ARCH *Alert*

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

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ARCH Disability Law Centre

ARCH's AGM – Save the Date!

ARCH will be hosting its Annual General Meeting (AGM) on **Monday October 1, 2018.**

Invitations will be sent about a month before the AGM. If you would like to receive the invitation and don't already subscribe to receive the ARCH *Alert* and other electronic materials from ARCH, please go to our website to subscribe: http://archdisabilitylaw.ca/

Exciting Announcement: the ARCH Blog

The ARCH Blog is live! Go to http://www.archdisabilitylaw.ca/Blog for bi-weekly content related to disability rights, accessible practice tips for lawyers and paralegals, and matters that may fall in between.

The first few posts are already up. Read about National AccessAbility Week, practice tips for working with clients who cannot sign documents because of a disability, and the much-anticipated federal accessibility legislation.

Readers will soon be able to sign up for notifications of new blog posts by email.

Accessible Canada Act Passes First Reading

By Kerri Joffe, Staff Lawyer

On June 20, 2018 the *Accessible Canada Act* was introduced in the House of Commons and passed first reading. The *Accessible Canada Act*, also known by its full title as *An Act to ensure a barrier-free Canada*, is presently a bill, and must work its way through the legislative process before becoming law in Canada. When it becomes law, it will create new accessibility requirements for certain federally-regulated sectors.

The purpose of the Act is to identify, remove and prevent barriers in:

- Federal buildings and public spaces
- Federally-regulated employment
- Information and communication technologies
- Federal procurement of goods and services
- Government of Canada programs and services; and
- Federally regulated transportation, including air, rail, ferry and buses that travel across a provincial or international border

The Government may identify additional areas in the future.

The Act defines a barrier as anything that hinders the full and equal participation in society of persons with a physical, mental, intellectual, learning, communication or sensory impairment or functional limitation.

The Act will apply to organizations under federal jurisdiction, including Parliament, the Government of Canada, government departments, Crown Corporations and agencies, the banking and financial sectors, broadcasting and telecommunications service providers, federally-regulated transportation service providers, and other private sector organizations that are under federal jurisdiction. The Act will also apply to the Canadian Forces and the Royal Canadian Mounted Police.

These organizations will be required to create accessibility plans, create feedback processes and submit progress reports. The accessibility plans must describe the organization's policies, practices, programs and services to identify, remove and prevent barriers. These plans will need to be developed through consultations with persons with disabilities. The plans must be published and updated every 3 years. Organizations must create feedback processes to receive and respond to feedback from people about the barriers they encounter and how the organization is meeting its accessibility plan. These feedback processes must be published. Organizations must also prepare and publish progress reports that explain how they are fulfilling their accessibility plans. These reports must be prepared in consultation with persons with disabilities, and must include information about the main concerns raised through the feedback process and how those concerns are being addressed. Organizations must make these progress reports available to people who request them.

The Act creates a new body called the Canadian Accessibility Standards Development Organization. The mandate of this new body is to develop and revise accessibility standards, which will be regulations that set out the steps that organizations must take to

identify, remove and prevent barriers. The new body also has a mandate to develop and revise information, products and services in relation to the accessibility standards, promote and conduct research into the identification and removal of barriers and the prevention of new barriers, and disseminate information about best practices. The majority of the new body's board of directors will be persons with disabilities, and the directors should represent the diversity of Canadian society.

To develop accessibility standards, the new body will form committees that include experts, persons with disabilities, and representatives from sectors or organizations that will have to meet the particular standard. When new accessibility standards are created, they must be made available to the public. The new body must submit annual reports on its activities to the Minister responsible for the legislation, The Honourable Kirsty Duncan, who is the Minister of Sport and Persons with Disabilities.

The Act sets out a number of ways in which it will be monitored and enforced. An Accessibility Commissioner, who is a member of the Canadian Human Rights Commission, will be appointed and will have responsibility for some aspects of compliance and enforcement of the Act. The Accessibility Commissioner's role is to give information or advice to the Minister about the legislation. The Commissioner must report on his/her activities annually to the Minister, and must include in the report an analysis of any systemic or emerging accessibility issues. This report may be published.

In order to determine whether organizations are complying with the legislation, and to prevent organizations from failing to comply, the Accessibility Commissioner or his/her officers can conduct inspections and make compliance orders requiring an organization to take steps to comply with the Act within a specified period of time. The Accessibility Commissioner or his/her officers can also issue notices of violation containing a warning or assigning a fine that organizations must pay for failing to comply with the accessibility requirements set out in the Act or regulations. Fines can be set at up to $250,000 and will depend on the extent to which an organization has failed to comply with the Act or regulations. Organizations will have rights to appeal these notices and fines.

With a few exceptions, people who have experienced physical or psychological harm, property damage, or economic loss due to an organization not complying with the regulations have a right to file a complaint with the Accessibility Commissioner. The Commissioner may investigate complaints, try to resolve complaints, and determine whether complaints are substantiated or not. For substantiated complaints, the

Commissioner may order an organization to take steps to meet its accessibility requirements and pay compensation to the aggrieved person.

Some complaints would not be made to the Accessibility Commissioner. For example, complaints about barriers in broadcasting and telecommunication services would continue to be made to the Canadian Radio-television and Telecommunications Commission (CRTC), and complaints about federal transportation systems would continue to be made to the Canadian Transportation Agency or the Canadian Human Rights Commission.

The right to make an accessibility complaint to the Accessibility Commissioner would not affect or prevent someone from using the existing Canadian Human Rights Commission process to make a complaint about discrimination.

In addition, an independent Chief Accessibility Officer will be appointed, with responsibilities for monitoring and reporting to the Minister on the implementation of the Act.

When the Act was introduced into Parliament, Minister Duncan also announced that the Government of Canada has committed $290 million over six years to implement this new legislation. Approximately $18 million will be invested to expand the existing Opportunities Fund for Persons with Disabilities to connect persons with disabilities looking for employment with employers, and support employers to recruit, accommodate and retain employees with disabilities.

Disability organizations and activists are presently studying the Act and developing legislative analyses and advocacy positions, which will be disseminated to the community. When the House of Commons resumes in the fall, the Act will continue to work its way through the legislative process. It is very likely that the Act will be referred to a legislative committee for further study and recommendations. Disability organizations, stakeholders and members of the community will likely have opportunities to provide feedback and input on the Act to the legislative committee.

For more information and to read the full text of the Act, go to:
http://www.parl.ca/DocumentViewer/en/42-1/bill/C-81/first-reading#enH755

To read the Government of Canada's plain language summary of the Act go to:
https://www.canada.ca/en/employment-social-development/programs/accessible-people-disabilities/act-plain-language-summary.html

Elections 2018: How Will the Newly Elected Progressive Conservative Government Address Disability Issues?

By Lila Refaie, Staff Lawyer

On June 7, 2018, Ontario voters elected a new government: the Progressive Conservative Party ("PC Party"), with a majority (76 seats). The leader of the Party and Ontario's premier-designate is Doug Ford. He was officially sworn in as Ontario's premier on June 29. The New Democratic Party ("NDP") is the official opposition Party, with 40 seats.

While the PC Party did not release a detailed platform during the campaign, Doug Ford pledged cuts to taxes and prices of some goods, while promising to eliminate the deficit, and spend money on transit and infrastructure, as his party's top priorities. The PC Party, through its leader, also addressed some issues affecting Ontarians with disabilities.[1]

Supports for Mental Health, Addictions, and Housing

Doug Ford promised to invest $1.9 billion in mental health, addictions, and supportive housing over the next 10 years[2]. This amount is in addition to the commitment made by the Government of Canada in 2017, to invest $1.9 billion for mental health in Ontario.[3]

Additional Funding for the Ontario Autism Program

Furthermore, the premier-designate promised to provide an additional $38 million in funding for all children with autism, above and beyond the funding already outlined in the former Liberal Government's plan. The current Ontario budget for 2018 includes an investment of $62 million for the Ontario Autism Program[4]. With this additional pledge, Doug Ford will effectively spend $100 million for children with autism, through the

[1] *For the People, A Plan for Ontario*, online: https://www.ontariopc.ca/plan_for_the_people ; Rodriguez, Jeremiah, *Here Are All of Doug Ford's Promises in Ontario Election 2018,* June 7 2018, online: https://www.macleans.ca/politics/ontario-election-2018-party-platforms/
[2] *Doug Ford Will Cut Wait Times*, May 18 2018, online: https://www.ontariopc.ca/doug_ford_will_cut_wait_times
[3] Benzie, Robert and Campion-Smith, Bruce, *Ontario Welcomes New 10-Year Health Accord With Ottawa*, March 10 2017, online: https://www.thestar.com/news/canada/2017/03/10/ontario-quebec-reach-health-deals-with-ottawa-after-months-of-negotiations.html
[4] *2018 Ontario Budget: Budget Papers*, March 2018, online: http://budget.ontario.ca/2018/chapter-1.html#s-23

Ontario Autism Program.[5] The Ontario Autism Program provides services and supports to children with autism in their home, school and community. It is anticipated that the additional investment in the program will result in an increase of services and a decrease of delays in accessing these services.

In addition, PC MPP in Kitchener South-Hespeler, Amy Fee, further described another promise for children with autism in relation to the use of service dogs. This issue is of particular importance to MPP Fee, who will support an expansion of the use of autism service dogs in schools[6]. Accordingly, the PC Party officially pledged to review the possible implementation of a province-wide approval of service dogs in schools.[7]

The Next Four Years

The newly elected PC Party has put forward limited pledges and has been relatively silent on its official position concerning disability issues. It remains important for Ontarians to continue to monitor all actions of the new government and to bring any concerns about proposed laws, policies, programs or other government action to your local MPP. ARCH will continue to monitor the new government's actions and their anticipated impact on communities of persons with disabilities.

[5] *Only the Ontario PC Party Will Provide More Support for Children with Autism,* May 26 2018, online: https://www.ontariopc.ca/only_the_ontario_pc_party_will_provide_more_support_for_children_with_autism
[6] *Ibid.*
[7] *Ibid.*

Abbey v. Ontario: No Damages for Discrimination if Government followed Laws or Policies Later Found to be Discriminatory

By Dianne Wintermute, Staff Lawyer

A very disappointing decision that will affect persons with disabilities was released by Ontario's Divisional Court in April 2018. At issue was whether the Human Rights Tribunal of Ontario could order the government to pay compensation for discriminating against someone by following a policy which was later found to violate Ontario's *Human Rights Code*. The Court said that it could not.

The case was about Ms. Sheryl Abbey, a person with a disability, who wanted to become self-employed while receiving Ontario Disability Support Program (ODSP) benefits. She developed a business plan and started to reach out to advertisers and others to assist her. She told her ODSP worker about her plans and for the first time she learned that if she were to sub-contract work to other people, their wages would be considered income to her. This would mean that her already meagre ODSP benefits would be reduced by those amounts. As a result, she abandoned her business plans. She also filed an application to the Human Rights Tribunal Ontario alleging that the ODSP sub-contracting rules were discriminatory.

The Human Rights Tribunal found that the sub-contracting rules discriminated against Ms. Abbey. It held that these rules were contrary to one of the goals of ODSP, which is to provide employment support to persons with disabilities who are able to contribute to their support by working. The Tribunal also said that the sub-contracting rules "exacerbated the already vulnerable circumstances of ODSP recipients who aspire to or attempt the kind of self-employment that the applicant tried to pursue". As a result, the Tribunal found that the sub-contracting rules were discriminatory and violated the *Human Rights Code.*

The Tribunal ordered ODSP to stop following the discriminatory sub-contracting rules. However, the Tribunal said that it could not order the government to pay damages to Ms. Abbey for injury to her dignity because cases under the *Canadian Charter of Rights and Freedoms* have said that unless someone can show that a government decision was clearly wrong, in bad faith, or an abuse of power, a successful claimant cannot get damages for a breach of rights. The reason is that government should be able to act in accordance with laws and not be liable if those laws are later found to breach *Charter* rights. The Tribunal held that this principle applies equally to discrimination under the *Human Rights Code.* Ms. Abbey asked the Human Rights Tribunal to reconsider its decision. The reconsideration upheld the original decision.

She then sought judicial review of the Tribunal's decision at the Divisional Court. ARCH and the Income Security Advocacy Centre (ISAC) represented the Council of Canadians with Disabilities, the ODSP Action Coalition and ISAC as interveners in the Divisional Court case. We argued that people who go to the Human Rights Tribunal of Ontario because of discrimination they've faced under a government policy should be granted damages for the harms they suffer, regardless of whether damages would have been granted under the Charter. Not only does the Human Rights Code explicitly give the Tribunal the power to make these orders, but this interpretation is also the only one in keeping with Canada's international obligations under the *Convention on the Rights of Persons with Disabilities*.

Unfortunately, the Divisional Court upheld the finding of the Human Rights Tribunal. It stated that if a government follows a law that is later found to be unconstitutional, the government is not "at fault". In addition, government decision-making could be affected if governments were held responsible for damages following a decision that a law was unconstitutional. Finally, if the government was held liable for every breach of a law that was later found to be unconstitutional, they would be responsible for paying vast sums of money. The Court said that this same reasoning also applies to governments who follow laws or policies that are later found to be in violation of the *Human Rights Code.*

The effect of this decision is that if a person is discriminated against by ODSP or other government actors due to the government following laws or policies that are later deemed discriminatory, the person will not get compensation for this discrimination.

ARCH is concerned that the Divisional Court's decision does not take into account the very broad remedial powers of the Human Rights Tribunal of Ontario. It also ignores the fact that "fault" has never been required in order to award damages for injury to dignity from discrimination. The object of remedies under the *Code* is to put the applicant in the place they would have been had the discrimination not happened. It is not to "punish" the person who breached the *Code.*

To read the Divisional Court's full decision, go to:
https://www.canlii.org/en/on/onscdc/doc/2018/2018onsc1899/2018onsc1899.html?autocompleteStr=abbey&autocompletePos=1

Class Actions Updates

By Lila Refaie, Staff Lawyer

Provincial Schools for the Deaf Class Action: settlement reached, pending court approval

In August 2015, a class action lawsuit was started against the Province of Ontario about abuse at provincial Schools for the Deaf. The original court application included four schools: Ernest C. Drury School for the Deaf, Sir James Whitney School for the Deaf, Robarts School for the Deaf, and Centre Jules-Léger. The lawsuit was seeking $325 million for students who experienced abuse while attending or living at one or more of these schools.

The class action is also known as *Welsh v. Ontario*. The lawsuit was certified as a class action on August 26 2016, and was limited to the following three schools where students were emotionally, physically, sexually, and/or psychologically abused:

- Ernest C. Drury School for the Deaf (or its predecessor), in Milton – between September 1 1963 and August 23 2016

- Sir James Whitney School for the Deaf (or its predecessor), in Belleville – between September 1 1938 and August 23 2016

- Robarts School for the Deaf (or its predecessor), in London – between September 1 1973 and August 23 2016

You are included in the class action if you were a student at one of these three schools during the period of time outlined above, and you experienced abuse. If you are an estate trustee for someone who was a student at one these schools during those periods, and that person was alive on or after August 10, 2013, you are also included in this class action.

A settlement agreement was reached with the Ontario Government in December 2017. While the Government does not admit its liability for the abuse, it has agreed to pay compensation to eligible affected students who experienced physical and/or sexual abuse only. The total amount of compensation is $15 million. This amount covers payments to eligible class members, legal fees, disbursements and any applicable taxes. According to the *Class Proceedings Act,* this settlement agreement was conditional on the approval of the Superior Court of Justice (the Court). In other words, the Court must first look at the agreement and ensure that it is fair, reasonable and beneficial to class members who attended or resided in these schools. A hearing was held on April 30, 2018 for this purpose.

On May 24 2018, the Court approved the settlement agreement, but added a condition to the agreement. The Court ordered Koskie Minsky LLP, the law firm representing the class members, to donate part of their legal fees ($1.5 million) to a charity for people who are deaf. This condition was added to the settlement agreement because the Court believes the amount of compensation ($15 million), and the actual number of eligible class members under this settlement agreement, would not benefit the majority of the students who attended these schools. In fact, it is expected that only 10% of class members will be eligible for compensation. By ordering the law firm to donate part of their fees to a charity, the Court hopes that the entire deaf community will benefit from the settlement agreement.

Further, the Court noted that Centre Jules-Léger was left out of the settlement agreement. A lawyer from Koskie Minsky explained that the application was amended after the class action was certified. However, according to the *Class Proceedings Act*, a court must approve the removal of part of, or the whole original claim, which was not done in this case. Even though the settlement agreement is approved, the Court ordered the lawyers to request approval of the removal of this school. The lawyers will have to explain the reason for removing Centre Jules-Léger from the class action. This added procedure is required to ensure that these students are not prejudiced and to protect all class members' interests. The Court must decide if there is a valid reason to not pursue a claim about this school.

While the Court indicated its disappointment in the settlement reached, mainly because of the reduction of the agreed compensation amount from the original claim and the elimination of many categories where past students may apply for compensation, the Court ultimately approved the settlement agreement with the added requirement of donation to a charity for people who are deaf.

Koskie Minsky LLP is now appealing the Court's order to donate part of their legal fees.

Once the appeal process is completed, it is expected that the claims process will begin. Claim forms will be made available and those who are included in this class action may apply for compensation.

For more information and updates on this class action, please go to:
https://kmlaw.ca/cases/schoolabuse/

Developmental Services Waitlist Class Action Started

A potential class action lawsuit has been started against the Province of Ontario about long waiting lists for developmental services. The lawsuit was started in April 2017. It alleges that the Government of Ontario negligently ignored long Developmental Services of Ontario

(DSO) waitlists for years. As a result, Ontarians approved for DSO and placed on the waitlist since July 1 2011 have been negatively impacted. The lawsuit is still in the first stages of the legal process. It has not yet been certified as a class action.

For more information and updates on this lawsuit, please go to: https://kmlaw.ca/cases/ontario-support-services-waitlist-class-action/

Crown Ward Class Action Certified by the Court

The Ontario Superior Court of Justice has permitted the Crown Ward lawsuit (also known as *Grann v. The Queen (Ontario)*) to continue as a class action. Crown Wards are children who are taken into the care and protection of the provincial government for reasons including neglect or abuse from their parents or guardians. The lawsuit alleges that the Ontario government failed to protect the legal rights of Crown Wards and caused them harm. Approved class members include anyone who became a Crown Ward between January 1, 1966 and March 30, 2017.

For more information and updates on this class action, please go to: https://kmlaw.ca/cases/crown-ward-class-action/

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New Law Affects Delivery of Health Care-Related Services in Ontario

By Jessica De Marinis, Staff Lawyer

On December 12, 2017, the *Strengthening Quality and Accountability for Patients Act, 2017* (the *Act*) became law. The *Act* makes changes that relate to the health care industry and the delivery of some health care-related services in Ontario. While some changes came into force on the day the *Act* was passed, the vast majority of the changes have not yet come into force (i.e. are not yet enforceable law).

The previous Liberal Government said that the *Act* was one part of its plan to improve Ontario's health care system by enhancing transparency and putting patient's needs first. However, advocacy groups across Ontario argued that the Government failed to conduct

sufficient public consultation for the *Act* and criticized some of the changes made to health care-related services.[1]

The *Act* makes changes to a number of laws, including the *Health Protection and Promotion Act, Medical Radiation and Imaging Technology Act, 2017, Oversight of Heath Facilities and Devices Act, 2017,* and *Ontario Drug Benefit Act*. The *Act* repeals the *Ontario Mental Health Foundation Act*, *Independent Health Facilities Act*, *Healing Arts Radiation Protection Act* and *Private Hospitals Act*. The *Act* also repeals and introduces new legislation in Ontario. To read all of the legislative changes made by the *Act,* go to: www.ola.org/sites/default/files/node-files/bill/document/pdf/2017/2017-12/bill---text-41-2-en-b160ra_e.pdf

This article highlights some of the more significant legislative changes that may affect persons with disabilities.

Collection of Personal Health Information

The *Act* makes changes to the collection of personal health information under the *Excellent Care for All Act, 2010*. For example, it permits the Ontario Health Quality Council to collect personal health information for patient ombudsman investigations. These documents are exempted from the *Freedom of Information and Protection of Privacy Act*, meaning that they would not be disclosed through a Freedom of Information request. These changes are currently in force.

Confinement and Restraints

The *Act* creates a new regime for confining or restraining residents in long-term care homes. Specifically, the *Act* changes the *Long-Term Care Homes Act, 2007* by removing

[1] Consult, for example, Ontario Health Coalition, "Submission to the Standing Committee on General Government, Regarding Bill 160, An Act to amend, repeal and enact various Acts in the interest of strengthening quality and accountability for patients" (13 November 2017) online: Ontario Health Coalition http://www.ontariohealthcoalition.ca/wp-content/uploads/submission-to-the-standing-committee-1.pdf. Consult, for example, Advocacy Centre for the Elderly, "Submission to the Standing Committee on General Government, Bill 160, Strengthening Quality and Accountability for Patients Act, 2017" (23 November 2017) online: Advocacy Centre for the Elderly http://www.advocacycentreelderly.org/appimages/file/ACE%20Submission%20on%20Bill%20160.pdf

references to "secure units" and adding a framework that deals with both confining and restraining residents who live in long-term care homes.

Previously, a secure unit was understood to be an area within a long-term care home that was locked and prohibited residents from freely coming and going as they wished. The practice of admitting residents into a secure unit was unclear and devoid of due process. This resulted in repeated and continued illegal detention of residents in long-term care facilities.[2]

Under the new *Act*, confinement is permitted only if there is significant risk of serious harm, recommended by a medical practitioner or nurse (as defined by the regulations), and alternatives to confinement have been considered and tried, where appropriate. The *Act* requires that confinement be the "least restrictive" measure and that the resident or their substitute decision-maker consent to the confinement.

The *Act* makes parallel changes to the *Health Care Consent Act, 1996* that set out a regime for consenting to confinement by a resident or their substitute decision-maker. These changes include the same legal test and presumption of capacity for consenting to confinement as exists for consent to treatment, admission to a long-term care facility or personal assistance services. None of these changes interfere with the pre-existing common law duty of a caregiver to restrain or confine a person where necessary to prevent serious harm to the person or others.

The *Act* establishes a system where residents in long-term care facilities have the right to appeal decisions about confinement, and capacity to make decisions about confinement, to the Consent and Capacity Board. The *Act* sets up a similar appeal procedure under the *Health Care Consent Act, 1996*.

Notably, the *Act* does not say what "confine" means. The definition is left to be set out in regulations at a later date. This is significant because "confine" is a central concept to the

[2] Consult, Jane E. Meadus, "A Brand New World: Ontario's New *Long-Term Care Homes Act*" online: (2010) 7:1 Advocacy Centre for the Elderly Newsletter http://www.acelaw.ca/ace_library_-_newsletters.php ; consult, Advocacy Centre for the Elderly "Submission to the Law Commission of Ontario Concerning: The Law as it Affects Older Adults" (23 July 2008) 23-24 online: Advocacy Centre for the Elderly http://www.advocacycentreelderly.org/appimages/file/Law_as_it_Affects_Older_Adults_July_2008.pdf

changes made to the *Long-Term Care Homes Act,* 2007 and the *Health Care Consent Act, 1996.*

Without a definition of "confine" and until the provisions come into force, it is difficult to predict the full impact of these changes. In any event, from a human rights perspective, confinement or restraint of persons in any case is problematic. For years, advocacy groups have raised the use of restraints in care facilities as an issue of critical concern. Generally, the use of confinement is an inherent violation of some of the guiding principles of disability rights, including respect for dignity, liberty, full participation, and independence.

The *Act* changes the *Retirement Homes Act, 2010* by clarifying the use of confinement in retirement homes in specific circumstances, similar to those outlined in the changes to the *Long-Term Care Homes Act, 2007.*

However, unlike the changes made to the *Long-Term Care Homes Act, 2007*, a resident in a retirement home does not have an automatic right to review decisions about confinement at the Consent and Capacity Board. Rather, residents will have the right to apply for a review, by way of a regime that will be set out by regulations.

The concerns about confinement in long-term care facilities are intensified in the context of retirement homes. Unlike long-term care homes, which are publicly funded and provincially regulated, retirement homes are often private, for-profit facilities regulated by the Retirement Homes Regulatory Authority (RHRA), which is a not-for-profit organization independent of the government. The *Act* gives increased authority to the RHRA to oversee and monitor retirement homes where they believe that retirement homes are failing to comply with the *Retirement Homes Act, 2010*. Even with this increased oversight, the relationship between resident and retirement home may resemble a landlord-tenant relationship. In some cases, retirement homes fall within the scope of the *Residential Tenancy Act*.[3] Giving a landlord or quasi-landlord the power to confine residents amplifies the human rights concerns raised above.

At this time, the changes related to confinement in long-term care facilities or retirement homes are not yet in force. ARCH will continue to monitor the changes made by the

[3] Consult, Social Justice Tribunals Ontario, Landlord Tenant Board, "Brochure: Rules for Care Homes" online: Social Justice Tribunals Ontario, http://www.sjto.gov.on.ca/documents/ltb/Brochures/Care%20Homes%20(EN).html.

Strengthening Quality and Accountability for Patients Act, and provide commentary and updates as appropriate and as the new provisions come into force.

Case Summary and Analysis: *Toronto Star v. Attorney General (Ontario)*[1]

By Mariam Shanouda, Staff Lawyer

Until recently, the rules governing how administrative tribunals and boards release information about cases were different than the rules governing how courts released that same information. These rules were changed by an April 2018 decision of the Ontario Superior Court of Justice called *Toronto Star v. Attorney General (Ontario)*.

Freedom of Information and Protection of Privacy: Differences between Courts and Tribunals

If a person decides to file a claim or action in court, all information that is filed with the court becomes available for public consumption, including the initial pleadings, motion records, affidavits and any personal or private documentation that might be appended as exhibits. This means that hearings are always open (except in very specific circumstances), and anyone can go to the court and ask to see the records that are a part of the legal proceedings.

At many administrative tribunals and boards, on the other hand, the pleadings, disclosure and exhibits at the hearing are all subject to a Freedom of Information (FOI) request pursuant to the *Freedom of Information and Protection of Privacy Act (FIPPA)*. This means that, while all hearings are open and anyone can attend (except in rare cases), the information submitted to the tribunal or board cannot be accessed and reviewed by just any person. If a person or organization that is not a party to the proceedings wants to review information that was submitted as part of an administrative board or tribunal case, that person must fill out an FOI request and state reasons as to why they want to review that information. The tribunal or board then has 30 days to decide whether or not that person should be allowed to see the information. During those 30 days, some tribunals, such as

[1] 2018 ONSC 2586

the Human Rights Tribunal of Ontario, will notify all parties that are affected by the request, meaning that the applicant and respondents are told that a person is asking to see their information.

It is clear that at many tribunals and boards, there is an additional protection of privacy that is not available to persons who appear before courts. It is important to emphasize, however, that the application of *FIPPA* to tribunals and boards does not mean that no one can ever see the information. It only means that an extra step, in the form of an FOI request, must be taken before that information is released. Further, before releasing information, tribunals will remove or redact any information that may be a personal identifier. This includes the parties' names, ages, addresses, etc.

Toronto Star v. Attorney General (Ontario) **Decision**

In February 2017, the Toronto Star brought an application against Ontario, alleging that the application of *FIPPA* to information contained in cases before administrative tribunals and boards[2] is unconstitutional as it infringes upon the Star's right to freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms* (*Charter*).[3]

The remedy that the Star sought was to have *FIPPA* no longer apply to information contained in cases before the 15 tribunals and boards which were named in the lawsuit. In his decision, Justice Morgan found that, as it currently stands, *FIPPA* infringes upon the Star's section 2(b) right to freedom of expression. While Justice Morgan kept the FOI request process in place, he did instruct the government to change the way in which tribunals and boards make decisions about whether or not to release information about parties in litigation to someone who requests this information. In his decision, Justice Morgan suspended the remedy for 12 months. This means that the Ontario Government has until April 2019 to change the legislation to reflect this decision.

[2] In particular, the Star named 15 administrative Boards and Tribunals including the Ontario Human Rights Tribunal, the Landlord and Tenant Board, the Criminal Injuries Compensation Board, among others.

[3] Section 2(b) of the Charter states: Everyone has the following fundamental freedoms, (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

How Will the Toronto Star Decision Affect Access to Information at Tribunals?

Flowing from the Toronto Star decision[4], the Ontario Government now has one year to amend *FIPPA* so that it reflects a test similar to the one used by courts to determine whether or not a third party should have access to the information contained in a case.

Notably, Justice Morgan stated that there was nothing inherently incorrect in having the FOI request process in place. That will likely continue to be the practice followed by tribunals and boards: if a third party wants to access information contained in a case or proceeding heard by a tribunal or board, then they must file an FOI request.

Where the difference lies, however, is in *how* the tribunal will make the determination as to whether or not the information is to be released. According to the decision, the Ontario Government should amend *FIPPA* to reflect the test that was developed and is used in the courts. This test is called the *Dagenais/Mentuck*[5] test and states that a publication order can be issued if certain conditions are met. These conditions are:

(a) a publication ban is needed to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and

(b) the need for a publication ban outweighs the damaging effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

In his decision, Justice Morgan did note that this test will have to be adapted to the purpose and processes of tribunals and as such may not be applied in exactly the same way in tribunal forums as it is in the courts. Nevertheless, these are the conditions that the Ontario Government has to keep in mind when they are amending *FIPPA* and responding to the Divisional Court's decision.

Amending *FIPPA*, however, is not the only potential consequence of this decision. The Ontario Government can choose to not amend the legislation and simply let the *FIPPA* provision in question expire. If the Government chooses this option, this would mean that section 21 of *FIPPA* would simply cease to apply to tribunals and boards in April 2019.

[4] Justice Morgan's decision focused in particular on section 21 of *FIPPA*.
[5] *Dagenais v Canadian Broadcasting Corporation*, 1994 CanLII 39 (SCC), [1994] 3 SCR 835; *R v Mentuck*, 2001 SCC 76 (CanLII), [2001] 3 SCR 442.

Each tribunal and board would likely need to determine how it will change its freedom of information procedures in order to respond to the *Toronto Star* decision.

Conclusion

The *Toronto Star* decision raises awareness about privacy considerations for persons who appear before boards or tribunals. In particular, persons with disabilities may have significant privacy concerns, given that many boards and tribunals require copious amounts of information and documents to support a claim or allegation the person is making. For example, if a person with a disability files an application at the Human Rights Tribunal of Ontario alleging discrimination and a failure to accommodate based on the ground of disability, they must provide evidence in support of these claims. Depending on the facts of the case, this evidence may include highly sensitive and private medical information which the person with a disability may not want anyone in the public to see. If such information is more easily available to the public, this could leave persons with disabilities more vulnerable to discrimination, stigma and attitudinal barriers about what they can and cannot do because they have a disability.

Prior to the *Toronto Star* decision, complainants were afforded an extra pillar of privacy protection when it came to information that was part of their tribunal case. Since the *Toronto Star* decision, it is unclear how this privacy protection will be impacted. ARCH will continue to monitor the response of the Ontario Government and tribunals and boards to the decision. Should the Government choose to amend *FIPPA*, there may be an opportunity for stakeholders and community members to provide input into the proposed amendments.

Matson and Andrews Case: Recent Supreme Court Decision Undermines Access to Justice

By Kerri Joffe, Staff Lawyer

On June 14, 2018 the Supreme Court of Canada released its judgment in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, also known as the "Matson and Andrews" decision. To read the full decision, go to: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17134/index.do?r=AAAAAQASTWF0c29uIGFuZCBBbmRyZXdzAQ . A summary of the decision is available by going to: https://www.scc-csc.ca/case-dossier/cb/37208-eng.aspx

In its judgment the Supreme Court found that persons who think they were discriminated against as a result of steps taken by government actors applying mandatory wording of a federal law cannot make a complaint to the Canadian Human Rights Commission. Instead, these complaints will have to be brought before the courts as *Charter* challenges.

Matson and Andrews' Discrimination Complaints

The case started from two complaints that members of the Matson and Andrews families made to the Canadian Human Rights Commission. Members of the Matson and Andrews families applied to be registered as "Indians" under the *Indian Act*. Being registered as an Indian entitles people to certain benefits, including access to some government health benefits, education, and child development programs. For some people, being registered as an Indian provides membership and belonging in one's community.

Members of the Matson and Andrews families were denied registration as Indians because of rules in the *Indian Act* about who can be registered. In their complaints to the Canadian Human Rights Commission, they argued that the Government of Canada discriminated against them by denying their registration as Indians, and that the denials continue historical sexism, racism and discrimination that is part of the *Indian Act*.

The Supreme Court's Decision

The Matson and Andrews' complaints of discrimination were never heard. The Canadian Human Rights Tribunal found that it did not have the jurisdiction or legal authority to hear these complaints. The *Canadian Human Rights Act* prohibits discrimination in services customarily available to the public. The Canadian Human Rights Tribunal found that the

Matson and Andrews' complaints were not about Indian registration services, but rather about the criteria in the *Indian Act* itself. Since the complaints were challenging the legislation rather than the provision of registration services, the Tribunal found that they were not about services customarily available to the public. Therefore, the complaints could not be heard by the Human Rights Commission and Tribunal. Instead, they should be brought to court as *Charter* challenges.

The Supreme Court found that the Tribunal's decision was reasonable.

Why is this Case Important for Persons with Disabilities?

This decision means that in many cases, people who think they have been discriminated against because of rules or requirements in federal laws will have to go to court to argue a *Charter* challenge to the law. They will not be able to bring their complaints to the Canadian Human Rights Commission or Tribunal. This will undermine access to justice for people from equity seeking groups, including persons with disabilities. Going to court is a more expensive, legally complicated and less accessible process than bringing a case to the Canadian Human Rights Commission.

ARCH Disability Law Centre represented the Council of Canadians with Disabilities (CCD) as an intervener at the Supreme Court hearing, in order to ensure that the Court had before it the perspective of persons with disabilities when making its decision. The intervention emphasized the critical nature of access to justice for persons with disabilities, and the negative impact that the Court's decision will have on access to justice.

CCD and ARCH were disappointed in the Supreme Court's decision. James Hicks, CCD National Coordinator, reacted to the decision by saying, "Effective access to justice is a crucial part of ensuring that persons with disabilities can participate fully and effectively in society. Today's decision will make it more difficult for persons with disabilities to have their discrimination claims heard. Courts are not accessible for many people with disabilities. People with disabilities are marginalized and often live on low incomes - many cannot afford to go through the courts."

The decision will have a similar impact on persons from other equity-seeking groups, including Indigenous persons, persons who are low-income, and racialized persons. 16 public interest organizations, legal clinics and individuals intervened at the Supreme Court hearing to provide the Court with a perspective on how its decision would impact access to justice.

Will this Decision Impact Cases in Ontario?

The Matson and Andrews decision is about the jurisdiction of the federal human rights commission to hear cases alleging discrimination by government actors applying mandatory wording of a federal law. However, lawyers and community members who have followed this decision are concerned that it may also impact on provinces and territories. Like the *Canadian Human Rights Act*, most provincial and territorial human rights laws prohibit discrimination in services. If provincial and territorial human rights commissions and tribunals follow this Supreme Court decision, many people who think they have been discriminated against because of rules or requirements in provincial and territorial laws will have to go to court to argue a *Charter* challenge to the law, rather than use the more accessible human rights proceedings.

In Ontario, there are a number of cases which have already been adjudicated by the Human Rights Tribunal of Ontario and other tribunals which have found that services include government actors applying laws or criteria in laws to make decisions about benefits or registration. For example, in *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 the Social Benefits Tribunal found that persons with addictions disabilities were discriminated against when they were denied Ontario Disability Support Program benefits. The denial was due to a particular section of the law that governs these benefits, which said that people with addictions disabilities were excluded from income support benefits. For the full decision, go to: https://www.canlii.org/en/on/onca/doc/2010/2010onca593/2010onca593.html

Another example is *XY v. Ontario (Government and Consumer Services)*, 2012 HRTO 726. In that case a person challenged a requirement in the *Vital Statistics Act* which said that in order for a transgender person to get a new birth certificate with the correct sex identifier, s/he first had to undergo transsexual surgery. The Human Rights Tribunal of Ontario found that it had jurisdiction to adjudicate the complaint because providing a birth certificate according to the rules set out in the *Vital Statistics Act* is a service. Ultimately the Tribunal found that the requirement in the law was discriminatory and ordered the Government of Ontario to stop requiring transgender people to have transsexual surgery in order to get a change in sex designation on their birth certificates. For the full decision, go to: https://www.canlii.org/en/on/onhrt/doc/2012/2012hrto726/2012hrto726.html?resultIndex=1

These are just two examples of discrimination cases that likely would not be heard by the Human Rights Tribunal of Ontario if that tribunal were to follow the precedent established by the Matson and Andrews decision. Courts would still have the jurisdiction to hear these cases. However due to stigma, discrimination, limited work opportunities, and social isolation, mounting a court challenge may be impossible, impractical or inaccessible for the

people with addictions disabilities or the transgender person who brought these discrimination cases forward to tribunals.

In addition to the above examples, and unlike the Matson and Andrews decision, there are a number of other cases in which the Human Rights Tribunal of Ontario has found that it can adjudicate cases alleging discrimination by government actors applying mandatory wording of a provincial law. It remains to be seen whether Ontario tribunals will begin following the precedent established by the Matson and Andrews decision, or whether the decision will impact only federal tribunals and commissions.

Schedule 1 Class Action Wraps Up

By Lila Refaie, Staff Lawyer

The Schedule 1 class action (also known as *Clegg v. Ontario)* was about twelve (12) institutions where people with disabilities lived. Many people with disabilities who lived in these places were neglected, abused, hurt or harmed. The Ontario government failed to care for them and protect them. The affected institutions in this lawsuit were:

- St. Lawrence Regional Centre in Brockville
- D'Arcy Place in Cobourg
- Adult Occupational Centre in Edgar
- Pine Ridge in Aurora
- Muskoka Centre in Gravenhurst
- Oxford Regional Centre in Woodstock
- Midwestern Regional Centre in Palmerston
- L.S. Penrose Centre in Kingston
- Bluewater Centre in Goderich
- Durham Centre for Developmentally Handicapped in Whitby
- Prince Edward Heights in Picton
- Northwestern Regional Centre in Thunder Bay

In November 2015, a settlement was reached. The Ontario Superior Court of Justice approved this settlement in April 2016. Since that time, a claims process was available for

class members. Class members could submit claims for compensation for the harm they experienced at the 12 institutions.

The claim process is now complete. All payments were sent at or around the end of March 2018. If you submitted a claim, you should have gotten a letter explaining whether you were given money for the abuse at one or more of the 12 institutions. If you were given money, then a cheque should have been sent with the letter. If you made a claim but have not yet gotten a letter, you can call Koskie Minsky for more information at 1-888-723-4304 or email them at institutionalabuse@kmlaw.ca. If ARCH has helped you with the claim, you can contact our office if you have any more questions.

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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.

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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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