation in federal prisons in the case of *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen.*[4] In this case, the Court found that placing a prisoner in administrative segregation beyond the legislated initial review process is unconstitutional because of the lack of an independent review of the placement. In other words, even though a review of the prisoner's placement in segregation is conducted five days after their placement, the fact that the Institutional Head makes the final decision about the length of the placement, instead of an independent review board, infringes on the prisoner's right to procedural fairness, guaranteed under section 7 of the Canadian *Charter of Rights and Freedoms* ("*Charter*").

The Canadian Civil Liberties Association ("CCLA") had brought the constitutional challenge to the Federal Act, concerning all the provisions related to administrative segregation. They argued that the current form of administrative segregation breached prisoners' rights under section 7, 11(h) and 12 of the *Charter.* Section 7 of the *Charter* guarantees everyone "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Section 12 of the *Charter* guarantees protection against cruel and unusual treatment or punishment.

While the Court partially agreed with the CCLA with regards to procedural fairness within the review process of the placement of a prisoner, it did not go so far as to find the entire current format of administrative segregation as being unconstitutional or that it breached any of the prisoners' other rights guaranteed by sections 7, 11(h) and 12 of the *Charter*. The Court agreed that administrative segregation could cause psychological stress to prisoners, which can in turn result in harmful mental health effects. However, it found that

[2] *Ibid.,* sections 31 to 37
[3] Corrections and Conditional Release Regulations, SOR/92-620, s. 21.
[4] 2017 ONSC 7491

the Federal Act appropriately deals with the potential danger of prolonged segregation and has procedures in place to monitor these prisoners adequately.

The Court suspended its ruling for 12 months to allow the federal government to properly amend the law in accordance with this ruling. To read the full decision, go to: https://www.canlii.org/en/on/onsc/doc/2017/2017onsc7491/2017onsc7491.html?resultIndex=1. The CCLA appealed the decision because the Court refused to declare the entire regime of administrative segregation unconstitutional.

In January 2018, the Supreme Court of British Columbia released a landmark decision in *British Columbia Civil Liberties Association v. Canada (Attorney General).*[5] In this case, the Court concluded that the current format of administrative segregation is unconstitutional because it infringes prisoners' rights guaranteed by sections 7 and 15 of the *Charter*. In doing so, the Court recognized that administrative segregation has a notable effect on prisoners with disabilities and Indigenous prisoners. The Court suspended its ruling for 12 months to allow the federal government to appropriately amend the law, in keeping with prisoners' constitutional rights. To read the full decision, go to: https://www.canlii.org/en/bc/bcsc/doc/2018/2018bcsc62/2018bcsc62.html?resultIndex=1 . Shortly after this ruling, the federal government announced its intention to appeal the decision from the Supreme Court of British Columbia.

Both appeals were heard separately in November 2018. While both Courts of Appeal have since extended the suspension of their respective rulings, decisions on the substance of the appeals have not been released yet.

Proposed Legislation to Amend the *Corrections and Conditional Release Act*, as it relates to Administrative Segregation

Bill C-56 was introduced in 2016 with the intention to address similar concerns raised in the court challenges. However, the Bill did not go further than first reading. Instead, the federal government introduced a new bill, Bill C-83 – *An Act to amend the Corrections and Conditional Release Act and another Act* ("Bill C-83"), shortly after the above decisions from Ontario and British Columbia were released.

With Bill C-83, the federal government is attempting to amend the law related to solitary confinement in accordance with the above-mentioned court decisions.

If it becomes law, among other amendments, Bill C-83 would replace administrative and disciplinary segregation with a structured intervention unit. According to this Bill, a structured intervention unit is a prison or a particular area of a prison for prisoners who cannot stay with the general prison population for security reasons or other reasons. The Bill outlines the procedure to follow when a prisoner is placed in a structured intervention

[5] 2018 BCSC 62

unit. The health of a prisoner placed in a structured intervention unit would be monitored daily. A prisoner's mental health would be monitored if the prison's staff recommends such monitoring if the prisoner "refuses to interact with others", "exhibits a tendency to self-harm", "is showing signs of an adverse drug reaction" or "is showing signs of emotional distress or exhibiting behaviour that suggests that the [prisoner] is in urgent need of mental health care". The Bill also sets out a limit for a prisoner's stay in the structured intervention unit. The length of the stay is different dependent on the cause of the placement and the prisoner's health. However, the Bill emphasizes that a prisoner should be released from a structured intervention unit "as soon as possible". Finally, the Bill introduces an "independent external decision-maker" whose role will be to oversee all decisions regarding prisoners placed in a structured intervention unit, including those related to whether a prisoner should remain in this placement and the conditions of the placement.

On March 19, 2019, the Bill passed first reading in the Senate. At second reading, a more fulsome debate of the Bill will begin. If it passes second reading, the Bill will likely be referred to a standing committee of the Senate for a detailed analysis. Once the analysis by the committee is complete, the committee will present a report outlining any proposed amendments to the Bill and members of the Senate will have an opportunity to debate the proposed amendments. If the amendments are accepted, the Bill will be modified accordingly and will go through third reading at the Senate. If the Bill is amended by the Senate, it will need to return to the House of Commons for further consideration. Once the House of Commons and the Senate agree on a final version of the Bill, it will be granted Royal Assent and become law.

Courts of Appeal for Ontario and British Columbia Each Extend Suspension of Unconstitutionality of Administrative Segregation, to allow Time for Bill C-83 to Become Law

On December 17, 2018, The Court of Appeal for Ontario released a decision on a motion brought forward by the federal government to extend the deadline in the initial decision. The federal government requested an extension until July 31, 2019, to allow Bill C-83 to properly go through the legislative process. The Court of Appeal decided to extend the deadline to April 30, 2019. To read the court's decision on the extension of the deadline, go to: https://www.canlii.org/en/on/onca/doc/2018/2018onca1038/2018onca1038.html?autocompleteStr=2018%20ONCA%201038&autocompletePos=1. The Court of Appeal also heard the CCLA's appeal of the merits on the same day. However, as of the date of writing this article, no decision on the merits had been released.

On January 7, 2019, the Court of Appeal for British Columbia released a decision on a similar motion from the federal government related to the deadline extension. Again, the federal government requested the same extension to July 31, 2019. The Court of Appeal decided to extend the deadline to June 17, 2019. To read the court's decision on the extension of the deadline, go to: https://www.canlii.org/en/bc/bcca/doc/2019/2019bcca5/2019bcca5.html?autocompleteSt

r=2019%20bcca%205&autocompletePos=1. The Court of Appeal also heard the federal government's appeal of the merits at the same time. However, as of the date of writing this article, no decision on the merits had been released.

Interestingly, both the Courts of Appeal for Ontario and for British Columbia each granted extensions to pass Bill C-83 into law, but provided two different deadlines to the federal government. It is unclear whether the federal government will be able to comply with the earliest deadline (April 30, 2019), set by the Court of Appeal for Ontario. ARCH will continue to monitor this issue.

Developmental Services Waitlist Lawsuit Certified as a Class Action

By Lila Refaie, Staff Lawyer

ARCH wrote about the Developmental Services Waitlist class action in July 2018. This lawsuit was started against the Province of Ontario about long waiting lists for developmental services. It alleges that the Government of Ontario negligently ignored long Developmental Services of Ontario (DSO) waitlists for years, which negatively impacted Ontarians approved for developmental services since July 1, 2011; that the Government of Ontario breached its fiduciary duty; and that the delays and inaction are a violation of the class members' rights under section 7 of the Canadian *Charter of Rights and Freedoms*.

On December 14, 2018, the Ontario Superior Court of Justice ("Court") certified this lawsuit as a class action.[1] This means that the lawsuit will continue as a class action. The Court decided that the only allegations that may continue are the allegation that the Government of Ontario was negligent, and the allegation that the Government breached its duties under section 7 of the *Charter*. These allegations have not yet been proven in court. This lawsuit is still at an early stage of the process.

The Court also defined who is included as a class member. This class action lawsuit concerns "all persons who were alive as of April 10, 2015, who are eligible for ministry-funded adult developmental services and supports and funding, have been assessed by an application entity (DSO) and placed, at any point between July 1, 2011 to December 14, 2018, on any one or more of the service registries for: (i) "residential services and supports", (ii) "caregiver respite services and supports" under the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*; and (iii)

[1] *Leroux v. Ontario*, 2018 ONSC 6452.

"Passport" funding under the *Ministry of Community and Social Services Act*."[2] Any person that falls under this definition is included in the class action, unless they choose to opt out of the lawsuit.

Now that this class action has been certified, the Court will decide how to notify potential class members of the details of the class action, including how someone can opt out of the class action. A notice will then be sent to all potential class members accordingly.

For more information about this class action, contact Koskie Minsky by:
Phone (Toll Free): 1-866-474-1740
Email: waitlistclassaction@kmlaw.ca

You can also go to: https://kmlaw.ca/cases/ontario-support-services-waitlist-class-action/

Recent Arbitration Decision: Workplace Policy had Discriminatory Impact on Nurse with Addictions Disability

By Jessica De Marinis, Staff Lawyer

There is a recent decision in Ontario about the important issue of discrimination against persons with addictions disabilities at work. The case is called *Regional Municipality of Waterloo (Sunnyside Home) v Ontario Nurses' Association*, 2019 CanLII 433 (ON LA). The decision maker found that a nurse, DS, was discriminated against when she was fired after she told her employer that she stole pain medication and made fake patient records. DS had an addictions disability and told her employer that she stole and used the pain medication because of her addictions disability.

DS was a registered nurse who worked at The Region of Waterloo's Sunnyside Home Long Term Care Facility since 2002. Prior to the incidents that led to this case, DS received excellent performance reviews, came to work well groomed, and was polite and respectful to her co-workers.

In 2014, DS acquired an addiction to pain medication and started to improperly steal pain medication for herself from work and made fake patient records to hide the stolen pain medication. DS said that she needed the pain medication to get through each day. She said that she wanted to stop taking it, but she could not.

[2] *Ibid.*, at paragraph 60.

Around this time, because of her addictions disability, her behavior and appearance changed – she lost weight, was no longer well groomed, was rude and irritable towards staff, and was occasionally seen taking her break with her head down on a table. Her co-workers noticed these changes in her behavior and reported this to her employer, but her employer did not ask DS about these behaviours or if she needed help.

In September 2016, DS admitted to her employer that she had been stealing the pain medication and making fake patient records. DS also told her employer that she had an addictions disability and was addicted to the pain medication, which was the reason she was stealing. Her employer fired her because stealing and making fake records was against workplace policies.

After her termination, DS successfully completed a treatment program for her addictions disability and continued to be successful in the aftercare program. The last time she used pain medication was in September 2016.

In 2017, the College of Nurses of Ontario (CNO), the body that regulates the nursing profession, put conditions on DS for going back to work. The conditions said that she must follow her doctor's treatment plan at all times, not have access to pain medication and other medication at work, and be directly observed by another nurse when she is working.

When DS asked to come back to work, the employer said no because it could not comply with the conditions. For example, the employer said that all nurses would have access to pain medications and other medications as part of their duties and that they did not have enough nurses to have another nurse directly observe DS when she was working.

Grievance

DS' union filed a grievance for her alleging that the employer discriminated against her when it fired her and that the employer failed to accommodate her disability-related needs to the point of undue-hardship. In order for DS to be successful, she had to prove that her addictions disability was at least a factor in the employer's decision to fire DS and that the employer should have let her come back to work because the conditions would not cause the employer undue hardship.

The employer argued that DS' disability was not a factor in its decision to fire her because the reason for DS' termination was stealing and making fake records, not her disability. The employer argued that the same workplace policy would apply to any nurse who stole pain medication. Therefore, DS was not discriminated against because she did not experience different treatment. Essentially, the employer argued that the misconduct (stealing) could be separated from the *reason* that she did the misconduct (DS' addiction disability).
The union argued that the employer's policy indirectly discriminated against DS because DS' addictions disability was a factor that caused her to steal the pain medication. The union argued that the test for discrimination is not about whether the same policy applies to

everyone, but rather whether the policy had an adverse impact on a person because of their disability. The union argued that DS' disability made it so that she could not stop herself from stealing pain medication, therefore, terminating her on the basis of the workplace policy had a discriminatory impact on her.

Ultimately, the decision maker found that the employer had discriminated against DS because the evidence showed that DS's disability was connected to the fact that she stole pain medication and made fake records. Therefore, the employer's decision to fire DS had a discriminatory impact on DS, even though the same workplace policy would apply to any nurse who stole pain medication. In coming to this decision, the decision maker considered the recent Supreme Court of Canada decision, *Stewart v Elk Valley*, which is another case about an addictions disability in the workplace.

On the issue of accommodation, the decision maker found that the employer failed to accommodate DS for two reasons:

1) The employer failed to ask DS if she was ok or needed any accommodations after DS' co-workers noticed DS' behavior and appearance had changed a lot and reported this to the employer; and

2) The employer failed to think about how the workplace could be changed to accommodate DS. For example, the employer did not have any evidence to show that it thought about having another nurse with DS so that she could do her duties while being observed by another nurse.

In sum, the decision maker agreed with DS and found that the employer discriminated against her on the basis of disability and that the employer failed to accommodate her to the point of undue hardship. The decision maker ordered the employer to allow DS to return to work, and ordered the employer to accommodate her disability-related needs.

Impact of this Decision

This is a good decision for employees because it suggests that there is a preferred approach in Ontario for applying workplace policies in situations where the worker's disability had an impact on their ability to follow the workplace policy. It shows how a valid workplace policy can have a discriminatory impact on a person with a disability, even if it is applied to all workers in the same way.

It also confirms that the duty to accommodate requires employers to inquire or ask whether an employee needs accommodation if they notice a lot of changes in the employee. It confirms that employers have a legal responsibility to think a lot and be creative about how

they might make changes in a workplace to appropriately accommodate an employee's disability-related needs.

You can read the full decision by going to: https://www.canlii.org/en/on/onla/doc/2019/2019canlii433/2019canlii433.html?autocompleteStr=2019%20canlii%20433%20&autocompletePos=4

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Celebrating the United Nations' International Day of Persons with Disabilities

By Robert Lattanzio, Executive Director

As we do every year, ARCH celebrated the annual International Day of Persons with Disabilities held on December 3rd. The theme for the 2018 celebration set by the United Nations was empowering persons with disabilities and ensuring inclusiveness and equality.

ARCH was involved in two events commemorating the day, one in Ottawa and the other in Toronto.

ARCH and the Canadian Centre on Disability Studies (now eviance) co-hosted an all-day event in Ottawa to celebrate the International Day of Persons with Disabilities, in collaboration with the Canadian Human Rights Commission, Council of Canadians with Disabilities, Canadian Council on Rehabilitation and Work and nineSixteen. The Conference was titled "Intersectionality and Human Rights: Monitoring Change Together".

Of note, The Honourable Carla Qualtrough, Minister of Public Services, Procurement and Accessibility, presented at the event and made an important announcement during her address. The Minister announced that Canada acceded to the Optional Protocol to the *Convention on the Rights of Persons with Disabilities*. Disability communities across the country have been advocating for this and we thank the Minister for her leadership in making this a reality.

ARCH delivered a presentation on the treatment of the *Convention on the Rights of Persons with Disabilities* in Canadian courts and tribunals. The Chief Commissioner of the Canadian Human Rights Commission presented on accessibility and human rights. Dr. Susan Hardie, eviance's Executive Director, presented on intersectionality, and Dr. Marcia Rioux spoke about the monitoring of human rights. There was also a panel discussion about monitoring and the learnings and experiences from civil society during Canada's first review by the UN Committee on the Rights of Persons with Disabilities. The event also launched the rebranding of the Canadian Centre on Disability Studies, now operating as eviance. Eviance awarded certificates to April D'Aubin, Dr. Marcia Rioux, and Steven Estey

in recognition of their exceptional leadership and contributions to the disability rights movement in Canada.

ARCH wishes to thank all of our partners and notable speakers in making this a successful event. Our sincerest thanks to eviance and Dr. Susan Hardie for her leadership in making this event possible.

ARCH's celebration of the International Day of Persons with Disabilities in Toronto was equally successful. ARCH launched several new series' of public legal education materials, and soft launched our website for feedback and user testing from our communities. ARCH has since officially launched our new website and we are grateful to all those who provided feedback for making our website more accessible and user friendly. To visit our new website please go to: www.archdisabilitylaw.ca

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

Check ARCH's website www.archdisabilitylaw.ca for the Latest ARCH News, publications (including past issues of the ARCH *Alert*), submissions, fact sheets and more.

Become a Member of ARCH
If you would like to become an individual member of ARCH, please visit our website at www.archdisabilitylaw.ca or contact our office to request an Application for Individual Membership form. Membership is free.

Donating to ARCH

While ARCH receives core funding from Legal Aid Ontario and grant funding from other sources, we also rely on the donations from individuals. We ask you to consider being a part of our work by contributing whatever you can. If you are able to assist please donate to ARCH through www.canadahelps.org.

Or you can send your donation cheque to:

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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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