ARCH *Alert*

ARCH's Newsletter on Disability and Law in Ontario

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2019 International Day of Persons with Disabilities

By Mariana Versiani, Communications and Outreach Coordinator

The United Nations proclaimed December 3rd as the International Day of Persons with Disabilities (IDPD) in 1992. This day continues to be celebrated around the world as an opportunity to promote the rights and inclusion of persons with disabilities in every aspect of political, social, economic, and cultural life.

ARCH observes this date every year by organizing events and releasing publications that raise awareness on the equality rights, fundamental freedoms, and inclusion of persons with disabilities.

The theme for this year's date as announced by the United Nations is "**Promoting the participation of persons with disabilities and their leadership: taking action on the 2030 Development Agenda**". The theme focuses on the empowerment of persons with disabilities for an inclusive, equitable, and sustainable development. This is very important for the 2030 Agenda for Sustainable Development that was set by the United Nations General Assembly in 2015.

The 2030 Agenda sets a plan of action to achieve Sustainable Development Goals by the year 2030. These goals are designed to be a "blueprint to achieve a better and more sustainable future for all", and the Agenda pledges to "leave no one behind", recognizing disability as an intersectional matter which needs to be considered.

The United Nations is observing IDPD this year with an official opening, a panel discussion, and a spotlight event.

Their panel will be discussing important initiatives for disability inclusion that have been launched this year across the three pillars of the UN system: peace and security, human rights, and development. This panel session will address the initiatives and discuss next steps.

You can find more information about the United Nations event by going to: https://www.un.org/development/desa/disabilities/international-day-of-persons-with-disabilities-3-december.html

In addition to speaking and participating at various events, ARCH is observing IDPD this year with the launch of *OP Lab: Learning, Sharing, Actioning!*

Through the OP Lab, ARCH and our partners hope to foster an exchange of ideas to develop innovative solutions for advancing disability rights, by bringing together networks of advocates and disability-rights lawyers across Canada. Participants of OP Lab will be part of a Canada-wide network to advocate for more effective implementation of the Convention on the Rights of Persons with Disabilities. ARCH is grateful to the Government of Canada for funding this project.

For more information and to apply for OP Lab, go to www.archdisabilitylaw.ca.

Advancing Disability Rights in Ontario through the CRPD

By Kerri Joffe, Staff Lawyer

The *Convention on the Rights of Persons with Disabilities* (CRPD) is an international agreement that promotes and protects human rights for persons with disabilities. Canada agreed to follow it, referred to as ratification, in March 2010. The CRPD says that persons with disabilities have the right to be treated equally, make their own decisions, have their rights respected, and participate in society. The CRPD has 33 articles about specific rights for persons with disabilities, including:

- living independently
- being part of the community
- inclusive education
- accommodations at work
- supported decision making
- accessible voting
- getting accessible information, and many other rights and freedoms.

There are rights on a broad range of areas that all fundamentally advance the inclusion of persons with disabilities. Many of these rights actually fall under the powers of the Ontario government and the other provinces and territories. The CRPD therefore can have a very important role in advancing disability rights locally and provincially, as well as federally.

The United Nations reviews how countries implement the CRPD once they agree to it. Canada has already been reviewed once by the United Nations and is now undergoing its second review. ARCH and our partners across Ontario and Canada made submissions both in writing and in person to the United Nations about the kinds of questions that the United Nations should be asking Canada about how well it is implementing the CRPD. The United Nations has since released its questions, called the List of Issues Prior to Reporting. The Government of Canada will send a report to the United Nations responding to the questions in the List of Issues Prior to Reporting. Disability organizations and other civil society groups also have an opportunity to respond to these questions. ARCH is working with our partners to develop a parallel report to the United Nations in collaboration with disability communities across Canada.

What is the Optional Protocol to the Convention on the Rights of Persons with Disabilities?

At an event co-hosted by ARCH last year in Ottawa on December 3rd, Minister Carla Qualtrough announced that Canada agreed to follow the Optional Protocol which is an additional part to the CRPD. This means that in some situations, people in Canada can make complaints to the United Nations Committee on the Rights of Persons with Disabilities.

The Optional Protocol provides two different ways to address the failure of government to implement the CRPD. One way is for individuals who have been personally and directly affected, and have gone through all the legal processes available in Canada, to ask the UN Committee to consider their complaint. This is called an "Individual Communication". The UN Committee will consider an Individual Communication if it is about a violation of CRPD rights and if a number of requirements are met, including: the matter has been dealt with by every level of the available legal process in Canada, and the rights violation happened after December 3, 2018, or if it happened earlier, that it also continued after this date. It is important to note that if the UN Committee finds that CRPD rights have been violated, the Committee can only make recommendations to the Government of Canada about steps it should take to stop or prevent the violation. It is up to governments to decide whether to follow the Committee's recommendations.

The second type of complaint that can be made under the Optional Protocol is called an "Inquiry". This is a way for communities to ask the UN Committee to investigate a particular systemic violation of CRPD rights that affects many people in Canada. If there is enough reliable information that governments in Canada are violating CRPD rights broadly and systemically, then the Committee can begin an inquiry. Disability communities in several other countries have already used the Optional Protocol in this way.

Along with the very important role that monitoring can have on how Ontario and other provinces/territories and federal government are implementing the CRPD, the Optional Protocol presents another important tool for disability-rights advocates to achieve systemic and sustainable improvements to the situation of people with disabilities.

To review the List of Issues Prior to Reporting and for more about ARCH's work on the CRPD and Optional Protocol, you can go to the following link: https://archdisabilitylaw.ca/initiatives/advancing-the-un-crpd/

Launch of *OP Lab: Learning, Sharing, Actioning!*

By Mariana Versiani, OP Lab Project Coordinator

In celebration of the International Day of Persons with Disabilities, ARCH is proud to launch a project called **OP Lab: Learning, Sharing, Actioning**!

In 2018, Canada agreed to follow the Optional Protocol (OP) to the Convention on the Rights of Persons with Disabilities (CRPD). The Optional Protocol is an additional part of the CRPD that allows people to make a complaint to the United Nations, if they believe their rights under the CRPD have been violated. The Optional Protocol is an important tool that can help disability communities across Canada advocate for governments to follow the CRPD, which is why we are excited to launch this new project. The OP Lab offers a series of courses about the Optional Protocol and the CRPD. These courses will be facilitated by ARCH lawyers and our project partners, and will include presentations from guest speakers, discussions, and learning exercises.

Participants in the OP Lab will join a Canada-wide network of advocates and lawyers to strategically advance the implementation of the CRPD in Canada.

ARCH is grateful for the support of the following Partners in this project: Alliance for Equality of Blind Canadians (AEBC); British Columbia Aboriginal Network on Disability Society (BCANDS); Canadian Association of Community Living (CACL); Canadian Association of the Deaf (CAD); Canadian Council on Rehabilitation and Work (CCRW); Communication Disabilities Access Canada (CDAC); Council of Canadians with Disabilities (CCD); DAWN Canada; Independent Living Canada (ILC); People First of Canada; National Coalition of People who use Guide and Service Dogs in Canada; National Network for Mental Health (NNMH);Tlingit Sovereign Nation; and York University - Osgoode Hall Law School.

ARCH is working hard to create and offer courses and materials that are as accessible as possible to enable a true connection amongst persons of all disability communities across Canada. Courses will be offered in English with French translation, English and French live captioning, and ASL and LSQ interpreting. Materials will be available in English and in French, in ASL and LSQ, and alternative formats will be available upon request.

The OP Lab will be hosted in D2L's Brightspace, a cloud-based learning platform. ARCH and D2L's Accessibility team are working in collaboration to offer the courses as fully accessible as possible.

This project is funded by the Government of Canada's Social Development Partnerships Program - Disability Component.

For more information, go to www.archdisabilitylaw.ca

To apply for the OP Lab, go to https://www.surveygizmo.com/s3/5281955/OP-LAB-Application-Form

Lancement de *l'OP Lab : apprendre, partager, agir!*

Par Lila Refaie, Avocate à ARCH

Pour célébrer la Journée internationale des personnes handicapées, ARCH est fier de lancer un projet intitulé **OP Lab : apprendre, partager, agir**!

En 2018, le Canada a accepté de suivre le Protocole facultatif à la Convention relative aux droits des personnes handicapées (CDPH). Le Protocole facultatif est une partie additionnelle de la CDPH qui permet aux personnes de déposer une plainte auprès des Nations Unies si elles estiment que leurs droits en vertu de la CDPH ont été violés. Le Protocole facultatif est un outil important qui peut aider les communautés de personnes ayant un handicap à travers le Canada à plaider pour que les gouvernements suivent la CDPH. C'est pourquoi nous sommes ravis de lancer ce nouveau projet. L'OP Lab offre une série de cours sur le Protocole facultatif et la CDPH. Ces cours seront animés par les avocats d'ARCH et nos partenaires du projet, et incluront des présentations par des conférenciers invités, des discussions et des exercices d'apprentissage.

Les participants à l'OP LAB se joindront à un réseau pancanadien de défenseurs et d'avocats pour faire progresser de manière stratégique la mise en œuvre de la CDPH au Canada.

ARCH remercie les partenaires de ce projet pour leur support : *Alliance for Equality of Blind Canadians* (AEBC); *British Columbia Aboriginal Network on Disability Society* (BCANDS); *Canadian Association of Community Living* (CACL); *Canadian Association of the Deaf* (CAD); *Canadian Council on Rehabilitation and Work* (CCRW); *Communication Disabilities Access Canada* (CDAC); *Council of Canadians with Disabilities* (CCD); *DAWN Canada*; *Independent Living Canada* (ILC); *People First of Canada*; *National Coalition of People who use Guide and Service Dogs in Canada*; *National Network for Mental Health* (NNMH);*Tlingit Sovereign Nation*; et *York University - Osgoode Hall Law School*.

ARCH travaille fort pour offrir les cours et le matériel dans un format aussi accessible que possible afin de permettre un lien réel entre les personnes de toutes les communautés de personnes ayant un handicap au Canada. Les cours seront offerts en anglais et traduits en français, sous-titrage en direct en anglais et en français, ainsi que l'interprétation ASL et LSQ. Le matériel sera disponible en anglais et en français, ainsi qu'en ASL et en LSQ. Un format alternatif du matériel sera également disponible sur demande.

L'OP Lab sera disponible sur Brightspace de D2L, une plate-forme d'apprentissage sur le cloud. ARCH et l'équipe d'accessibilité de D2L travaillent en collaboration pour offrir les cours sur une plate-forme accessible.

Ce projet est financé par le Programme de partenariats pour le développement social (Volet personnes handicapées) du gouvernement du Canada.

Pour plus d'informations, visitez https://archdisabilitylaw.ca/fr

Pour vous inscrire à OP Lab, allez à https://www.surveygizmo.com/s3/5316545/OP-LAB-Formulaire-de-Demande

Accessible Canada Act - Updates

By Kerri Joffe, Staff Lawyer

On June 21, 2019 the *Accessible Canada Act* received Royal Assent, making it law in 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 that hinder the full and equal participation in society of persons with disabilities.

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; being employed by 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 information and communication technologies.

Under the *Accessible Canada Act*, new regulations can be made. The Government of Canada recently held pre-consultations on two regulations, called the Technical Regulations. One of these Technical Regulations will address accessibility plans, reports, and feedback processes. The *Accessible Canada Act* applies to federally-regulated

organizations, meaning that organizations such as banking, transportation, telecommunications, the Government of Canada, Crown corporations, and Parliament must follow the requirements in the *Accessible Canada Act*. These organizations will need to create and publish accessibility plans that explain what they are doing to identify, remove, and prevent barriers. They will need to report on steps they are taking to address accessibility. They will also need to create ways to receive and address feedback on accessibility from people who interact with the organization. The second of these Technical Regulations will address how the *Accessible Canada Act* and its regulations will be enforced. Enforcement is key for ensuring that organizations follow all the accessibility requirements in the *Accessible Canada Act.* The Government of Canada is now developing these two Technical Regulations. There will be another opportunity to provide input on these regulations when they are released for consultation.

The Canadian Transportation Agency (CTA) also has powers to develop new regulations under the *Accessible Canada Act*. In March 2019, the CTA published the *Accessible Transportation for Persons with Disabilities Regulations*. These regulations are not yet law; they will become law on June 25, 2020. They will require federal transportation providers, like airlines, railways, interprovincial buses, and others to take certain steps to make some aspects of transportation more accessible for persons with disabilities. To review these regulations, go to: www.gazette.gc.ca/rp-pr/p2/2019/2019-07-10/html/sor-dors244-eng.html

In August 2019 the Government of Canada announced leadership for the Canadian Accessibility Standards Development Organization (CASDO). CASDO is a new organization created by the *Accessible Canada Act*. CASDO has a mandate to develop and revise accessibility standards. These standards will not be laws, but will be publicized and sent to the responsible Minister, who will consider making them into regulations which have the force of law. For more information about CASDO and its Board of Directors, go to: www.canada.ca/en/canadian-accessibility-standards-development-organization.html

Service Animals in Schools

By Lila Refaie and Hina Ghaus, Staff Lawyers

Under Ontario's *Human Rights Code*, school boards have a legal duty to accommodate students with disabilities to the point of undue hardship. In order to do so, the school board must make an individualized assessment of the student's disability-related needs as they relate to accessing a meaningful education. Some students with disabilities may require the use of a service animal to attend school and access the curriculum in a meaningful way. Per the *Integrated Accessibility Standards,* made under the *Accessibility for Ontarians with Disabilities Act,* 2005, a service animal is simply defined as an animal readily identified as such and used by a person for disability-related reasons.

Unlike guide dogs, there are no legislative requirements related to a service animal's training or certification, nor the kind of animal that may be a service animal. Ontario's *Human Rights Code* does not define service animals and the Human Rights Tribunal of Ontario has only publicly addressed the issue of service animals within a school environment in one decision, *J.F. v. Waterloo Catholic District School Board*, 2017 HRTO 1121. Nonetheless, the *Human Rights Code* is clear on a student's right to appropriate accommodations at school. The nature of the appropriate accommodation depends on the individualized assessment of the student's disability-related needs, which may include the use of a service animal.

However, not all school boards treat students' request for the use of a service animal at school in a similar manner. In an effort to promote uniformity among school boards, the Ministry of Education released a policy directive to all elementary and secondary school boards outlining their obligation to put in place a policy related to the use of service animals in schools.

This policy directive was created under the authority of a new section in the *Education Act*. In April 2019, the *Education Act* was amended to require school boards to establish policies and guidelines about service animals in school. The importance of introducing this explicitly into the legislation is reflected by the fact that in the spring of this year, the Ministry reported that only 39 out of the 72 school boards in Ontario had policies in place for service animals.

New Policy Directive Mandates School Boards to Develop a Service Animal Policy

Between April and May 2019, the Ontario government held consultations with the public on how service animals should be managed in Ontario schools. Suggestions from the consultations included a recommendation that the policy directive directly address the competing rights for students and staff as an important factor when decisions are being made. Under the *Education Act*, a school principal has the authority to make decisions which are in the school's best interest. In the context of service animals, principals would have to address the competing rights of students and staff who may have cultural sensitivities, phobias, and/or allergies, among other considerations.

Despite these recommendations, the policy directive does not address competing rights in any noteworthy way. Rather, it briefly states that school boards must make a determination on a case-by-case basis, "taking into account all of the circumstances", such as the needs of the student, the school community, and a school board's obligation to provide meaningful access to education.

Since the purpose of the policy is to create a uniform framework for school boards across Ontario, much of the six-page policy directive focuses on the minimum components that each school board policy must contain. Essentially, school board policies must talk about a communication plan, the process for a student's request to be accompanied by a service animal, a protocol to address health and safety concerns, roles and responsibilities of all

parties involved, training for staff related to service animals, and a review of the policy and data collection process. With regards to the process, school boards are encouraged to address how requests for students to be accompanied by service animals in schools can be made, as well as steps in the school board's decision-making process. However, much of the policy directive's particulars related to the decision-making process use discretionary language such as the word "should". The effect of this language is that school boards are left with a lot of leeway in developing individual policies and procedures.

Moreover, there are some concerns that school boards may interpret the government's policy as being given great liberties to create any policy, including banning service animals altogether. However, a strict no pet policy does not negate their obligations under Ontario's *Human Rights Code,* or the duty to accommodate students. This is true even if school boards develop their policy with restrictive factors to consider. For example, they may require that the service animal is certified by a recognized training and certification program. Such a factor is potentially highly restrictive and legally unnecessary for several reasons. First, while there are limited organizations in Canada that provide certification for limited types of service animals, not all service animals qualify for specialized training and certification. Second, even if certification exists for a particular service animal, organizations providing these certificates are not necessarily accessible to Ontario students. There are only a small handful of these organizations in Ontario. Furthermore, the few organizations that are in Ontario have years-long waitlists. A student with a disability, who has a demonstrated disability-related need for a service animal in order to access a meaningful education, should not be restricted from attending school with their service animal for the sole reason of a lack of certification.

Another ambiguous point of this policy directive is what type of service animal should be considered beyond a dog. Although the policy acknowledges that other species can also be service animals, there is no further information on what types of restrictions may exist.

Finally, this policy directive entirely fails to discuss how a school board should accommodate other members of the school community who use service animals, including teachers, school staff, and parents or guests who visit the school. In order to achieve uniformity across the province, guidance on how schools are to deal with these situations is an important aspect that should also be addressed.

School boards must develop their policy on service animals by January 1, 2020. ARCH will continue to monitor this issue.

To access this policy directive (only available in PDF), go to:
http://www.edu.gov.on.ca/extra/eng/ppm/ppm163.pdf

Updates on the Ford Government's Cuts to Education

By Hina Ghaus, Staff Lawyer

On March 15, 2019, Premier Doug Ford's Progressive Conservative government announced sweeping changes to Ontario's education system. In order to achieve the Ministry of Education's spending plan in the 2019 Ontario Budget, two major measures to reduce spending were announced: an increase in class sizes in elementary and secondary school and proposed legislation aimed at limiting public sector compensation growth.

Almost 1.5 years into the Ford government's period of spending restraint, what key changes have been implemented in the education system and which proposed changes have been cancelled or altered?

Increase in Class Sizes and Decrease in Teachers

Earlier this year, former Education Minister Lisa Thompson announced that the government is lifting the caps on class sizes in primary and secondary schools across the province. Class sizes for grades 4 to 8 were to increase from 23.8 to 24.5 students per teacher, while class sizes for secondary schools were to increase from 22 students to 28 students over four years.

Although there were no changes announced relating to kindergarten classes or grades 1 to 3, there was an announcement about a reduction of the number of funded early childhood educators per kindergarten classroom from 1.14 to 1.

This increase in class sizes has been met with significant pushback from parents, teachers, and unions. Larger classes mean less support for all students, and a disproportionate impact on students with disability-related support needs. A recent research study co-led by ARCH reported that students with disabilities had limited access to appropriate accommodations. Nearly one-third of parents reported that their child did not have access to additional support staff when needed by their child. ARCH often speaks with students with disabilities, and their parents, who consistently report a lack of one-on-one support that many students need to succeed in the classroom. An increase in class sizes would even further reduce access to teaching resources for students who need additional support, and negatively impact the quality of their education.

Minister Thompson also stated that no teacher would lose their job as a result of this class strategy. Instead, the reduction in teachers would be achieved only through **attrition**, that is, through teacher retirements and other voluntary job exits. Accordingly, the Ford government announced the **Teacher Job Protection Fund**, which provides $1.6 billion in temporary funding to school boards so that the new class size targets can be achieved gradually through attrition.

Ontario's Financial Accountability Office has stated that the increase in class sizes would result in 10,000 fewer teachers in the public school system over the next five years.

Specifically, in the current 2019-2020 school year, there will be an **estimated 2,826 fewer teachers** as a net result of the new class size targets and the Teacher Job Protection Fund.

Unions and Educators Are Not Happy

Unions representing educators continue to warn of significant job losses and show massive resistance to the government's proposed changes. At the end of August 2019, contracts with all of the province's education workers expired. The Ford government has been in negotiations with the province's education unions since the start of this school year.

In October 2019, Ontario's current Education Minister Stephen Lecce offered the union representing high school teachers a reduction in average high school class sizes from the government's previous goal of 28 students down to 25 students. This offer was promptly rejected as it contained a condition that would eliminate the class size caps in local collective agreements at all school boards across the province. The impact of eliminating all local class-size caps would mean that any class could rise to any size, regardless of the needs of the students in that class. Further, the union believes that the lowered threshold to 25 students is still too high to guarantee high-quality education for students.

In 2018, cuts to public and community services directly impacted the quality of education for Ontario's nearly 2 million students. In 2019, the Ford government's austerity measures continue. What else the Ford government is willing to negotiate about in an effort to avoid potential labour disruptions remains to be seen.

E-Learning Courses

As part of the Ministry of Education's plan to "modernize classrooms", a strategy to centralize electronically delivered instruction was announced. Beginning in the 2020-2021 school year, secondary school students would be required to take a minimum of four e-learning courses out of the thirty credits required to receive their diploma. These e-learning courses would have an average of 35 students per teacher.

In November 2019, Minister Lecce announced that secondary school students would only be required to take two e-learning courses rather than the original four. This concession resulted from a recent round of negotiations with the union for secondary schools. Despite Minister Lecce's backpedaling, many continue to disagree with the mandate of compulsory online courses altogether.

Those opposed to this new requirement state that e-learning is used by the school board to respond to austerity rather than to improve quality of instruction and education. Further, making e-learning courses mandatory could have an adverse impact on students that lack access to technology, reliable internet service, and students with disabilities who may require more support than what is available in independent learning.

Reduced Budget for School Repairs

Last year, the Ford government cancelled Ontario's cap-and-trade system, which was aimed to lower greenhouse gas emissions by putting caps on the amount of pollution companies in certain industries could emit. As a result, the $100 million fund for school repairs has also been eliminated. The province continues to struggle with an estimated $15 billion repair backlog at its 4,900 publicly funded schools.

The 2018 budget allocated $16 billion in capital grants over ten years for infrastructure repairs and new schools. The 2019 budget has reduced this amount to $13 billion over the next ten years.

Capping Public Sector Compensation Growth

On November 7, 2019, the government passed a law called *Protecting a Sustainable Public Sector for Future Generations Act, 2019* (Bill 124) to reduce the province's deficit by controlling the increase of public-sector salaries.

This law sets out time-limited requirements on new compensation increases for unionized and non-unionized employees in Ontario's public sector. During each three-year period, the law imposes a 1 percent cap on both salary increases and compensation entitlements in each 12-month span (with certain exceptions).

The law applies to over 1 million workers across the provincial public sector, including school boards under the *Education Act* and post-secondary institutions. However, it does not apply to any compensation increases provided for in existing collective agreements, so long as those agreements were made on or before June 5, 2019.

This law has been a significant point of contention, as exemplified by union protests around the province. Shortly after it passed in the legislature, the four major unions representing high school, elementary, Catholic, and French teachers in the province issued a joint statement. They say that the passage of the legislation eliminates any prospect of good faith bargaining and that they are preparing a court challenge. Many feel this law is an attack on the collective bargaining rights of workers.

How You Can Help

These are just some of the numerous changes related to elementary and secondary education by the Ford government. These cuts to education have caught the attention of countless students, guardians, educators, and concerned residents across the province who have developed a variety of campaigns and calls to action.

One way to help is to send a personal email to your local MPP and/or to Premier Doug Ford and Minister of Education Stephen Lecce.

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

Minister of Education Stephen Lecce
stephen.lecce@pc.ola.org
647-560-9700
ARCH will continue to monitor and report on changes to our education system.

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Update on Solitary Confinement

By Lila Refaie, Staff Lawyer

ARCH wrote about court decisions and proposed legislation related to administrative segregation (commonly known as solitary confinement) in Canada in the April 2018, March 2019, and July 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 July 2019 issue of ARCH *Alert*, there have been some developments related to the appealed court decisions. The Court of Appeal for British Columbia confirmed that administrative segregation in federal prisons is unconstitutional. Following this, the federal government has requested leave for appeal of this decision at the Supreme Court of Canada, as they did for the decision from the Court of Appeal for Ontario.

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 in Ontario

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/arch_alert/arch-alert-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. In its decision[5], the Court of Appeal for Ontario confirmed that this regime is unconstitutional because it violated section 12 of the Charter. The Court also placed a cap of 15 consecutive days on all prisoners placed in administrative segregation[6].

Summary of Court Decisions in British Columbia Court

In January 2018, the Supreme Court of British Columbia released a landmark decision in *British Columbia Civil Liberties Association v. Canada (Attorney General).*[7] 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*, particularly for prisoners with mental health disabilities and Indigenous prisoners. 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[8].

Shortly after this ruling, the federal government announced its intention to appeal this decision. This appeal was heard in November 2018 and a decision was released on June 24, 2019.

In its decision[9], the Court of Appeal for British Columbia confirmed the unconstitutionality of administrative segregation because it violated section 7 of the *Charter*. However, the Court refused to state this regime violated section 15 of the *Charter*. Rather, it concluded that any inequality faced by prisoners with mental health disabilities or Indigenous prisoners came from an improper administration of the Federal Act instead of the regime itself. In other

[4] ARCH wrote a detailed analysis of this decision in the April 2018 issue of ARCH *Alert*. To access a more in depth analysis of this decision, go to: https://archdisabilitylaw.ca/arch_alert/arch-alert-volume-19-issue-1/.
[5] 2019 ONCA 243. To access the full decision, go to: https://www.canlii.org/en/on/onca/doc/2019/2019onca243/2019onca243.html?resultIndex=1.
[6] ARCH wrote a detailed analysis of this decision in the July 2019 issue of ARCH *Alert*. To access this article, go to: https://archdisabilitylaw.ca/arch_alert/arch-alert-volume-20-issue-2/#solitary-confinement-in-federal-prisons.
[7] 2018 BCSC 62. To access the full decision, go to: https://www.canlii.org/en/bc/bcsc/doc/2018/2018bcsc62/2018bcsc62.html?resultIndex=1.
[8] ARCH wrote a detailed analysis of this decision in the April 2018 issue of ARCH *Alert*. To access a more in depth analysis of this decision, go to: https://archdisabilitylaw.ca/arch_alert/arch-alert-volume-19-issue-1/.
[9] 2019 BCCA 228. To access the full decision, go to: https://www.canlii.org/en/bc/bcca/doc/2019/2019bcca228/2019bcca228.html?autocompleteStr=british%20columbia%20civil%20liberties%20association%20v.%20canada&autocompletePos=3.

words, the Court determined that the administrative segregation regime is not discriminatory per se. The discriminatory effect of the regime flowed from the way prison administrators and staff acted, and how they implemented the Federal Act. This was not enough for the Court to determine that section 15 of the *Charter* was violated. Nonetheless, the Court did declare the administrators of federal prisons breached their obligations towards these prisoners under the Federal Act. Finally, the Court issued an official declaration that prisoners have a constitutional right to have legal representation at their segregation review hearing.

Federal Government Appeals Court Decisions to the Supreme Court of Canada

The federal government has requested leave for appeal at the Supreme Court of Canada in both the case from Ontario and the case from British Columbia, on April 9, 2019 and September 23, 2019, respectfully. This means the federal government asked the Supreme Court of Canada to hear their appeal of both decisions. The Supreme Court of Canada has not yet decided on either request.

ARCH will continue to monitor this developing issue.

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