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ARCH *Alert*

ARCH's Newsletter on Disability and Law in Ontario

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Severe Cuts to Legal Aid Impact Persons with Disabilities

By Robert Lattanzio, Executive Director

On April 11, 2019, the Government of Ontario announced significant cuts to many sectors that impact ARCH's communities across Ontario. These measures disproportionately impact persons with disabilities and include cuts to education, public health, social and community services including disability specific programs and services, freezing the minimum wage, and a severe reduction in compensation for victims of violent crimes while dissolving the Criminal Injuries Compensation Board.

Among these austerity measures was a significant reduction to Legal Aid Ontario's budget in the amount of $133 million during this current fiscal year, with a larger funding decrease next year. Provincial funding for immigration and refugee legal services was explicitly cut. In response to this budget reduction, Legal Aid Ontario undertook a number of measures which, in addition to significant reductions in immigration and refugee services, included changes and reductions in some aspects of other services such as mental health related legal services, family law and criminal law.

Legal Aid Ontario also reduced the legal clinic system budget by almost $15 million, with some central supports to clinics being cut or eliminated. The direct cuts to legal clinics varied in severity between clinics, with 20 clinics receiving budget reductions of between 6-45%. ARCH received a smaller reduction for this year, which will not impact our direct services, unlike some other clinics.

The system of independent community based legal clinics across Ontario provides a critical service and safety net. ARCH, as one of numerous specialty clinics within this broader and highly revered legal clinic system, provides tailored and accessible legal services in areas of law that are underserviced to low, no income, and vulnerable persons with disabilities.

Cuts to Legal Aid Will Worsen Barriers and Discrimination Experienced by Persons with Disabilities in Ontario

Communities of persons with disabilities across Ontario and Canada are diverse and complex. An estimated 22% of Canadians aged 15 years and over, or one in five Canadians, have one or more disabilities that limit them in their daily activities, according to the 2017 Canadian Survey on Disability. Persons with disabilities are disproportionately represented in having lower incomes, less likely to have a post-secondary degree and less likely to be employed. The employment rate for working-age adults with disabilities is approximately 59% as compared to 80% of those without disabilities. The survey also estimates that 1.6 million Canadians with disabilities cannot afford disability related aids and devices or prescription medication. The highest rates of poverty are among those that reported more severe disabilities.

ARCH's community is not homogenous. Disability touches everyone. Disability is experienced differently by everyone. Poverty, multiple disabilities, geography and intersecting identities such as ethnic origin, citizenship, race, gender identity, sex, sexual orientation, creed and age impact the degree and nature to which people experience societal barriers and discrimination. For example, the United Nations Committee on the Rights of Persons with Disabilities has recognized the extreme marginalization of Indigenous persons with disabilities in Canada and their lack of access to social supports, employment, health services, and education. A further example is the higher rates of violence experienced by women with disabilities compared to those without. Ableist barriers and intersectional discrimination can significantly add to the difficulty that our communities face in advocating for themselves and representing themselves in complex legal processes.

Canada and Ontario's dark history of eugenics, institutionalization and exclusion of persons with disabilities, and medical model based policies and laws continue to adversely and disproportionately impact ARCH's communities. ARCH recently represented claimants in institutional abuse class action compensation processes, and supported legal clinics and advocates to represent claimants in these processes. For us, this work confirmed the extent and ongoing effects of decades of abuse and isolation of people with disabilities in Ontario.

A recent research study co-led by ARCH reported that students with disabilities were routinely denied access to school and/or classroom and had limited access to appropriate accommodations. Parents and students with disabilities reported high levels of conflict between educational staff and families, and limited dispute resolution mechanisms.

Persons with disabilities in Ontario and across Canada experience high rates of discrimination. Disability is consistently the most often cited ground in discrimination complaints, accounting for over 50% of the complaints filed at provincial, territorial and federal human rights commissions and tribunals. Human rights processes are quasi-judicial, very complex, and opposing parties often have legal representation. All of the above factors combine to demonstrate why ARCH's services, including legal representation and our Summary Advice and Referral service, law reform, and public legal education are so essential for the communities we serve.

The Importance of Independent Legal Clinics Governed by Community Boards of Directors

The legal clinic system in Ontario is made up of independent clinics with volunteer boards of directors that guide clinics to provide relevant and effective legal services to low and no income individuals. Local general service community legal clinics, and specialty clinics such as ARCH, play a very important role within their communities in delivering a range of legal services to vulnerable, marginalized, racialized and low and no income persons in Ontario.

As a specialty legal clinic mandated to advance systemic change for persons with disabilities, ARCH's broad mandate allows our volunteer board of directors to plan appropriately in response to the unique systemic barriers that our communities face. Our communities are underserviced. The clients we represent often fall through the cracks due to already underfunded and siloed systems of disability services and supports.

Many issues that ARCH encounters, including those from the approximately 2,000 individuals with disabilities across Ontario that we assist directly every year, can also be addressed by pursing systemic change through education and capacity building, and policy and law reform. A recent example is ARCH's work with disability groups across Canada to ensure that the strongest possible national accessibility legislation be passed, leading to the historic passage of the *Accessible Canada Act* which received Royal Assent in June 2019. Many important amendments were a direct result of the work of ARCH and our partners in the disability community.

Legal Clinics Provide Critical Access to Justice

> The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve. Access to justice is therefore critical.
>
> -Former Chief Justice Beverley McLachlin, Supreme Court of Canada

Persons with disabilities are disproportionately required to engage in legal and administrative processes for redress in matters that most Ontarians take for granted. As many disability related services and supports are administratively regulated, persons with disabilities are forced to engage with judicial and administrative legal processes to gain or retain eligibility for benefits and services, appeal decisions made about the nature of their disability, and overcome barriers and challenge ableist attitudes, to name but a few examples. For persons with disabilities, this may mean the difference between living independently in their community or being forced to move to a long term care facility; receiving appropriate supports to learn or be forced to stay home from school; being appropriately supported to make important life decisions or having others making decisions for them; or being able to simply travel to an important medical appointment rather than having their health deteriorate. In addition, many issues that ARCH's clients face lack clear legal processes available for redress, which add to the complexity of the matter. With all this in mind, access to justice is indeed critical.

For persons with disabilities, access to justice can mean many things. For example, accessing disability related accommodations to participate equally in a legal process can be just as important as having one's proverbial day in court. For many people with disabilities, it is essential to have legal representation to navigate complex and disjointed systems, or the lack of any system for advancing their rights. More specifically, legal representation must accommodate disability-related needs and provide accessible and

trauma informed services. Without such legal representation, access to justice is threatened.

Additional Funding Cuts and Restructuring of the Legal Clinic System on the Horizon

The community legal clinic system, including ARCH, is now preparing for more significant cuts for the 2020/2021 fiscal year. These cuts will undoubtedly impact direct legal services to low and no income persons living in Ontario.

Of great concern, in addition to these impending cuts, is the Government of Ontario's newly initiated Legal Aid Modernization Project aimed at transforming legal aid, including legal clinics. Legal Aid Ontario has publicly stated that further budget cuts to the clinic system in 2020/2021 will need to include "some kind of restructure".

While no one objects to modernizing our system to continue providing effective, high quality and responsive legal services to our communities, the core aspects of our current model are what underpin the successes that ARCH and other clinics have had in representing our clients and advancing systemic change. This includes a mandate to tackle systemic issues through a multiplicity of legal tools rather than just direct casework. It also includes the independence that each clinic maintains, with a volunteer board of directors rooted in the communities that we serve, which is fundamental to ensuring that the voices we are trying to amplify have a role in determining the clinics' vision and priorities. This allows each clinic to be responsible and responsive to their own particular communities' needs. For example, ARCH's work advancing supported decision making or advocating for protections in medical assistance in dying legislation may differ from that of some other clinics, and this difference emphasizes the need for ongoing consultation and capacity building within our distinct communities. There is not one homogenous community that all clinics serve. The work of clinics is always informed by the particular communities it serves. The diversity in communities and their needs underscores the need for independent community legal clinics.

All of our services provide demonstrable benefits to our client communities, and the elimination of any one of them renders the others less effective. In addition to ARCH's direct casework, litigation, and summary advice program to persons with disabilities across Ontario, ARCH conducts initiatives and grassroots projects that help build the capacity of persons with disabilities to understand their legal rights, and to identify and remove barriers and systemic inequalities. For example, ARCH's Respecting Rights project provides training by, and for, advocates labelled with intellectual disabilities. Respecting Rights delivers rights workshops and training, while also building capacity to self-advocate and identify more systemic problems across the developmental services sector. These types of initiatives are a more efficient solution that can directly target the problem for a large number of people.

Furthermore, the areas of law that ARCH practices are those that directly address existing gaps in legal services. These are complex areas of law and we rely on our board of directors and our communities to help us identify what those gaps are.

A Report of the House of Commons Standing Committee on Justice and Human Rights in 2017 identified concerns in the piecemeal approach to legal services across the country, and amongst its recommendations included increasing funding for specialized legal clinics. The evidence that it considered included research that reported that for every dollar spent on legal aid, six to seven dollars could be saved in other areas of spending such as healthcare, social assistance, and in efficiencies by reducing unrepresented litigants. Supreme Court of Canada Chief Justice Richard Wagner recently stated that "legal aid is essential to the justice system, to make sure that the justice system is strong and fair," and "[i]t's also a smart investment."

Changes to the core values of the clinic system, a model respected worldwide, and continued deeper budget cuts to clinics, will drastically affect and impact the most vulnerable in our communities.

How You Can Help

There are numerous campaigns and calls to action that you can support. One way to help is to send a personal email to your local MPP and/or to Premier Doug Ford and Attorney General Doug Downey. There are also numerous campaigns led by clinics and the ACLCO that you can support.

Find your MPP contact info by going to:
https://voterinformationservice.elections.on.ca/en/election/search?mode=postalCode

Premier Doug Ford
Premier@ontario.ca
416-325-1941

Attorney General Doug Downey
doug.downey@pc.ola.org
705-726-5538

The campaign led by the Association of Community Legal Clinics of Ontario (ACLCO) can be accessed by using the following link https://stoplegalaidcuts.nationbuilder.com/

Accessible Canada Act Receives Royal Assent!

By Kerri Joffe, Staff Lawyer

On May 29, 2019 the House of Commons voted to pass Bill C-81- *Accessible Canada Act* with all the amendments that the Senate made to strengthen the Bill. On June 21, 2019 the *Accessible Canada Act* received Royal Assent, making it law in Canada. ARCH welcomed the passage of the *Accessible Canada Act*, an important moment in Canada's disability rights movement and an important step towards the goal of full inclusion and equality for persons with disabilities in Ontario and across Canada.

The *Accessible Canada Act* is federal accessibility legislation. Its stated purpose is to achieve a barrier free Canada by 2040. To do this, the Act gives powers to the Government of Canada, the Canadian Transportation Agency, and the Canadian Radio-television and Telecommunications Commission to create new legal requirements for advancing accessibility in federal employment, the built environment, transportation, procurement of goods, services and facilities, information and communication technologies, communication, and the design and delivery of programs and services. If these agencies use their new powers, the new legal requirements they create will be aimed at identifying, removing and preventing barriers, which the Act defines as anything that hinders the full and equal participation in society of persons with a physical, mental, intellectual, cognitive, learning, communication or sensory impairment or functional limitation.

The *Accessible Canada Act* will impact all people with disabilities living in Canada, including people with disabilities living in Ontario. The Act and its regulations may remove barriers that prevent people with disabilities living in Ontario from: travelling on railways, airplanes and inter-provincial buses; gaining employment with federal employers; accessing federal buildings; accessing federal programs and services like Canada Pension Plan-Disability, Employment Insurance, Registered Disability Savings Plan, Disability Tax Credit, Canada Revenue Agency, and Service Canada; and using television, radio and other information and communication technologies.

Bill C-81 – *Accessible Canada Act* was first introduced in the House of Commons in June 2018. As the Bill wound its way through the legislative process, a number of important changes were made to it. In particular, the Senate Standing Committee on Social Affairs, Science and Technology (SOCI) made several amendments which strengthened the Bill. For example, SOCI included in the Bill a timeline of 2040 for achieving a barrier free Canada; added multiple and intersectional discrimination as a principle which must be considered when laws, policies, services and programs are developed; clarified that nothing in the Bill or its regulations limits the existing legal obligation to accommodate persons with disabilities; and recognized sign languages as the primary languages for communication by Deaf persons in Canada.

SOCI adopted these amendments after receiving recommendations from disability organizations across Canada. "ARCH thanks Senators for listening to the concerns of

disability communities and taking action to address them. The amendments made by the Senate strengthen the Accessible Canada Act. We commend Minister Qualtrough and the Government for voting to pass Bill C-81 with all the amendments made by the Senate" said Robert Lattanzio, Executive Director of ARCH.

Throughout Bill C-81's journey, disability communities across Canada were actively involved in advocating for the Bill to be as strong as possible. ARCH worked closely with Council of Canadians with Disabilities (CCD), AODA Alliance and over 90 national, provincial and local disability groups. To support disability communities with their advocacy, ARCH wrote an extensive legal analysis of Bill C-81, provided updates on the Bill's progress in our quarterly newsletter, gave presentations on the legislation, and produced a series of Briefing Notes explaining key amendments sought. ARCH also worked with CCD and AODA Alliance to coordinate 2 Open Letter campaigns advocating for changes to improve the legislation. "Advocating to strengthen Bill C-81 has provided opportunities for disability communities to work together. It has been a privilege to work closely with so many dedicated advocates. The *Accessible Canada Act* is stronger because of their tireless work" said Kerri Joffe, ARCH Staff Lawyer.

Despite the helpful amendments that were made to the legislation, a number of concerns raised by ARCH and other disability groups remain. One such weakness is the use of permissive language "may" rather than directive language "shall" or "must" in the *Accessible Canada Act*. This language gives government, the Canadian Transportation Agency, the CRTC and other bodies power to make and enforce the new accessibility requirements, but does not actually require them to use these powers.

Input Needed from ARCH *Alert* Readers

In 2017 and 2018, ARCH *Alert* included a number of articles on medical assistance in dying (MAiD) written by Catherine Frazee, Professor Emerita, Ryerson University. MAiD remains a difficult and controversial topic for all persons in Canada. ARCH thanks Professor Frazee for providing thoughtful articles on this challenging topic, informed by a disability rights perspective.

ARCH and Professor Frazee are now appealing to ARCH *Alert* readers to let us know whether there is a particular question you have about MAiD or a particular issue related to MAiD which you would like us to address in future ARCH *Alert* articles.

We will not be able to address all the questions and issues that readers submit, but we will select topics for future MAiD articles from readers' suggestions.

If you would like to send a question or issue about MAiD to us, for possible use in an upcoming ARCH *Alert*, please send an email to Amanda Ward at: archintake@lao.on.ca. If email is not accessible to you, ARCH can be reached via telephone at: 416-482-8255 or toll-free 1-866-482-2724, or via TTY at: 416-482-1254 or toll-free 1-866-482-2728.

Access Awareness 2019: Procedural Accommodations at Tribunals

By Mariana Versiani, Communications and Outreach Coordinator

This year, ARCH and the Law Society of Ontario (LSO) once again co-hosted Access Awareness to mark National AccessAbility Week. The focus of this year's event was on procedural accommodations to ensure access to justice for persons with disabilities at administrative tribunals.

The event was opened by Malcom Mercer, LSO's Treasurer, who noted that access to justice is a fundamental principle that relates to the contributions we all make to our communities and to our society.

Administrative tribunals are essential to persons with disabilities' access to justice because they provide legal processes for enforcing and vindicating rights on a broad range of everyday matters. In his opening comments, Robert Lattanzio, Executive Director of ARCH, explained that in Ontario:

> "Administrative tribunals can decide on matters related to human rights, landlord and tenant matters, social assistance benefits, workers compensation, education, attendant services, some consent and capacity matters, compensation as victims of a crime, and access to health services, to name but a few.
>
> Access to Justice for persons with disabilities however is more than just accessing the process to receive a remedy. In order for administrative justice to be accessible, persons with disabilities may require disability related accommodations in order to meaningfully participate in the administrative process itself."

Robert also highlighted Article 13 of the *Convention on the Rights of Persons with Disabilities*, and the importance of procedural and age-appropriate accommodations for persons with disabilities to access justice on an equal basis with others.

Procedural accommodations may include providing extra breaks between hearings, providing a computer to access the hearing remotely, providing an FM system at a hearing, and many other accommodations. The duty to accommodate is not directed only to parties

with disabilities, but also to any participant in the process, including witnesses, lawyers, law students, and other participants who have disability-related needs.

Jessica DeMarinis, ARCH Staff Lawyer, mediated the event's discussion amongst the panelists, who included:

- Ena Chadha – Human Rights Lawyer and Educator, Chair of Human Rights Legal Support Centre Board of Directors
- Wade Poziomka – Human Rights Lawyer, Ross & McBride LLP
- Karen Andrews – Staff Lawyer, Advocacy Centre for Tenants Ontario (ACTO), Acting Director, Tenant Duty Counsel Program

Ena Chadha reminded everyone that disability is the leading ground for applications filed not just at the Human Rights Tribunal of Ontario (HRTO) but at human rights tribunals across the country. Chadha pointed out that it is good practice to bring forward the need for accommodation as quickly as possible to allow sufficient time for the HRTO to put the requested accommodations in place. The request should be made to the HRTO's accommodation coordinator, who is the assistant registrar.

Wade Poziomka raised problems currently faced by applicants and respondents due to adjudicator vacancies at the HRTO. Poziomka observed that HRTO adjudicators are not being reappointed, and the Tribunal is down to 50-60% of its capacity, which is resulting in significant delays.

In addition, when a sitting adjudicator is not renewed, a hearing often needs to start over from the beginning, which results in more distress and cost for the parties. Poziomka noted that delays may also aggravate some disabilities, for example for parties with anxiety disorders.

Chadha raised the HRTO announcement that there will be a mediation blitz during the summer months to try to deal with the existing backlog of human rights cases. Poziomka observed that the *Human Rights Code* requires adjudicators to have experience, knowledge or training with respect to human rights law and issues.

Both Poziomka and Chadha discussed issues that arise when the accommodation being requested is the very issue in dispute. For example, an applicant who requests to stand at an HRTO hearing because of a herniated back, when the legal issue being addressed at the hearing is the employer's denial to let the applicant stand while at work on an assembly line for more than 40 minutes.

Karen Andrews spoke about accessibility issues and challenges in the Tenant Duty Counsel Program, and the importance of persons in Ontario having confidence in the administrative justice system. According to Andrews, most people who appear before the Landlord and Tenant Board do not have legal representation and are not aware of their rights. Tenant Duty Counsel provides legal help to tenants who do not have a lawyer

representing them at their hearing at the Landlord and Tenant Board. Tenant Duty Counsel often work in challenging conditions, including higher demand for services than they can meet, no access to Wi-Fi, and buildings that are not physically accessible.

All panelists voiced concern over a recent Ontario court decision called *Toronto Star v. AG*, 2018 ONSC 2586 (CanLII) and new legislation called the *Tribunal Adjudicative Records Act* that allow for greater access to adjudicative records in view of the open-court principle. Andrews noted it may allow for a "presumption of openness" instead of a presumption of privacy. People are often required to disclose their personal medical records when requesting procedural accommodations for a disability. As a result of the recent court decision, these medical records may now be more easily available to the public. For more information about the new law on access to records at Administrative Tribunals and how to get a confidentiality order, go to the article in this issue of ARCH Alert called New Law about Access to Records at Administrative Tribunals. For a detailed analysis about the *Toronto Star v. AG* court decision and the legislation, go to the ARCH blog: www.archdisabilitylaw.ca/provincial-government-introduces-legislation-about-access-to-records-at-administrative-boards-and-tribunals.

Doug Waxman, Chair of ARCH's Board of Directors, thanked the Law Society of Ontario for co-hosting the event with ARCH, thanked the panelists for their interesting and insightful comments, and gave closing remarks. ARCH thanks everyone who attended and participated in another successful AccessAbility Week event.

To access the archived webcast for this event go to: https://archdisabilitylaw.ca/get-involved/events/access-awaress/

Advocating for Accessible Class Actions

By Mariam Shanouda, Staff Lawyer

In March 2018, a statement of claim was filed against the province claiming that Ontario was negligent and breached its fiduciary duty by establishing, funding, and operating training schools under the *Ontario Training Schools Act, 1931.* This case is called *Keeping v. Her Majesty the Queen (Ontario)*, 2018 ONSC 5621.

According to the statement of claim, many people who were placed in these training schools as students experienced abuse, and the Government of Ontario was negligent by failing to stop or prevent this abuse. In filing the statement of claim, the representative plaintiff, Mr. Keeping, was asking the court to certify the claim as a class action. A class action is a case where a group of people all have similar claims against the same defendant. In class actions,

a “representative plaintiff” is someone who represents the whole group of people bringing an action against the defendant.

What is Certification?

A person cannot file a class action without first getting permission from the court. This permission is called “certification.” In this case, Mr. Keeping was asking the court to certify his case as a class action because many people had experienced the same things he had experienced at a training school run by the province.

In order for a case to be certified, the court considers whether certification is the preferable route and whether it will advance three different objectives: access to justice, judicial economy and behaviour modification. Access to justice refers to whether the class action will provide more people the opportunity to have their claim heard than if they were to try and pursue an action on their own. Some of the factors that the access to justice component takes into consideration include the fact that in a class action persons that are part of the class do not have to pay for their own lawyer as well as the fact that most persons in a class action can protect their privacy by not being publicly identified in the proceedings. Judicial economy means that instead of the court having to hear similar cases against the same defendant several times, the court can hear the similar cases at once, making the process more efficient. A class action allows a person to do that by grouping the plaintiffs all together and hearing the similar parts of their case against the same defendant and awarding them the same or similar remedies. Behaviour modification means that certifying the case will lead to remedies that may not otherwise be available to a single plaintiff and that will lead the defendant to change its behaviour in order to avoid having the same or similar cases brought against it again.

If the representative plaintiff can demonstrate to the court that these three objectives – access to justice, judicial economy and behaviour modification - will be better served by certifying the action as a class action, then the court will grant the request.

Barriers to Accessibility of Class Actions

Generally, class actions is not an area of law in which ARCH practices. However, ARCH was involved in class actions regarding persons with disabilities who were institutionalized at Huronia, Southwestern, and Rideau Regional Centres, and at Schedule 1 facilities. ARCH’s work in these class actions included: representing persons with disabilities who had been institutionalized to claim compensation after a settlement was reached between the representative plaintiff and the defendant; supporting disability communities to access the compensation process by providing workshops and webinars; and producing accessible, plain language versions of legal documents about the class action.

In doing this work, ARCH identified several barriers that directly impact disability communities.

1) *Choice of Forum*

Choice of forum means that a person bringing a legal case should be able to choose to which court or tribunal they bring their case, from the legal options available to them. For example, people who were placed in a training school and experienced abuse could choose to either join the *Keeping* class action, or file a claim against the government on their own.

This choice is technically available to every person who is potentially a part of the class. This is because when a class action is certified, the lawyers representing the class have to send out a notice informing every person that may be a part of the class that this action is happening. If a person who is potentially a part of this class does not want to be involved they may "opt-out" or take steps to remove themselves from the class action.

However, sometimes people who are part of the class do not get a copy of this notice. The notice may be published on websites that are not visited by some members of the class; if the notice is sent out by mail, the address of the potential class member may be outdated or not available; if the notice is received by a potential class member, they may not understand it because it is not written in plain or clear language or because they do not read.

Timing is also an issue for opting-out. Time to opt-out is limited; sometimes a potential class member has only 90 days to decide whether they want to be a part of a class action, want to pursue a claim on their own, or do not want to pursue a claim at all. If the notice reaches the potential class member late or does not reach them at all, then they have had no opportunity to choose the way they want to pursue their claim and are lumped into the class action without their explicit consent.

2) *Informed Choice*

Related to choice of forum is the idea that potential class members should be able to make the choice as to whether they want to be part of the class, pursue a claim on their own, or not pursue a claim at all only after they have been provided with all the relevant legal information. This includes having access to lawyers who can explain to potential class members the benefits and drawbacks of each option.

In ARCH's experience, many potential class members are not provided adequate access to legal services. As a result, many potential class members do not receive adequate legal advice about the different available forums where they can pursue a claim, and what remedies, risks, costs, privacy issues, and other factors are associated with each of the forums.

Without access to this information, it is less likely that potential class members are going to be able to make an informed choice about whether to remain part of the class action or opt out.

3) *Effective Access to Justice*

In many class actions, class members face the same economic and practical barriers that they may have faced had there been no class action at all. In short, many of the barriers faced by class members are not resolved simply because the action has been certified.

In order to measure if access to justice is effected, lawyers representing the class need to make sure that class members have access to information about the case. Further, lawyers representing the class need to make sure that any settlement reached would benefit the class more than if there was no class action at all. Lawyers for the class must also ensure that class members have legal assistance and other supports to file their compensation claims in order to access the settlement funds.

ARCH's Role in *Keeping v Ontario*

ARCH sought leave to intervene in the motion for certification of the *Keeping v Ontario* class action. Mr. Keeping did not identify as a person with a disability, and the statement of claim itself did not allege that persons with disabilities were targeted by the training schools. Even so, many of the barriers that ARCH identified in our work on previous class actions involving persons with disabilities were also present in this case. Therefore, it was important to have a disability community perspective present in the *Keeping* case.

One of the legal arguments made by ARCH was that when deciding whether to certify the case as a class action, the court should consider whether the lawyers for the potential class had demonstrated how they were going to make the extremely complex class action process accessible to all potential class members, including class members with disabilities. This would include lawyers for the class action ensuring that each and every potential class member had access to legal assistance and other supports to enable them to make an informed decision about whether to remain in the class action or opt out. They would also need to make sure that all notices about the class action were accessible, including being drafted in plain or clear language as well as large print, braille, or other accessible formats if necessary. Further, ensuring that if the class action is certified, and then if a settlement is reached, that each and every class member has access to legal assistance and community supports to enable them to claim compensation under the settlement. ARCH argued that these considerations were an important part of the access to justice component of class actions.

Unfortunately, ARCH was denied leave to intervene in the *Keeping* case. The reasons for the Judge's decision can be accessed by going to: http://bit.ly/2Z8pPkC.

In December 2018, the case was certified as a class action. ARCH continues to monitor the case.

Changes to the *Canada Elections Act* may Increase Accessibility of Federal Elections

By Lila Refaie, Bilingual Intake Lawyer and Student Programs Lead

The *Canada Elections Act* ("*Act*") governs the rules Elections Canada must follow when there is a federal election. The *Act* was amended by Bill C-76 in December 2018 and is now in force. The new rules will be implemented as soon as the next general election in October 2019. Bill C-76 introduced a great number of changes to the *Act*. Of the many changes, some relate to the rights of electors with disabilities.

Elections Canada must ensure that any communications, public education or other materials available to the public are accessible to persons with disabilities. This includes information about the way someone can become a candidate or how an elector can vote during the election period.

The format of the ballot has also been redesigned in a way that is more accessible for electors with disabilities. According to Elections Canada, the new design improves the readability of the ballot and facilitates the optical character recognition (OCR) by screen readers. For more information about the redesigned ballot, go to: https://www.elections.ca/content.aspx?section=ele&dir=2019ge&document=index&lang=e#10

You can access a detailed report prepared by Elections Canada about this new design by going to: https://www.elections.ca/content.aspx?section=res&dir=rec/tech/bal&document=index&lang=e

Elections Canada must now ensure that polling stations are available for all electors with disabilities

Elections Canada now has a mandate to secure "accessible" polling stations, both for the official polling day and advance polling days. This encompasses much more than its previous mandate, which was limited to ensuring the polling station was "level access". This mandate has also been expanded to the local offices of the returning officer. The registration card, which is sent to all electors during the election period and holds the information about the location of the assigned polling station, will now include information on whether or not the stated polling station is accessible. In a situation where the designated polling station is not accessible for an elector with a disability, that elector can request a transfer certificate to a different polling station.

The availability of at-home voting has been expanded to electors with disabilities, irrespective of the nature of their disability. In some circumstances, an elector with a disability may have the option to vote from home. Previously, this option was limited to only those with physical disabilities who were unable to attend a polling station to vote; this

option has now been expanded to any elector with a disability, irrespective of the nature of their disability.

Furthermore, any elector with a disability can make a request for accommodations in order to exercise their right to vote. Both a transfer certificate and requests for accommodations are available to any elector with a disability. These changes represent a broader approach to accessibility than the previous elections legislation. The previous legislation limited these requests to electors with physical disabilities, whereas now they apply to all electors with disabilities regardless of the nature of their disability.

Candidates and political parties will be reimbursed for accommodations provided to persons with disabilities during the election period

A financial incentive has been added for candidates, and more generally for political parties, to ensure that electors with disabilities wishing to attend political events can be accommodated by the event organizer. During the election period, candidates and registered parties have a set budget they can use for their campaigns, including expenses related to campaign events. These expenses are reimbursed by the federal government up to the maximum amount stated in the *Act*. Before Bill C-76 was introduced, candidates and registered parties had to include costs related to requests for accommodations for electors with disabilities attending their events. Now, the amended *Act* has introduced new rules related to the amount of expenses allowed, particularly related to accommodation costs. Any expenses related to accommodations or accessibility measures will now be reimbursed separately from the allotted campaign budget. This means that candidates and registered parties will not prioritise campaign expenses over accommodation expenses for their events or campaign materials. These new rules will effectively encourage candidates and registered parties to be more inclusive during the election period.

Elections Canada must develop or obtain voting technologies to assist electors with disabilities

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 in federal elections would greatly help to achieve this goal.

For more information about Bill C-76 and other changes it made 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 access Elections Canada's current accessibility policy, go to: http://www.elections.ca/content.aspx?section=vot&dir=spe/policy&document=index&lang=e

Respecting Rights Launches New Project

By Sue Hutton, Respecting Rights Coordinator

Respecting Rights is extremely excited to launch a new project called MY VOICE, MY CHOICE, with funding left over from the Huronia Class Action Settlement. The settlement provided that surplus funds would be used for one-time investments, called Strategic Program Investments ("SPI") to benefit individuals with a developmental disability and their families. The purpose of the SPI is to enhance the ability of persons with a developmental disability to guide and influence decisions affecting them from a systemic and personal point of view.

MY VOICE, MY CHOICE, as with all Respecting Rights work, is led by people with disabilities. In MY VOICE, MY CHOICE people labelled with intellectual disabilities work together with ARCH lawyer, Kerri Joffe, and ARCH social worker, Sue Hutton, in three communities: Ottawa, London, and Toronto. In these three communities, people labelled with intellectual disabilities will receive monthly workshops about their decision making rights. Each workshop includes art, role play, and interactive accessible games peer-led by people labelled with intellectual disabilities who are Respecting Rights members.

MY VOICE, MY CHOICE is being evaluated by eviance (formerly the Canadian Centre for Disability Studies), with long-time disability researcher and Ryerson School of Disability Studies faculty, Cameron Crawford, leading the evaluation.

Our community partner for MY VOICE, MY CHOICE in Ottawa is DANEO, the Disability Advocacy Network of Eastern Ontario. With DANEO's strong self-advocacy group, MY VOICE, MY CHOICE had a successful Ottawa launch with peer-led rights-education activities. ARCH and Respecting Rights members are excited to work with our partners to continue developing a strong advocacy voice in Ontario for persons labelled with intellectual disabilities.

Updates on Solitary Confinement in Federal Prisons

By Lila Refaie, Bilingual Intake Lawyer and Student Programs Lead

ARCH wrote about court decisions and proposed legislation related to administrative segregation (commonly known as solitary confinement) in Canada in both the April 2018 and March 2019 issues of ARCH *Alert*. Those articles discussed important developments regarding the rights of prisoners with mental health disabilities in administrative segregation in both federal and provincial prisons. Since the last publication of ARCH *Alert*, there have been some significant developments related to the appealed court decisions and the proposed legislation. The Court of Appeal for Ontario imposed a 15-day limit on solitary confinement. This decision is being appealed to the Supreme Court of Canada by the federal government. Meanwhile, the federal government passed Bill C-83 into law, which amends the *Corrections and Conditional Release Act*.

Brief Summary of the Former 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 an Institutional Head. Until June 21, 2019, there were two types of segregation placements. A prisoner could have been placed in either disciplinary segregation or administrative segregation. Placing a prisoner in disciplinary segregation served as a punishment when a prisoner acted in violation of a rule while incarcerated. On the other hand, a prisoner may have been placed in administrative segregation if it is believed that such placement was for the safety or security of either the prisoner in question or other prisoners in the prison. There were no limits to the length of stay in administrative segregation.[2]

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.*[3] In this case, the Court found that placing a prisoner in administrative segregation beyond the legislated initial review process was unconstitutional because of the lack of an independent review of the placement. The

[1] S.C. 1992, c. 20
[2] ARCH wrote a detailed article about the former segregation system in prisons in the April 2018 issue of ARCH *Alert*. To access this article, go to: https://archdisabilitylaw.ca/resource/april-5-2018-volume-19-issue-1/.
[3] 2017 ONSC 7491. To access the full decision, go to: https://www.canlii.org/en/on/onsc/doc/2017/2017onsc7491/2017onsc7491.html?resultIndex=1.

Court suspended its ruling for 12 months to allow the federal government to properly amend the law in accordance with this ruling[4].

The Canadian Civil Liberties Association ("CCLA") appealed the decision because the Court refused to declare the entire regime of administrative segregation unconstitutional. Below, we provide more details on the outcome of this appeal.

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 administrative segregation regime was unconstitutional because it infringed prisoners' rights guaranteed by sections 7 and 15 of the *Charter*. The Court also suspended its ruling for 12 months to allow the federal government to appropriately amend the law, in keeping with prisoners' constitutional rights[6]. Shortly after this ruling, the federal government announced its intention to appeal this decision. This appeal was heard in November 2018, however a decision on the substance of the appeal has not been released yet.

CCLA Appeal: Court of Appeal for Ontario Found that Administrative Segregation Should be Limited to 15 Days

On March 28 2019, the Court of Appeal for Ontario released its decision in CCLA's appeal[7]. CCLA argued that administrative segregation violated sections 11(h) and 12 of the *Charter*. Section 11(h) of the *Charter* relates to further punishment for an offence, other than the original sentence. Section 12 of the *Charter* protects "the right not to be subjected to any cruel and unusual treatment or punishment".

In its decision, the Court of Appeal reaffirmed the negative impact of administrative segregation because it essentially eliminates meaningful social interaction or stimulus, and could potentially cause permanent serious psychological harm[8]. The Court of Appeal rejected CCLA's argument related to section 11(h) of the *Charter*. However, it agreed that the administrative segregation framework violated section 12 of the *Charter*, as prolonged administrative segregation amounted to cruel and unusual punishment. Consequently, it determined that any placement in administrative segregation beyond 15 days is unconstitutional. The Court of Appeal agreed that prisoners with mental health disabilities may be at greater risk of potential harm in segregation, but the evidence in this case was

[4] ARCH wrote a detailed analysis of this decision in the April 2018 issue of ARCH *Alert*. To read a more in depth analysis of this decision, go to: https://archdisabilitylaw.ca/resource/april-5-2018-volume-19-issue-1/.
[5] 2018 BCSC 62. To access the full decision, go to: https://www.canlii.org/en/bc/bcsc/doc/2018/2018bcsc62/2018bcsc62.html?resultIndex=1.
[6] ARCH wrote a detailed analysis of this decision in the April 2018 issue of ARCH *Alert*. To read a more in depth analysis of this decision, go to: https://archdisabilitylaw.ca/resource/april-5-2018-volume-19-issue-1/.
[7] 2019 ONCA 243. To access the full decision, go to: https://www.canlii.org/en/on/onca/doc/2019/2019onca243/2019onca243.html?resultIndex=1.
[8] *Ibid.*, at para. 1

not strong enough to make such a determination[9]. The Court of Appeal placed a cap of 15 consecutive days on all prisoners placed in administrative segregation, regardless of their age or the nature of their disability, because of foreseeable psychological harm to prisoners[10]. Shortly after the release of this ruling, the federal government announced its intention to appeal this decision to the Supreme Court of Canada ("SCC"), particularly related to the 15-day cap.

The Federal Government Passes a Bill to Amend the *Corrections and Conditional Release Act* into Law

In October 2018, shortly after the above decisions from Ontario and British Columbia were released, 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"). With Bill C-83, the federal government attempted to amend the law related to solitary confinement in accordance with the above-mentioned court decisions.

Among other amendments, Bill C-83 replaced administrative and disciplinary segregation with a structured intervention unit. ARCH wrote a detailed analysis of this Bill in a previous ARCH *Alert* issue, published in March 2019[11].

Since the publication of that ARCH *Alert* article, the Bill has gone through several stages of the legislative process. On May 2, 2019, the Bill passed second reading in the Senate and was referred to the Standing Senate Committee on Social Affairs, Science and Technology ("SOCI") for further analysis. After hearing from many different groups, the SOCI proceeded to a detailed analysis of the Bill, during which, a number of amendments were identified and approved. While many of these amendments were technical in nature, some substantial amendments were made to the Bill. Of the most significant changes to the Bill, the SOCI proposed that any placement in a structured intervention unit must end as soon as possible and the placement is limited to 48 hours, unless the placement is authorized by a Superior Court. In making this change, the SOCI wanted to include judicial oversight for these types of placements in order to ensure that no placement is unnecessarily prolonged. The SOCI justified this important change based on concerns raised by many advocacy groups and members of the SOCI that this Bill does not resolve the constitutional issues related to administrative segregation. In fact, some members of the SOCI recognized that the Bill as it was drafted still does not eliminate administrative segregation and more safeguards are necessary to protect the rights of prisoners. Some members have raised serious concerns about the constitutionality of the Bill, even with the amendments, and have proposed to recommend to the Senate that the Bill not proceed at all. In the alternative, these members proposed to remove the concept of structured intervention units from the Bill and instead replace this with a provision indicating that any segregation must

[9] *Ibid.*, at para. 66
[10] *Ibid.*, at para. 71
[11] You can find this detailed analysis at: https://archdisabilitylaw.ca/resources/arch-alert/.

follow international conventions related to this type of placement. However, the SOCI rejected both these recommendations. Instead, it decided to simply report to the Senate all proposed amendments and alert the Senate that there may still be serious constitutional concerns about the content of the Bill. The Senate ultimately agreed to amend the Bill in accordance with SOCI's recommendations, and it passed third reading on June 12, 2019. The Bill was sent back to the House of Commons for further consideration and a vote on the proposed amendments.

After extensive debate and despite a plea from some parliamentary members that the Bill may have constitutional concerns, the House of Commons rejected several significant proposed amendments, including the recommendation to include judicial oversight on placements longer than 48 hours. The Bill was returned again to the Senate for approval.

On June 20, 2019, the Senate approved the Bill as amended by the House of Commons, despite the rejection of the many proposed amendments and potential constitutional concerns. On June 21, 2019, the Bill received Royal Assent and became law.

Successful Class Action Against Federal Government

In the midst of the court decisions and new legislation, the Ontario Superior Court released a summary judgment on March 25, 2019, regarding a class action against the federal government. This case is called *Brazeau v. Attorney General (Canada)*, 2019 ONSC 1888[12]. In this class action, which began in 2015, prisoners placed in administrative segregation argued that the federal government breached their rights to life, liberty and security of the person under section 7 of the *Charter.* Members of the class action were limited to prisoners in federal prisons, who were placed in administrative segregation before February 24, 2013 (or after that date if the prison is outside Quebec), and diagnosed with "an Axis I Disorder (excluding substance use disorders) or Borderline Personality Disorder". The Court found that a breach of the prisoners' constitutional rights occurred because of the lack of independent review of their placement in administrative segregation (contrary to section 7 of the *Charter*) and the placement constituted cruel and unusual punishment or treatment (contrary to section 12 of the *Charter*). For the purposes of this class action, the Court specified that only prisoners who were involuntarily placed in segregation for more than 30 days, or voluntarily placed in segregation for more than 60 days, may claim compensation. As a result of this case, the Court ordered the federal government to pay $20 million, less legal fees and disbursements, towards additional mental health or program resources in the federal prison system. Individual compensation for members of this class action has not yet been determined.

ARCH will continue to monitor this constantly developing issue. Please note that the information in this article is current as of June 21, 2019.

[12] To access this decision, go to: https://www.canlii.org/en/on/onsc/doc/2019/2019onsc1888/2019onsc1888.html?resultIndex=1.

ARCH's AGM – Save the Date!

ARCH will be hosting its Annual General Meeting (AGM) on **Wednesday October 2, 2019.**

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: https://archdisabilitylaw.ca/

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MacLean v. Nova Scotia: Meaningful Access to Community Supports and Housing for Persons with Disabilities

By Luke Reid, Staff Lawyer

A recent decision of the Nova Scotia Board of Inquiry raises a number of important issues for many persons with disabilities with respect to housing and social services. In *MacLean v. Nova Scotia* the Board of Inquiry found *prima facie* discrimination by the Province of Nova Scotia in their provision of housing and social services to several complainants with disabilities. *Prima facie* discrimination means that the complainants in this case have proven on a preliminary basis that they were discriminated against.

There is now a second stage to this hearing during which the Province can attempt to justify its actions and ask the Board of Inquiry to rule that its actions are not actually discrimination, within the meaning of the Nova Scotia *Human Rights Act* 1989, c. 214. The case highlights many of the barriers that persons with disabilities encounter when trying to access housing and social services and may yet provide some legal remedy to address these issues.

Summary of the Case

There were three complainants in this case: Beth MacLean, Sheila Livingstone, and Joseph Delaney. They were all persons with disabilities who were on waitlists for supportive housing in the community. However, while they were waiting for housing, the Province of Nova Scotia had placed them all in a locked-unit psychiatric facility, despite the fact that none of them required any sort of psychiatric treatment. The facility offered very little programming for residents and circumscribed their decision making in many ways. Unfortunately, they were all confined to these placements for many years despite attempts by staff and those close to them to move them into more appropriate settings.

During the course of the hearing, many medical experts testified on behalf of these complainants stating that there was no clinical reason for any of them to be in these

placements, and suggested these placements were in fact very harmful to them over the long-term.

The Decision

Ultimately, the Board of Inquiry found that placing these individuals in such a facility, without a clinical purpose, and denying them appropriate housing and day programming was *prima facie* discrimination. It found that they were entitled to the same community housing services afforded to other persons with disabilities. It stated that by putting them on waitlists for these services, while keeping them in the psychiatric facility, the Province was denying them "meaningful access" to these services on the basis of their disability.

In coming to this conclusion, the Board of Inquiry used a somewhat unique analysis and it remains to be seen whether this analysis will survive in subsequent decisions. Regardless, the case still raises a number of vitally important issues to persons with disabilities.

The first and foremost is that it highlights that the deinstitutionalization of persons with disabilities continues to progress too slowly in many parts of Canada. This is often a result of insufficient community supports and housing resources to properly support persons with disabilities to live and be included in the community.

The second issue, which may have some relevance for those living in Ontario, is the fact that the Board of Inquiry found that in some cases being on a waitlist for housing for an extended period of time may, in certain circumstances, be a violation of someone's human rights. For the Board of Inquiry it appears that these circumstances include occasions where someone is in an intolerable placement and has been waiting for more appropriate services for an extended period of time.

Ultimately, if the reasoning in this case is upheld, and subsequently adopted in Ontario, it could have wide ranging implications for many people on waitlists for more appropriate housing. For example, it may have significant implications for persons waiting in hospitals to move to long-term care facilities or those waiting for more supportive and accessible housing in the community.

A third important innovation in this case is the expanded use of the human rights concept "meaningful access". The Supreme Court of Canada introduced this term in 2012 in a case called *Moore v. British Columbia* in the context of education services. In that case the Supreme Court found that all education providers have an obligation to ensure that they provide everyone with "meaningful access to education" regardless of disability, race, gender or any other protected ground under human rights law. This case set the standard for all future human rights education cases and it is of great interest that this standard is being applied to other areas beyond the education sector.

For the full decision in *MacLean v. Nova Scotia* go to: https://humanrights.novascotia.ca/sites/default/files/editor-uploads/maclean_et_al_decision.pdf

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New Law about Access to Records at Administrative Tribunals

By Jessica De Marinis, Staff Lawyer

On May 29, 2019, Bill 100, An Act to Implement Budget Measures and to Enact, Amend and Repeal Various Statutes received Royal Assent and became law. Schedule 60 of this bill creates a new law, called the *Tribunal Adjudicative Records Act*, *2019* (the *Act*). The *Act* has not yet come into force.

The *Act* sets out new rules that make evidence and documents related to a case at an administrative tribunal more easily accessed by members of the public, unless there is a confidentiality order.

Before the new *Act* was passed, any evidence and papers filed by a party during a case at an administrative tribunal were protected from being easily accessed by members of the public because of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*). *FIPPA* said that the evidence and documents were not available to the public, unless the public made a request. The administrative tribunal then decided if the documents are appropriate to be provided to the public. If it did provide the documents, it would block out any private information that could be used to identify a person, such as their name. This process gave applicants at administrative tribunals some security that their sensitive personal information would not be disclosed to the public.

The reason the new *Act* was introduced was because of a court case brought by Toronto Star newspaper, which argued that the operation of *FIPPA* to protect evidence and documents at administrative tribunals was in violation of the *Canadian Charter of Rights and Freedoms*. Toronto Star argued that administrative tribunals should be more like the court system, which operates on an "open-court principle", meaning that all court documents and papers are easily available for the public to view. The court case was decided in Toronto Star's favour and found that administrative tribunals were required to make evidence and documents available to the public in a way that was more similar to the court system.

With the passing of the *Act*, there are now new rules for making evidence and documents filed with administrative tribunals available to the public. The *Act* uses the term "adjudicative records" to describe the kinds of evidence and papers that are part of the new

rules. The *Act* says that now if the public makes a request to access adjudicative records, the administrative tribunal must provide the adjudicative records, unless there is a confidentiality order in the case. Each administrative tribunal is permitted to set up its own specific rules about the process for making the adjudicative records available.

Section 2(1) of the Act, states that the new rules apply to cases that are filed at an administrative tribunal after the day that the *Act* comes into force. No date has been set yet for coming into force.

The *Act* has two important parts: 1) it defines what kinds of evidence and documents are "adjudicative records;" and 2) it creates a test for how to get a confidentiality order.

1) What evidence and papers are adjudicative records?

The *Act* says that all "adjudicative records" must be available to the public. According to the *Act*, adjudicative records include:

- application forms,
- written legal arguments,
- notices and papers from the administrative tribunal,
- documents that are filed as evidence in a hearing or during an interim request,
- documents that an administrative tribunal relies on when making a decision,
- decisions, and
- schedules of hearings.

Because the *Act* has not yet come into force and because each administrative tribunal has not yet released its own rules about how it will process requests for adjudicative records, it cannot be determined exactly how the definition of adjudicative records will be interpreted. A broad interpretation of "adjudicative records" might include medical documents filed in support of an accommodation request for a hearing. A narrow interpretation may not include these kinds of documents, which would continue to protect personal identifying information from being disclosed to the public.

The most cautious way to think about the new *Act* is that if you file documents at an administrative tribunal related to your case, those documents may be available for the public to access.

2) How can a party get a confidentiality order?

The *Act* says that all adjudicative records must be available to the public, unless there is a confidentiality order. Before the *Act*, there were two main ways to have your case be more private - you could ask for anonymization of your name so that only your first and last initial were used in a decision, and you could ask for a publication ban, which meant that some or all of the papers in your case would not be available to the public and that no one would be allowed to publish anything about your case.

With the passage of the *Act*, it is not clear whether these are still available to applicants. Instead, the *Act* sets out requirements for a party to ask for a confidentiality order. The requirements to get a confidentiality order over some or all of the documents in the case are:

- If the documents include information about public security, or
- If the documents include such extremely sensitive personal information that keeping them private is more important than having them be available to the public.

These requirements set a high standard for getting a confidentiality order. It is likely that only exceptional cases would qualify for a confidentiality order.

ARCH will continue to monitor when the *Act* comes into force and the how the *Act* is interpreted and applied by different administrative tribunals. If you have questions about public access to documents related to your case at an administrative tribunal, contact ARCH. An ARCH staff lawyer may be able to give you free, confidential legal information and advice.

ODSP: Redefining Disability

By Dianne Wintermute, Staff Lawyer

On November 22, 2018, the Minister of Children, Community and Social Services announced that social assistance in Ontario would be reformed. One of the changes is to redefine disability under the current *Ontario Disability Support Program Act* (ODSPA), the law which governs income support benefits that Ontario provides to eligible persons with disabilities. The Minister said that the new definition would be more like the one used in federal government benefit programs.

Generally, there is no one definition of disability that applies provincially or federally. Each benefit program has its own eligibility criteria. This means that you might qualify for one program but not another. That is why the definition of disability is so important.

Currently, in order to qualify for ODSP benefits, a person must show that they have a substantial physical or mental impairment that is continuous or recurrent and expected to last one year or more; that results in a substantial restriction in one or more activities of daily living; and is verified by a prescribed health care provider.

The ODSP definition has been applied in a broad and flexible manner. Courts and Tribunals have recognized that people with disabilities face barriers to work or community involvement or participating in activities of daily living. ODSP benefits include money for shelter and basic needs and provide employment supports. There are other benefits, like

medical transportation, drug coverage, vision and some dental care, and help with the purchase of assistive devices. People who receive ODSP can also receive financial gifts and use additional money to pay for disability-related items and/or expenses. ODSP is a social assistance program and is therefore considered to be a “program of last resort”, which means that you own few assets and have little or no income.

Federally, Canada does not have one single definition of disability. The closest program to ODSP is likely the Canada Pension Plan Disability (CPP-D) benefit program. In order to qualify for benefits under CPP-D, a disability must be both "severe" and "prolonged," and it must prevent you from being able to work at any job on a regular basis. Severe means that you have a mental or physical disability that regularly stops you from doing any type of substantially gainful work. Prolonged means that your disability is long-term and of indefinite duration or is likely to result in death. In addition, you must have contributed to the Canada Pension Plan through insurable earnings from employment to be able to take advantage of the program. The amount you are entitled to under this plan depends on how much and how long you have contributed to the program. CPP-D does not take into account financial need.

ARCH is concerned that a more narrow definition of disability for ODSP will exclude many persons with disabilities and force them to live on Ontario Works (OW). At present, a single person on ODSP receives $1,169.00 per month. OW provides significantly less income support – only $733.00 per month. OW does not provide benefits for disability related supports and services that are so important to the health, well-being, and inclusion of persons with disabilities. OW’s emphasis is on getting more people back into the workforce to earn money and not rely on social assistance. This emphasis on employment might not take into account restrictions that people with disabilities have. This is particularly the case with people who experience chronic or episodic disabilities or those who can work some time but not full time. Very few employers have flexible work schedules to accommodate persons with disabilities. The government is changing social assistance rules – but will they also encourage employers to consider different ways that people can participate in work?

There are many details about changes to ODSP or OW programs that the Government of Ontario has not yet released. We do not know what the definition for ODSP will be; we do not know what benefits, and in particular, what disability or health related benefits, will be available; we do not know what kind of employment supports will be put in place. Persons with disabilities are left with a lot of questions and no real answers.

On April 5, 2019, ARCH, along with the Income Security Advocacy Centre, the ODSP Action Coalition and Voices from the Street, among others, participated in an Ontario Government consultation on proposed changes to defining disability. Issues of severity and duration of disability were discussed. ARCH encouraged the government to take an individualized approach to disability, one that will reflect each person’s lived experience and the context in which they experience disability. We also reminded the government of their obligations under the *Convention on the Rights of Persons with Disabilities* which

provides that persons with disabilities have a right to an adequate standard of living and social protection. We were told that a summary of the government's consultations will be made available. We will report back to our communities once we receive it.

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.

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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, Operations, Program and Administrative 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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