



ARCH Alert

ARCH's Newsletter on Disability
and Law in Ontario

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Note from the Editors

Welcome to the National AccessAbility Week edition of *ARCH Alert*!

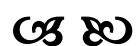
National AccessAbility Week has been celebrated in Canada for some time but it is now enshrined in Canada's new federal accessibility legislation, the *Accessible Canada Act*. This year, National AccessAbility Week is being celebrated from May 31st to June 6, 2020. It is a time for us to promote inclusion and accessibility across our communities and to celebrate the accomplishments of persons with disabilities and the disability rights movement. ARCH is celebrating National AccessAbility Week in a number of ways, including posts and information released through social media and on ARCH's website. Due to the COVID-19 pandemic, ARCH's longstanding annual event celebrating National AccessAbility Week in partnership with the Law Society of Ontario has been cancelled for this year.

ARCH is celebrating its 40th year! While some of our scheduled events have been disrupted by the COVID pandemic, ARCH will be celebrating this milestone at our upcoming Annual General Meeting to be scheduled this autumn – more details to follow.

We hope you find the information and resources in this edition of *ARCH Alert* helpful and informative.

Be well and stay safe,

Amanda Ward and Robert Lattanzio



ARCH's work during the COVID-19 Pandemic

By: Robert Lattanzio, Executive Director

As the COVID-19 pandemic continues to challenge us all, there is no question of the severely disproportionate impacts it is having on marginalized communities, and in particular persons with disabilities.

Moreover, some of our communities of persons with disabilities are more susceptible to the COVID-19 virus and most systems and emergency response plans do not contemplate from the outset persons with disabilities and their disability-related accommodation and support needs. This is layered on already inaccessible systems such as health care, social services, and a history of exclusion and marginalization.

Important and critical response measures to deal with the pandemic like physical distancing are simply impossible for many persons with disabilities. Concerns and fears regarding

access to vital supports and services for daily living, lack of accessible shelters, insufficient income supports, food security, access to health care, and access to communication devices and support people when accessing health care are but a few of the heightened and real concerns permeating across our communities. The COVID-19 pandemic has simply exacerbated the vulnerability that already existed.

Ongoing responses to dealing with the pandemic have been slow to recognize the particular impacts on disability communities. The UN Special Rapporteur on the rights of persons with disabilities, Catalina Devandas Aguilar, stated on March 17, 2020 that "[p]eople with disabilities feel they have been left behind." "Containment measures, such as social distancing and self-isolation, may be impossible for those who rely on the support of others to eat, dress and bathe."

Among the early responses to the growing health crisis, People First of Canada released a strong statement underscoring how their communities of persons labelled with intellectual disabilities are feeling forgotten stating, "[w]e are the left behind of the left behind". While this statement rings particularly true for the specific communities that People First of Canada represent, it is emblematic of a larger issue: that decisions regarding pandemic planning, public health, government programs, transportation, enforcement, and emergency orders to name but a few, do not fully comprehend the complexities of the lives of persons with disabilities, the insufficient supports and systems available, and how responses to the COVID-19 pandemic may have either ineffective or harmful consequences on persons with disabilities. The UN High Commissioner on Human Rights on March 6, 2020 stated, "our efforts to combat this virus won't work unless we approach it holistically".

ARCH continues to provide legal representation to persons with disabilities across Ontario that have been disproportionately and discriminatorily impacted by responses to COVID-19. In addition, ARCH has been providing comprehensive updates on COVID-19 related developments that impact our communities, as well as working with our communities to develop law reform and public education responses to community concerns. ARCH has developed community based advisory committees to inform some of our specific files and we work alongside disability rights groups across Ontario and Canada on a variety of legal issues related to COVID-19. Our website offers a series of materials on various COVID-19 related issues that are of concern to our communities. On our webpage devoted to pandemic related materials, you can find bulletins, advocacy and rights education materials, COVID-19 related media reports, and open letters that ARCH has prepared and supported. You can access this information by going to:

<https://archdisabilitylaw.ca/covid/>

ARCH has raised significant concerns about a draft document called the Clinical Triage Protocol for Major Surge in COVID Pandemic, dated March 28, 2020 from Ontario Health. This document is meant to help doctors make difficult decisions about who will receive

critical health care during the COVID-19 pandemic if there are not enough medical resources. ARCH has been working closely with disability rights groups in different ways to ensure that if such a document is ever needed, that persons with disabilities will not be disproportionately and discriminatorily impacted. For more information about ARCH's work on making changes to this document, go to:

<https://archdisabilitylaw.ca/resource/arch-bulletin-on-covid-19-ontario-health-clinical-triage-protocol/>

ARCH has been very concerned about the impact of visitation bans in hospitals and in group homes and congregated settings, and we have been working with disability groups to make changes to ensure that people with disabilities still receive accommodations and have access to their supports. ARCH recently produced an advocacy toolkit, in multiple and accessible formats including plain language and video, providing legal information and advocacy tips to people with disabilities who need their support person, attendant or communication assistant to be with them in hospital during the COVID-19 pandemic. For more information, go to:

<https://archdisabilitylaw.ca/resource/advocacy-toolkit-advocating-for-your-support-person-attendant-or-communication-assistant-to-be-with-you-in-hospital-during-the-covid-19-pandemic/>

For more information about temporary visitation bans in developmental services group homes, go to:

<https://archdisabilitylaw.ca/resource/arch-bulletin-on-covid-19-people-living-in-developmental-services-group-homes-need-access-to-essential-support-persons/>

In order to better understand the impacts on our communities regarding the COVID-19 related closure of the Assistive Devices Program (ADP), ARCH launched a community survey on April 22. The ADP has since reopened and you can access more information by going to:

<https://archdisabilitylaw.ca/resource/arch-bulletin-on-covid-19-assistive-devices-program-is-open/>

We continue to find innovative ways to engage with our diverse communities to better understand how COVID-19 is impacting particular disability communities. ARCH, Respecting Rights, and in partnership with People First Ontario and Health Care Access Research and Developmental Disabilities (H-CARDD) at CAMH have been hosting a plain language virtual forum to answer any health and legal questions about COVID-19 to help everyone feel well, safe, and connected. This forum is directed at adults labelled with intellectual disabilities living in Ontario, and is called **What's Up Wednesdays**. It continues to take place every Wednesday at 2pm since the first session on April 15. To register for a session, or for more information, please go to:

<https://www.eventbrite.ca/e/whats-up-wednesdays-covid-19-information-in-plain-language-tickets-102373911124>

If you need any help with registering please reach out to us.

With the recent announcement that primary and secondary schools will not reopen for this academic year, attention shifts to planning for a return to school in the fall and the impacts of such plans on students with disabilities. The Ministry of Education released a document titled, Ontario's Framework for Continued Learning, which sets out an initial approach. The Ministry is seeking input and feedback on what is being considered. For more information, go to: <https://www.ontario.ca/page/ontarios-framework-continued-learning>

ARCH continues to provide legal services to our communities across Ontario during the COVID-19 pandemic. ARCH began operating remotely on March 16, 2020 and will continue to do so until further notice. Please contact us via telephone or email. We do not have access to our TTY. To learn more about how to contact ARCH, please go to: www.archdisabilitylaw.ca/contact. Persons with disabilities who live in Ontario can call ARCH for free, confidential legal information, and summary advice. To find out about the type of legal advice ARCH provides and how to book an appointment, please go to: www.archdisabilitylaw.ca/services. If your legal issue does not fall within the areas of law ARCH provides advice on, we will do our best to provide you with appropriate referrals.



ARCH is Seeking Board Members

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

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

The Committee is seeking, in particular, Board members with Human Resources and non-profit governance expertise. According to the by-laws, the ARCH Board is to be composed of 15 directors and a majority of the directors must be persons with disabilities. We strongly encourage applications from persons with disabilities.

Prospective directors should know that ARCH provides legal services throughout Ontario to persons with disabilities. Applicants should have up to 10 hours a month to dedicate to

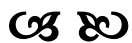
ARCH. This includes preparation for (reading, reviewing, and commenting on materials) and attendance at Board meetings, Committee meetings, in person or by telephone conference call, and participation at occasional day-long events including planning meetings, and Annual General Meetings. ARCH reimburses directors for travel costs and covers disability accommodation expenses.

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

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

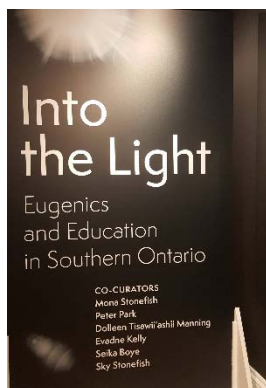
The Nominating Committee will review the list of prospective directors, interview selected applicants and do its best to nominate a slate of individuals who collectively cover as many of the skills, experience, and geographic coverage it has identified to strengthen the Board's capacity to effectively lead ARCH over the next two years. ARCH welcomes applications from persons from equity seeking groups including Indigenous persons, immigrants, young adults, people with lived poverty experience, and persons with disabilities. Accommodations are available on request for candidates taking part in all aspects of the selection process. ARCH is a scent-free environment.

The Nominating Committee requests that interested applicants send an email expressing interest as well as a resumé or short biography by June 15, 2020 to archgen@lao.on.ca. Please type "Board Recruitment" in the Subject line. Only those selected for an interview will be contacted.



Into the Light Receives Lieutenant Governor General Award

By: Robert Lattanzio, Executive Director



ARCH is thrilled to announce that the Guelph Civic Museum's exhibition 'Into the Light: Eugenics and Education in Southern Ontario' received the Lieutenant Governor's Ontario Heritage Award for Excellence in Conservation. ARCH is a proud partner of the 'Into the Light' exhibition, which is now closed. The exhibition received overwhelming interest and support. The exhibition shined a light on a dark history of institutionalization, hidden histories, and ongoing legacies of eugenics through an Indigenous and disability lens in Ontario, and aimed to bring forward stories of survival from eugenic practices.

Into the Light was presented in partnership with Re•Vision: The Centre for Art and Social Justice, Bodies in Translation: Activist Art, Technology and Access to Life, Respecting Rights, and ARCH Disability Law Centre. It was co-curated by Mona Stonefish, Peter Park, Dolleen Tisawii'ashii Manning, Evadne Kelly, Seika Boye, and Sky Stonefish.

ARCH Alert published an article about this exhibition in 2019 in honour of Indigenous Disability Awareness Month titled *Building Solidarity in celebrating Difference*, which you can access with the following link:

https://archdisabilitylaw.ca/arch_alert/volume20-issue3/#building-solidarity-in-celebrating-difference

You may also be interested in reading an article written by Evadne Kelly and Carla Rice in The Conversation Canada titled *Universities must open their archives and share their oppressive pasts* which can be accessed with the following link:

<https://theconversation.com/universities-must-open-their-archives-and-share-their-oppressive-pasts-125539>



COVID-19, Human Rights, and Post-Secondary Education

By: Michael McNeely, ARCH Law Student

Due to the COVID-19 pandemic, universities and colleges across Ontario have offered online learning to students to complete their semester as physical buildings closed. Although it is unclear how universities and colleges will deliver classes in September as planning continues, it remains clear that online learning will be a significant part of any plan moving forward, and certainly for any summer courses being offered. Regardless of whether one takes a course online or in person, human rights laws such as the Ontario *Human Rights Code* (the *Code*) apply to protect the rights of students receiving education. The *Code* guarantees the right to equal treatment in education, without discrimination based on protected grounds including disability. For students with disabilities, academic accommodations can be fundamental to ensuring equal access to education.

Disability-related accommodations are the supports that a student needs to get an education equal to that of their peers. Accommodations can include things like working with a support person (such as a notetaker or tutor, which can also be done remotely), getting school materials in alternate formats (such as Braille or large print – these alternate formats can be shipped to you), and/or having extra time to complete assignments, quizzes, tests, and exams.

One of the most important things to do, if you are a student with a disability and need accommodations to be provided by the school, is to register with the school's Disability (or Accessibility) Services Department. You should be able to register by phoning or e-mailing Disability Services, and their information should be available on the school's website (try Googling "[name of school] Disability Services"). As a result of COVID-19, appointments may be done over the phone or through a video chat platform. If you need accommodations for the appointment (such as an ASL interpreter, a notetaker, captioning, slower conversation speed, etc.) be sure to ask – this is the service they provide.

You can register with Disability Services at any time when you are studying – but the earlier the better, so that accommodations can be implemented sooner.

The decision to provide accommodations is made on a case-by-case basis, and the process should be as uncomplicated as possible. The process should respect the dignity and privacy of the person being accommodated and must be provided on a timely basis. Identifying the appropriate accommodations for each student is a highly individualized process and depends on the particular needs of each student. The limit to providing accommodation is up to the point of undue hardship. The *Code* states that undue hardship occurs if the risk to the health and safety of the individual or others is undue (i.e. too high), or if the cost to provide the accommodations is undue.

Working with Disability Services

The discussions and paperwork that you fill out with Disability Services should always be **confidential**. You should feel **safe, welcome, and encouraged** to engage with people at Disability Services.

If you are aware that you are struggling in a certain area, but are not sure why, Disability Services may be able to assist by sending you to get assessed or by having you try different kinds of adaptive technology. For example, some people with learning disabilities do better with text-to-speech software, or software that reads text out loud. The assessments and testing out of assistive technology may need to occur remotely or adapt as conditions change with regards to COVID-19. This is dependent on decisions made by the school about how it carries out operations.

Disability Services may inform you of grants and scholarships that can help pay for your own equipment, and they may have special areas where you can study and work that are just for people with disabilities (even if it is online, such as a special chatroom).

Disability Services may ask you for documentation about a disability that you are requesting accommodations for. A doctor's note may be sufficient. You are responsible for paying any costs related to this. Disability Services should keep this documentation in a safe and secure place to ensure confidentiality.

Disability Services can work with you to plan your timetable of what courses you will take. They may have information about which professors are best for particular types of learning styles. With the support of Disability Services, a letter will be created that informs your instructors of what accommodations you need for their courses. The instructors are obligated under the *Code* to provide those accommodations and to not punish you for requesting or receiving these accommodations. Please note that instructors do not need to know your diagnosis, rather they just need to provide the accommodations.

If your **accommodations change or need adjusting**, then return to Disability Services for a follow-up appointment. Disability Services may make this appointment with you anyway, to assess how things are going.

If you do not agree with the findings of Disability Services, or if you feel that they are treating you unfairly, you can ask about what kind of appeal mechanisms are in place at the school, or you can contact ARCH or another legal representative for legal information.

Scenario: Accommodations for online course

Marcy is registered for a summer course called Introduction to Psychology online due to the COVID-19 crisis. Before class started, Marcy and Disability Services sent a letter to the professor detailing her accommodations. The professor simply replied, "Ok," which left Marcy uncertain about whether or not the request for accommodation was understood.

On the day of the first class, Marcy had a problem with Wi-Fi at home, and was unable to log on to the Zoom chat (which is how the course is presented). When Marcy was finally able to get back online, the professor had sent a message to all students saying, "Latecomers are not welcome, #sorrynotsorry".

Although worried, Marcy remembered that an accommodation e-mailed to the professor was having the lectures recorded. After class, Marcy e-mailed the professor again, asking for the recording. The professor wrote back: "no I don't do that, especially if you think you can skip my course - good luck on the midterm!"

Among other disabilities, Marcy has an anxiety disability and a print disability, meaning that Marcy benefits from viewing and listening to recordings on multiple occasions and at a slower pace.

Scenario: Response

Marcy, as stated in the *Code*, has the right to an education, same as everyone else. It is apparent that communication with the Introduction to Psychology professor is getting off to a bad start, which could potentially have a negative impact on Marcy's future studies in Psychology and in the school at large.

It is important that instructors, when receiving a letter of accommodation be prompt, detailed, and courteous in their response. What does it mean when the professor says "Ok"? Does he know what he is saying "Ok" to? As Marcy is taking an online course, she does not have the benefit of interacting with the professor face-to-face, meaning that certain subtleties may be lost in translation. For Marcy's anxiety condition, a lack of uncertainty about whether or not she will be welcomed in class will only cause undue stress. Marcy should reach out to Disability Services to help clarify the situation: perhaps Disability Services can reach out to the instructor for more information, and help explain that his "Ok" was not an adequate response.

Instructors, when teaching in a novel way, should be open to students having difficulties as well as the diversity of their students and the disability-related needs they may have. As a result of COVID-19, many students are going online that would not have otherwise done so. Specific types of equipment and conditions are required that may be difficult to meet. Schools will have to think of creative solutions that allow everyone to take part in the educational experience. In this situation, the professor's demand that everyone be in class at the same time as he is lecturing is unrealistic given how COVID-19 has affected our lives: many students may be otherwise engaged in other activities, such as caring for young children and getting necessary supplies. A work-around could be that students listen to the lecture by a certain time to get an attendance mark, or to write a reflection based on the lecture content. It is important to instructors to know that their students are not falling behind, especially on material that depends on prior learning (which an introductory Psychology class does).

Flexibility needs to be built into instructional methods that allow students to participate when it is most accessible for them. Flexibility is also needed in the professor's responses: his cynical attitude that Marcy (and other students) are taking advantage of him by not coming to the lecture is based on an assumption not supported by any available evidence.

Even if COVID-19 was not present, it is apparent that Marcy needs to engage with the course differently than her fellow students. She learns best by viewing/listening to the lecture on multiple occasions, and when she can adjust the speed of the lecture. Perhaps attending class when the professor is lecturing is not an effective use of Marcy's time. Perhaps she needs him to finish recording and then to ensure that she receives the recording.

The Ontario Human Rights Commission states that, "[e]ducation providers are responsible for ensuring that they meet both the procedural and the substantive components of the duty

to accommodate”.¹ In other words, the process that education providers take to identify and provide the accommodation, referred to as a procedural duty, is as important as the actual substance of the accommodation itself that is provided, referred to as the substantive duty. “An education provider will not be able to argue persuasively that providing accommodation would cause undue hardship if it has not taken steps to explore accommodation solutions, and otherwise fulfil the procedural component of the duty to accommodate.”²

In this scenario, working with Marcy to figure out how she can best participate in the class is just as important as the accommodations she receives. The reason for this is because the accommodations may need to be adjusted over time, meaning that Marcy should be able to communicate in a safe space about what she needs (or thinks she needs). She can either communicate with the professor, with the support of Disability Services, or just with Disability Services for now.

Best Practices for Online Courses³

There are a number of “best practices” you can request for an online course, which will help you ensure that you have appropriate accommodations. The most important document in a course is the syllabus, where the professor should put as much information as possible, including the following:

Class Meeting Times/Arrangements

How is lecture content being delivered? As in the Scenario above, does the professor expect you to be present and accounted for at a certain time, or is there more flexibility to meet “attendance” requirements? If you do not think you can meet attendance requirements as a result of your disability, it is best to discuss this with Disability Services right away to see if an accommodation can be made for you.

Required Readings

How much are you expected to read per week? An example syllabus might say, “Each of the two main textbooks has more than 300 pages, resulting in approximately 60-80 pages of reading a week. You will also be reading or viewing links to articles, news items, and recordings such as TedTalks each week. Finally, you will be locating such resources

¹ Ontario Human Rights Commission, “Policy on accessible education for students with disabilities” (March 2018), online: *Ontario Human Rights Commission* <<http://www.ohrc.on.ca/en/policy-accessible-education-students-disabilities#Duty%20to%20accommodate>>

² *Ibid.*

³ Material partly adapted from Naomi Jeffery Petersen, ‘Strategies for Efficient, Meaningful, and Inclusive Online Learning Environments: It’s About Time’, in Lydia Kyei-Blankson, Esther Ntuli, & Joseph Blankson eds, *Handbook of Research on Creating Meaningful Experiences in Online Courses: Advances in Educational Technologies and Instructional Design* (Hershey, PA: IGI Global, 2019).

yourself to investigate topics that interest you and producing the items that demonstrate your learning.”

This may give you information to assess whether or not, for example, the required TedTalks and other recordings are accessible, and you could proactively reach out to Disability Services or the instructor for more details. Some schools have media policies where captioning is required for all video course materials.

Required Technology and Proficiency

What kinds of technology are you required to have or to work with? Is everything accessible? An example syllabus might say, “This is an online class, so you will need internet connection of adequate strength to open sizable files. You must have access to a computer with current levels of functionality, for instance you will need to hear recordings and be able to embed your voice recording in Canvas discussion boards.”

With regards to proficiency, the syllabus might say, “Your competence to use standard online and word processing and spreadsheet features is assumed for a 300-level course. If you need help with the required technology and skills, [name of school] provides computer labs and support services. Please allow extra time if you are new to any of these skills. If you need help, please seek it earlier, rather than later.”

Knowing the required technology and proficiency can allow you to assess whether or not you need accommodations to meet the expectations.

Details about the online learning platform

You should visit the platform and learn about its accessibility features to see if the instructor is utilizing them to their fullest capacity.

The syllabus might say something like, “All information will be disseminated via [name of school] e-mail and Canvas, our Learning Management System (LMS) (Other learning management systems include Moodle, Brightspace, and Blackboard, among many others.)

- You are expected to remain current with announcements and content added to Canvas. You are certainly expected to respond in a timely manner to any requests.
- Make sure your Canvas settings have announcements sent to your [name of school] email.”

Assessments

How is your work and understanding of content being assessed in the course? The breakdown of assessments should be as detailed as possible. An accommodation for a student with a disability might be to have detailed rubrics or sample work to help guide the student to a successful assignment. Some students benefit from having planning software

or their assignments divided up into smaller, manageable chunks. It is important to discuss any concerns you have about assessments with Disability Services or (if comfortable) the instructor sooner rather than later. Looking at the syllabus is the best place to start, although some assignments may be discussed at length later on in the course.

The intent of this section is to ensure that you are informed about how the course is being delivered and what skills you are expected to demonstrate. If there are any questions related to class meeting times/arrangements, required readings, required technology and proficiency, and/or assessments, then this may need to be discussed with the instructor and/or Disability Services.

Note about Universal Design for Learning

Universal Design for Learning (UDL) is the idea that, by encouraging as much inclusion and accessibility as possible in educational spaces, more people are able to function well in that space without needing to request accommodations. Online learning offers a great deal of potential for UDL: for example, as an instructional method, a video with closed captioning and a transcript that can be read by anyone, would be an example of UDL. Another example is text written and structured in such a way that it is both accessible for people with and without screen-readers.

Conclusion

Everyone has a right to an education, and during COVID-19, we may be learning in different ways but that should not mean that the quality of our education is diminished. With the information in this article, we hope that students with disabilities will be able to better manage their working relationship with Disability Services, and to assess their courses' syllabi to ensure that instructors have considered accessible ways to teach the material. This article is not intended to be legal advice: for that, please reach out to ARCH for legal information and summary advice.



LEAF-DAWN-ARCH granted to intervene in *R v Slatter* before the Supreme Court of Canada

By: Robert Lattanzio, Executive Director

On May 19, 2020, the Supreme Court of Canada granted a joint application of Women's Legal Education and Action Fund ("LEAF"), DisAbled Women's Network Canada ("DAWN"), and ARCH, to intervene in the matter of *R v Slatter*. For an overview of the facts of the case and the interests that the LEAF-DAWN-ARCH coalition will advance, please go to: <https://www.leaf.ca/slatterleave/>

ARCH (Kerri Joffe, Staff Lawyer) is also acting as co-counsel to the LEAF-DAWN-ARCH coalition along with Suzan Fraser (Fraser Advocacy) acting on a pro bono basis.



ARCH Submission to the Canadian Transportation Agency about Accessible Transportation

By: Rachel Weiner, ARCH Project Lawyer

In December 2019, the Canadian Transportation Agency (CTA) announced a consultation about Phase II of its *Accessible Transportation for Persons with Disabilities Regulations*. These new regulations relate to: small transportation providers; One Person, One Fare; emotional support animals; and planning and reporting requirements under the new federal accessibility law.

The CTA finalized the first phase of these regulations last year, and they will become law on June 25, 2020. They will require large federal transportation providers such as airlines, railways, and interprovincial buses, to take steps to make some aspects of transportation more accessible for persons with disabilities. To review these regulations, go to: <http://www.gazette.gc.ca/rp-pr/p2/2019/2019-07-10/html/sor-dors244-eng.html>

The second phase will address questions the CTA wanted to take more time to consider, as well as requirements in the *Accessible Canada Act (ACA)*, the new federal accessibility law. The CTA explains these issues in a discussion paper posted on its website. To access the CTA's discussion paper, which is provided in html version, audio version, and ASL/LSQ video, you can go to: <https://otc-cta.gc.ca/eng/consultation/accessible-transportation-persons-with-disabilities-regulations>.

The consultation for this second phase has now concluded. This second phase of the regulations may affect:

- Persons with disabilities who travel with small transportation providers, for example, in remote communities;
- Persons with disabilities who access One Person, One Fare on small carriers travelling on domestic routes and all carriers on international routes. One Person, One Fare provides that a person with a disability should only pay for one fare while travelling, even if they need more than one seat for disability-related reasons. The CTA applied One Person, One Fare to large carriers on domestic routes in Phase I of its regulation development. In Phase II of the regulations, the CTA will decide whether One Person, One Fare should be extended to small carriers on domestic routes, and international travel; and

- Persons with disabilities who travel with an emotional support animal for their disability-related needs.

The Phase II regulations will also explain what transportation providers have to do with respect to accessibility planning and reporting under the *ACA*. They will require transportation providers to write an accessibility plan, have a feedback process to respond to complaints about accessibility, and hold consultations about what the accessibility plan should say.

Improving accessibility in transportation may depend on how these regulations are worded and enforced. Laws like the *ACA* create very general goals and ways to achieve them. It is the regulations that explain the concrete tasks transportation providers must complete, and when they have to complete them.

ARCH made a submission to the CTA in February 2020. In this submission, ARCH emphasized the importance of human rights principles and the duty to accommodate. We also highlighted key provisions of the *ACA* which say that barriers to accessibility should be removed without delay, and that persons with disabilities should be meaningfully included in policies, programs, services, and structures meant to promote accessibility. ARCH recommended that the CTA take these principles seriously when they are considering requests from the transportation industry for weaker accessibility requirements or exceptions to them. ARCH's submission to the CTA can be found on ARCH's website by going to: <https://archdisabilitylaw.ca/resource/submission-to-cta-consultation-on-atpdr/>

More specifically, ARCH's submission made the following points:

- If the CTA decides to create exceptions to accessibility requirements for small transportation providers, they should be supported by evidence of undue hardship and should be relied on sparingly. When a transportation provider wants to rely on an exception, they should continue to track the relevant barriers as part of their procedural duty to accommodate.
- The CTA should undertake pilot projects to require all Canadian airlines to extend their One Person, One Fare policies to all flight routes for a limited time. The CTA can collect information on the economic and other impacts of these pilot projects. Then they can decide whether extending One Person, One Fare permanently would constitute undue hardship.
- The CTA should take a leadership role to work toward the goal of applying One Person, One Fare to international airlines. Most international airlines originate from countries that have signed and/or ratified the United Nations Convention on the Rights of Disabilities (CRPD). Working toward One Person, One Fare internationally will promote the goals of the CRPD.

- The regulations should not limit the use of service animals to persons with certain kinds of disabilities or disability-related needs only. Rather, they should require all transportation providers to permit a service animal to travel when the person has a disability-related need, the service animal is providing a service in relation to that need, and the service animal and handler have been trained.
- The CTA should standardize the documents that transportation providers request with respect to service animals and ensure these requests follow human rights principles. For example, transportation providers cannot demand documentation that discloses a person's diagnosis or their specific disability.
- The CTA should specify in regulations that accessibility plans include: actions to be taken to remove barriers; the person responsible; timelines; performance indicators; how consultations were conducted; how consultation information was used to develop the plan; and how principles in the ACA informed the plan. These essential elements should be included in mandatory regulations that transportation providers must follow, rather than guidance documents which are recommended but voluntary.
- Consultations with persons with disabilities and complaints received through feedback processes should inform accessibility plans and progress reports. A facilitated, in-person engagement process is the preferred way to conduct a consultation. This shifts the focus to co-creation through in-person dialogue.

Once the CTA reviews the input they received from this consultation, they will write draft regulations. When these draft regulations are published, there will be an opportunity for persons with disabilities to review and comment on them.

The CTA anticipates that the regulations will be finalized by the summer of 2021.

ARCH will continue to monitor the development of these regulations and provide updates to our community.

Please note this article has been updated as of June 4, 2020 to clarify the specifics of the Phase II consultation.

Canadian Transportation Agency Changes its Approach to Disability-Related Complaints

By: Mariam Shanouda, Staff Lawyer

The Canadian Transportation Agency (“Agency”) deals with disability-related complaints that arise from barriers experienced by persons with disabilities when they try to access services within the federal transportation network. For example, such complaints may include someone being denied an accommodation when trying to ride the train or a ferry or trying to travel by plane. If a person with a disability needs disability-related accommodations but is refused those accommodations by the transportation service provider, they may file a complaint with the Agency.

In dealing with these complaints, the Agency used to apply a legal test that was quite different from the more well-established legal test that is used by both federal and provincial human rights tribunals for complaints about discriminatory conduct on any of the prohibited grounds, including disability. The Agency’s test asked three questions: (1) is the complainant a person with a disability?; (2) does an obstacle exist because the person with a disability was denied accommodation?; and, (3) is the obstacle “undue”?

The person filing the complaint is responsible for answering and proving that they: (1) are a person with a disability, and (2) experienced an obstacle and were not accommodated. Once the complainant proved those two factors, then the responsibility shifted to the service provider against whom the complaint has been filed to answer question (3) as to whether the obstacle was undue?

The Agency provided some guidance on whether an obstacle was undue or not. First, an obstacle can take many forms. That means an obstacle can be a practice or a policy. When deciding whether a practice or policy is undue, the Agency considered (a) if the practice or policy was rationally connected to providing transportation services; (b) if the practice or policy was adopted based on an honest and good faith belief that it was necessary; and, (c) if removing the obstacle would be unreasonable, impractical, or impossible.

In comparison, the legal test used by federal and provincial human rights tribunals is twofold. First, the person bringing a human rights complaint has to show (a) that they are a person with a protected characteristic (this includes disability); (b) that they experienced an adverse impact; and, (c) that their protected characteristic (for example, disability) was a factor in the adverse impact. If the person bringing the complaint is able to demonstrate the above three factors, then the test shifts to the respondent to demonstrate that accommodating the complainant would cause them undue hardship.

The Agency’s legal test caused concern from both lawyers and complainants. The fact that the Agency used a different legal test than other human rights tribunals meant that persons with disabilities may have found it more difficult to prove that they experienced discrimination, and easier for service providers to prove that an accommodation was

unreasonable, impractical, or impossible. In other words, the legal test used by the Agency was lower for respondents to meet than the test established in human rights law.

In June 2019, the Agency released a decision stating that they will now use the human rights tests used by other human rights tribunals. That decision can be accessed at: <https://www.otc-cta.gc.ca/eng/ruling/33-at-a-2019>. Even though this decision was released in June 2019, the Agency said it would not apply to any complaints that had been filed before that date. Instead, this new test would apply to new complaints filed after June 2019.

The Agency's decision to use a well-established human rights test is a welcome change. Both the language and approach of the more well-established test will hopefully even the playing field between complainants and service providers at the Agency. Complainants bringing disability-related complaints should expect the same test to be applied no matter which human rights tribunal they are appearing before. The use of the same test leads to consistency in the law which is necessary, especially because it is more likely that the Agency will deal with disability-related complaints having to do with transportation more than any other tribunal.

ARCH will monitor how the Agency has applied the new test and report on any new Agency decisions that may be of interest to ARCH's client communities.



ARCH's Accessible Legal Services Program

By: Lila Refaie, Staff Lawyer

ARCH provides numerous services for members of the legal community through its Accessible Legal Services program. The Accessible Legal Services program aims to educate members of the legal community on providing accessible legal services to persons with disabilities. ARCH also provides educational training related to procedural accommodations within the legal system.

Through this program, ARCH offers educational presentations, panels, workshops, and webinars on providing accessible legal services to persons with disabilities. Topics include best practices for accommodating clients with disabilities at various stages of the legal process and/or within the client relationship, legal capacity, and procedural accommodations. ARCH's program addresses both human rights legislation and professional duties under the rules of professional conduct for lawyers and paralegals. ARCH also provides training to the judiciary and administrative tribunal adjudicators. To make a request for a presentation for members of the legal profession, please complete ARCH's online form at: <https://archdisabilitylaw.ca/services/legal-education/>

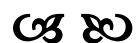
ARCH has also developed resources for lawyers and paralegals on providing accessible legal services. These resources are available on ARCH's website, at: <https://archdisabilitylaw.ca/resources/fact-sheets/>

ARCH regularly publishes a blog for lawyers and paralegals, which addresses complex issues faced by lawyers and paralegals related to disability rights and accessible legal services. To access the blog, go to: <https://archdisabilitylaw.ca/category/blog/>

Finally, ARCH provides case consultation services for lawyers and paralegals, covering disability-related questions arising in their litigation, requests for ARCH to intervene in their case, as well as questions related to accommodating their clients with disabilities or legal capacity. Lawyers and paralegals can contact ARCH's intake to schedule an appointment to speak with an ARCH staff lawyer. To contact ARCH for a consultation, please access the following link for contact information:

www.archdisabilitylaw.ca/contact/

ARCH invites members of the legal profession in Ontario to contact us.



Attendant Services Legal Education

By: Dianne Wintermute, Staff Lawyer

ARCH has been working with the Centre for Independent Living Toronto (CILT) and Citizens With Disabilities - Ontario (CWDO) to present two different sets of public legal education workshops about Independent Living and Attendant Services.

ARCH and CILT held their first workshop on August 16, 2019, which was followed by similar presentations on January 17, and February 20, 2020.

The public legal education presentations with CILT focused broadly on the rights of consumers of attendant services. We covered topics such as the legal framework for the delivery of attendant services; the Bill of Rights; quality of services and complaints; and quantity of services and complaints, including appeals to the Health Services Appeal and Review Board (HSARB). At the end of each workshop, ARCH hosted a legal clinic for people who attended the presentation to provide one to one advice and assistance. For example, in August, 2019, many service contracts were up for review. ARCH met with attendees individually to review their service contracts and advise them of potential issues with their contracts.

The ARCH and CWDO presentations have a slightly different focus, and were held as webinars. There were three workshops, with a specific topic discussed at each one. On

February 25, 2020, we talked about the Legal Framework for Attendant Services. This included a review of the *Home and Community Care Services Act* (HCCSA); the Bill of Rights; and problems with the quality of services consumers receive and how to address those concerns. On a webinar delivered on March 10, 2020, the topics included complaints about the quantity of services a person may get; eligibility for services; reduction in the hours of services; exclusion from services; and termination of services. We discussed the internal complaints process, and how to appeal a negative decision to HSARB. At this workshop, we also talked about service contracts, common clauses and tips for reviewing service contracts. The final webinar was held on March 24, 2020. That presentation addressed the Direct Funding application and interview process; SSLU's; services at home; homemaking and outreach services, and professional services.

In addition to these presentations, ARCH has published a Guide to Attendant Services and is preparing Fact Sheets on different issues that arise in attendant services. You can find these under "publications" on ARCH's website, or by going to:

<https://archdisabilitylaw.ca/resources/fact-sheets>

These workshops, presented together with members of the community of persons with disabilities, have been a successful way to provide knowledge and personalized legal services to consumers of attendant services. The information improves knowledge to self-advocate, and ensures that consumers have access to accurate and reliable rights information.

To access the archived version of ARCH's webinars, please go to:

www.archdisabilitylaw.ca/arch-webinars-on-rights-regarding-attendant-services



Bill 175 – Modernization of Ontario's Home and Community Services

By: Gabriel Reznick, ARCH Staff Lawyer

On February 25, 2020, Ontario's Deputy Premier and Minister of Health, Christine Elliott, introduced Bill 175, *Connecting People to Home and Community Care Act, 2020*. This Bill was introduced in order to modernize the delivery of home and community care, ensuring that these services are in line with the province's new healthcare system. Bill 175 was moving quickly through parliament. As of March 10, 2020, the Bill had passed second reading and was sent to the Standing Committee on Social Policy. Due to the COVID pandemic, the work of the Standing Committee was put on hold. The government recently announced that the Standing Committee will be reviewing this legislation virtually, allowing

for the Bill to be passed on June 23, 2020. It is important to remember that the Standing Committee may make recommendations to change the current version of Bill 175. In addition, the regulations that will be discussed in this article are merely proposed regulations and have yet to be finalized. This legislation and its attached regulations are creating a new system for home and community service, and therefore it is likely that it will be years before consumers experience the full impact of this legislation

Purpose of Bill 175

Although not explicitly stated, there appears to be two purposes of this Bill. The primary purpose of Bill 175 is to ensure that home and community services are in line with the new healthcare strategy that the Ontario Government implemented with the passing of the *People's Healthcare Act, 2019* and the *Community Care Act, 2019* ("CCA"). The Provincial government is attempting to majorly transform and improve the health system and "end hallway healthcare". Hallway healthcare is a term meant to extend to all sectors of the health system where access to timely health services is not optimal. Several provisions in this Bill are simply changing the definitions outlined in the affected acts, so as to provide for the integration of home and community services.

A pillar of the *People's Healthcare Act, 2019* is the creation of **Ontario Health Teams (OHT)** which are being designed to bring together multiple services that clients need, including home and community services. The government believes that the current system provides "siloeled care" in which decisions regarding home and community services are made separately from the other sectors of the healthcare system. The purported promise of this new approach is that it will allow for a more coordinated service plan, built on the idea that healthcare providers will work together to provide the individual the health services they need. It is important to note that it may take years for there to be a comprehensive system of Ontario Health Teams across the province, and therefore the current system of LHIN provided care will likely be maintained for at least a few years.

The second purpose of Bill 175 is an attempt to **modernize the current system**, and ensure that the system takes into account the aging population, the complexity of services provided, increased opportunities for services to be provided at home, and the need for increased use of technology, especially to deliver some services through digital technologies or "virtual care". This modernization, and introduction of "virtual care" could be concerning to consumer's who do not have the required technology. The government believes that the current system is problematic. For example, home and community services is often subject to a very prescriptive set of regulations, such as a set number of hours for specific services, and it is hoped that this new legislation will address clients' needs in a more client centered approach that is not based on prescribed maximums of

service.

Concerns with Bill 175

Lack of a Consumer-Focused Agenda

One concern surrounding Bill 175 is its lack of a consumer-focused agenda, and instead a focus on integration with other health services. As stated above, a key purpose of the legislation is to ensure that the system corresponds with the principle health legislation of this government, the *People's Healthcare Act, 2019*, which is heavily focused on hospital care. There is a concern that the new integrated system will lead to less money being provided for home and community services. Connected to this are concerns that this Bill will allow for Ontario Health Teams to contract out to for-profit agencies which may have negative consequences for consumers of home and community services.

In reading the transcripts of parliamentary debates, it is evident that the government's focus is on hospital care and home and community services are considered through the lens of hospital or acute care avoidance. This ignores the critical sector of persons with disabilities who rely on home and community services in order to live independently. In addition, the government in their briefing materials constantly refers to recipients of home and community services as "patients". In fact, Bill 175 amends the *Excellent Care for All Act* so that the definition of patient includes individuals receiving home and community services. Referring to consumers as patients is quite concerning, as this goes directly in the face of the independent living movement. It is worrisome that it appears that in this "transformed healthcare system" consumers are seen as patients receiving care, rather than independent consumers receiving services.

Regulation instead of Legislation

Bill 175 will repeal the *Home Care and Community Services Act, 1994* ("HCCSA"). HCCSA and its regulations currently govern the provision of Ontario's publicly funded home and community care services. The Provincial Government's main rationale for repealing HCCSA is that the current system is outdated and requires modernization.

One major concern with Bill 175 is the use of regulations instead of legislation. The parts that many consider as important to HCCSA such as the Bill of Rights, and the jurisdiction of the Health Services Appeal Review Board (HSARB) have been repealed and will be put in the newly drafted regulations instead of directly in the legislation. The reason this is impactful is regulations can be changed by the Minister or other government officials. In addition, regulations are often not taken with the same weight as legislation.

It is important to mention, that although draft regulations have been published, the regulations that will be attached to the legislation have yet to be finalized. The government has shared that they are open to consultations about the regulations and have also mentioned the possibility of redrafting the Bill of Rights. The creation of a new Bill of Rights

could provide the opportunity for consumers to have input on which rights they believe should be explicitly stated in regulation. Although this new Bill of Rights could be beneficial for consumers, ARCH is still concerned by the fact that provisions which have a significant impact on consumers will no longer be stated in legislation. As a result of COVID-19 the consultation process to review and revise the regulations is on hold.

Failure to fix the problems of the current system

Bill 175 fails to address two of the main issues that many consumers have with the current system. One of the main problems with the current system is the lack of an independent appeals body for quality of service complaints. Quality of service complaints commonly involve problems with how you have been treated during the delivery of services. As of now, it appears that the regulations will not expand the jurisdiction of HSARB. Although the Bill does not expand HSARB's jurisdiction, it does increase the powers of investigations, which could possibly be used to ensure that health service providers and OHTs are following both regulations and service contracts. Bill 175 also creates new penalties for failure to comply with an investigation.

The other significant problem with the current system is the lack of PSWs to provide care. This issue was mentioned by MPP France Gelinis in the first debate on this Bill. Due to the shortage of PSWs, consumers are often not receiving the full complement of hours that are outlined in their service plans. The Bill's removal of maximum amounts of service with a focus on services based on the needs of the individual, although positive, will require additional measures to ensure that actual needs are met and that sufficient PSWs are available to meet those needs.

New Residential Congregate Care Model

The government, through regulations, has proposed adding "residential congregate care settings" as a location in which home and community services can be delivered. These "congregate care models" would be used for individuals who do not require the resources of hospitals or long-term care, but their needs are too high to be receiving services at home. The government has outlined that these models will be useful in transitions from hospital to home care, as a place to provide some rehabilitation, but they could also be used for longer periods. There is a concern that these models will allow individuals receiving hospital care to be pushed out of hospitals and be placed in one of these institutions. These models could be seen as potentially reducing the number of people who will be eligible to receive services in their own home. This possibility raises significant concern and is contrary to the independent living movement and disability rights.

Community Action

Bill 175 has yet to pass, and there is still time for the government to consider the concerns of the community. It is important that communities work together in an effort to revise both Bill 175 and its attached regulations.

One way to share concerns with the government is to provide submissions to the Standing Committee on Social Policy. ARCH, together with Citizens With Disabilities – Ontario (CWDO) and the Centre for Independent Living Toronto (CILT), have discussed the prospect of making submissions to the Standing Committee. ARCH has up until June 9, 2020, to request an online presentation to make submissions. If you have any concerns, we encourage you to contact ARCH, and we will do our best to get your concerns heard by the Standing Committee. The Standing Committee will be holding online hearings on June 15th, June 16th, and June 17th. If you want to apply for standing yourself, you can contact the Clerk at 416-325-3509 or by email at: comm-legisassembly@ola.org. Following these consultations, the standing committee will review the Bill clause by clause, in preparation for the legislative assembly's reopening on June 23rd. As of June 23rd, the Bill can be called for Third Reading, and if passed will become law in Ontario.

In addition to providing submissions to the Standing Committee, the Government is open to feedback from individuals in respect to the new regulations. As a result of COVID-19 the consultation process to review and revise the regulations is currently on hold. ARCH will provide an update on the consultation process when new information is released by the government. If you would like to review the draft regulations you can find them here: <https://www.ontariocanada.com/registry/view.do?postingId=31727&>.

ARCH will continue to monitor the development of this new Act and its regulations.



Contingency Plans – The new hall pass for agencies

By: Gabriel Reznick, Staff Lawyer

As part of our mandate, ARCH assists many clients who identify as consumers receiving attendant services. In speaking with our clients, we have uncovered several systemic problems with the provision of attendant services. One of the systemic problems that we have noticed, is a consistent failure by the service agency to ensure that an attendant is scheduled for all planned bookings. This issue is not agency specific; we have seen this failure to provide an attendant for bookings by both LHIN contracted agencies and other service agencies.

The agencies have provided various reasons as to why they are unable to schedule attendants. The main reason is that they do not have enough government funded resources to hire and retain attendants. The shortage of attendants is a well-known issue, and one that will not be the focus of this article. Instead this article will focus specifically on a loophole in each attendant service contract, which is being used by agencies when they are unable to schedule an attendant for a booking. This loophole is a provision in the

contract which states that an individual has to have a contingency plan in place prior to receiving services.

What is a contingency plan?

A contingency plan is the consumer's back up plan, which ensures that the consumer has people who can provide services, when an attendant is unable to attend a scheduled booking. The attendant service contract will likely state that in order to receive services you must prove that you have a contingency plan in place. The purpose of the contingency provision is to ensure that even if an attendant cannot attend the scheduled booking, the consumer will still receive the services they require. This provision is particularly vital if the attendant assists with medication, or other services that need to be provided in a timely fashion.

Growing use of the contingency plan

A contingency plan was designed to only be required in the rare occurrence that an attendant had an emergency, and the service provider was unable to replace them for a booking. In cases such as these a contingency plan makes sense. With the growing number of individuals requiring attendant services, and the decrease in attendants to provide these services, many consumers are asked to use their contingency plan on a daily occurrence.

There are several problems with this agency response in forcing individuals to rely on their contingency plan. Firstly, all service agencies receive money based on the premise that they are going to provide services to an individual. If agencies are to continue receiving funding, they must consistently provide the services they are funded to provide. Secondly, the individuals serving as the consumer's contingency plan, may be too busy to provide the consistent service needed. Individuals who are part of a consumer's contingency plan may have other employment and have other obligations. It may be possible for them to take the odd afternoon or morning off to provide services, but they likely will not be able to do so on a consistent basis. Lastly, there are many individuals who do not have the supports to have an effective contingency plan in place.

Concerns with the need for a contingency plan

One of the main concerns with this provision, is that not all consumers will be able to set up a contingency plan. Some consumers may not have family who live near them or have friends who would be willing to help. These individuals will have to choose between paying for backup attendants, or not receiving any services whatsoever. This can create a significant barrier for many individuals with disabilities receiving services. But in order to receive any care, they may be forced to spend the little money they have arranging for backup care, or rely on other alternatives such as asking strangers or unqualified individuals. Many consumers need services that an average person cannot provide, without the required training and experience. A consumer may experience harm as a result of an

untrained friend providing these services, which are supposed to be provided by a trained attendant. This risk increases, if an individual is forced to consistently rely on their contingency plan, because their agency is failing to provide the service that they agreed to. The health consequences of services not being provided by anyone are also significantly harmful.

What next?

The government has recently introduced a new Bill, Bill 175, in order to attempt to modernize and fix some of the problems in the current system. In reading through this Bill and regulations, there is no mention about the reliance on contingency plans, and the consistent lack of service. These issues were briefly mentioned by NDP members during the debates, but these concerns were ignored by the Conservative Party. It is unlikely that this new Bill and its attached regulations will provide a positive change to this systemic problem.

Some agencies are taking proactive measures to ensure that consumers receive the services they require, such as allowing noncertified attendants to provide services following the agency training program. Although this may not be the best option, it will at least lead to less reliance on a consumer's contingency plan. These changes have just recently been made, and it is uncertain whether other agencies will attempt to do anything to fix this problem.

ARCH is currently exploring legal remedies, to try to ensure that an agency is held liable for failing to provide the services that they agreed to in the attendant care contract. If you are a consumer reading this article, and have a similar problem we welcome you to contact ARCH.



Solitary Confinement Update

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, July 2019, and December 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 issue of *ARCH Alert*, the Supreme Court of Canada ("SCC") has agreed to consider the appeals of decisions from the Court of Appeal for British Columbia and the Court of Appeal for Ontario. Both of these decisions relate to the constitutionality of administrative segregation

in federal prisons. Nine weeks later, the federal government unexpectedly decided not to pursue their appeal at the SCC.

For ease of reference, below is a brief summary of the history of the court decisions in Ontario and British Columbia.

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. 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 Court suspended its ruling for 12 months to allow the federal government to properly amend the law in accordance with this ruling⁴.

The Canadian Civil Liberties Association (“CCLA”) appealed the decision because the Court refused to declare the entire regime of administrative segregation unconstitutional. In its decision⁵, the Court of Appeal for Ontario confirmed that this regime is unconstitutional because it violated section 12 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”).

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>.

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/resource/april-5-2018-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>.

The Court also placed a cap of 15 consecutive days on all prisoners placed in administrative segregation⁶.

Summary of Court Decisions in British Columbia

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 rights⁸. This decision was ultimately appealed to the Court of Appeal for British Columbia and a decision was released on June 24, 2019.

In its decision⁹, 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 a bad administration of the *Federal Act* instead of the regime itself. In other words, the Court determined that the administrative segregation regime is not discriminatory per se, rather, 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.

On February 13, 2020, the SCC granted leave to appeal both court decisions from Ontario and British Columbia. In doing so, the SCC also granted leave to the cross-appeals from each court decision. This means that the SCC was set to consider arguments from all parties and decide whether the courts of appeal from Ontario and British Columbia were wrong for the reasons argued by the parties.

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/resource/april-5-2018-volume-19-issue-1/>.

⁹ 2019 BCCA 228. To access the full decision, go to:

<https://www.canlii.org/en/bc/bcca/doc/2019/2019bccca228/2019bccca228.html?autocompleteStr=british%20columbia%20civil%20liberties%20association%20v.%20canada&autocompletePos=3>.

The Federal Government Withdraws Appeal to SCC

On April 21, 2020, the federal government made the unexpected announcement that they are withdrawing their appeal to the SCC. This means that the SCC will not consider the appeals of Ontario and British Columbia court decisions. This also means that the decisions from the Courts of Appeal of each province are now the state of the law. Administrative segregation as described in the *Federal Act* (before June 2019) is unconstitutional. Of particular note, the 15-day cap on these types of placement of prisoners is upheld and now accepted by the federal government.

With the passing of an amendment to the *Federal Act* in June 2019, the federal government has already put in place a new regime to replace administrative segregation, called structured intervention unit¹⁰. However, it is unclear whether this newly created regime will present the same constitutional issues as administrative segregation or whether it follows all conditions placed by the courts. Various critics of the legislative changes have reported that structured intervention units do not satisfy the conditions put in place by the courts, particularly limiting these placements to 15 days.

Class Actions Against Federal Government Appealed at Court of Appeal for Ontario

Meanwhile, there has also been an important development in two Ontario class actions related to administrative segregation in federal prisons. ARCH originally wrote about one of these class actions in its July 2019 edition of the *ARCH Alert*. That edition included comments about the class action case called *Brazeau v. Attorney General (Canada)*, 2019 ONSC 1888¹¹ ("*Brazeau*"). In that case, the Court ordered the federal government to pay individual compensation to qualified prisoners who were placed in administrative segregation in federal prisons for a specific number of days, and have a mental health disability. The federal government was also ordered to spend \$20 million towards additional mental health or program resources in the federal prison system. The purpose of this order, according to the decision, was to bring structural changes to the prison system.

The second class action is called *Reddock v. Canada (Attorney General)*, 2019 ONSC 5053¹² ("*Reddock*"). The decision was released on August 29, 2019, and it was before the same judge who decided the *Brazeau* case. In *Reddock*, the Court ordered the federal government to pay individual compensation to qualified class members in the amount of \$20 million. The class was ultimately defined as any prisoner who was involuntarily placed in administrative segregation in a federal prison between March 3, 2011 and April 7, 2019 for at least 15 days. Prisoners who would be included in the *Brazeau* class action are excluded from the *Reddock* class action. Besides ordering individual compensation, the

¹⁰ ARCH wrote about this new regime in its March 2019 and July 2019 editions of *ARCH Alert*.

¹¹ To access this decision, go to:

<https://www.canlii.org/en/on/onsc/doc/2019/2019onsc1888/2019onsc1888.html?resultIndex=1>.

¹² To access this decision, go to: <https://www.canlii.org/en/on/onsc/doc/2019/2019onsc5053/2019onsc5053.html>

Court also determined that the federal government were systemically negligent towards members of this class action. In other words, the federal government had a duty of care towards prisoners in federal prisons, and they failed in their duty by subjecting prisoners to prolonged placement in administrative segregation.

Both class action lawsuits were later appealed at the Court of Appeal for Ontario. On March 9, 2020, the Court of Appeal for Ontario confirmed that administrative segregation is unconstitutional and that the identified class members should receive individual compensation¹³. However, this Court said the order made in *Brazeau* for the government to pay for additional mental health or program resources in prisons was wrong. The reason given by the Court was because the judge in the original decision did not have jurisdiction to make this order. The Court determined that, since neither party to the case made submissions before the decision was made, the original judge was not allowed to force the federal government to put such resources in place. Furthermore, the original judge did not follow the legislation related to class actions, which permits compensation for persons outside the class members only after identified class members have received their individual compensation. Finally, the original judge overstepped its authority when it decided the court will monitor the implementation of these resources. The Court of Appeal ordered the original judge to reconsider this part of its decision. The amount of individual claims for compensation in the *Brazeau* class action will be determined at a later date.

As for the appeal of the *Reddock* decision, the Court of Appeal for Ontario confirmed most of the original decision, with the exception of one ruling from the original judge. This ruling related to the judge's declaration that the federal government failed in their duty of care and committed systemic negligence against prisoners. The Court of Appeal determined that this declaration was wrong because the government cannot be liable on a systemic level for individual issues faced by each prisoner in administrative segregation.

To access the Court of Appeal for Ontario decision, go to: <https://www.canlii.org/en/on/onca/doc/2020/2020onca184/2020onca184.html#document>

ARCH will continue to monitor this developing matter.

¹³ *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184 (CanLII).

Library Corner

By: Mary Hanson, Librarian

Persons with disabilities, parents, and siblings provide their own unique perspective on family life and relationships. The ARCH Library collection offers a variety of these personal family experiences. We invite you to read the selected items below and others on the topic of family and parenting, held in our Resource Centre on the 15th floor. If you want to borrow a copy for reading at home, please ask your local library (<http://www.mtc.gov.on.ca/en/libraries/oplweb.shtml>) to find you a loan copy.

- Melberg Schwier, Karin, editor. ***Life Landscapes***. Saskatoon: Saskatchewan Association for Community Living, 2005. (on ARCH shelves at 649.15 CA Mel 2005)

Brothers and sisters – children, teenagers and adults - through stories, poems and pictures share their experiences on living with a sibling with a disability. “We are just families with all the good and tough stuff rolled together. Most of all, we just love our brothers and sisters....”

- Freeman, Victoria. ***A World Without Martha: A Memoir of Sisters, Disability, and Difference***. Vancouver: Purich Books, 2019. (on ARCH shelves at 362.4044 CA-ON Fre 2019)

A sister looks back with regret at choices made to institutionalize her infant sister born with Down syndrome in 1960s Ontario and the long-lasting impact on family relationships. Revealing the harm visited on her sister by exclusion, social attitudes and government policies, the author traces missed opportunities for family reconciliation and her own journey of self-discovery.

- Klein, Stanley D. & John D. Kemp, editors. ***Reflections From a Different Journey: What Adults with Disabilities Wish All Parents Knew***. New York: McGraw-Hill, 2004. (on ARCH shelves at 649.15 Kle 2004)

This compilation shares forty adults’ experiences on what it is like to grow up with a disability. Intended to answer the question “what do you wish your parents had read or been told when you were growing up?” their responses offer reliable suggestions for parents and family members.

- Harrison, Jill, Matthew Henderson & Rob Leonard, editors. ***Different Dads: Fathers’ Stories of Parenting Disabled Children***. London: Jessica Kingsley, 2007. (on ARCH shelves at 649.15 Har 2007)

These personal accounts provide a wide range of experiences and shared knowledge. Drawn from a variety of family environments, the fathers discuss frankly both the challenges and positives of raising a child with a disability.

- Llewellyn, Gwynnyth et al, editors. ***Parents With Intellectual Disabilities: Past, Present and Futures***. Oxford: Wiley-Blackwell, 2010. (on ARCH shelves at 649.1087 INT Lie 2010)
Offering a human rights approach to disability and family life, the authors focus on the experiences and perspectives of parents with developmental disabilities and on ways to support them in this role. The work includes discussion of a Quebec program aiming to bridge the gap between rights and reality.
- Aiken, Cara. ***Family Experience of Bipolar Disorder: The Ups, the Downs and the Bits in Between***. London: Jessica Kingsley, 2010. (on ARCH shelves at 362.2092 Aik 2010)
A parent living with this mood disorder, the author presents her own experience, as well as that of other parents, children and close family members, to show in real terms how it impacts family life. The book combines personal experiences with information written by psychologists.
- Willey, Liane Holliday. ***Asperger Syndrome in the Family: Redefining Normal***. London: Jessica Kingsley. (on ARCH shelves at 616.85882 Wil 2001)
The author, an educator with Asperger Syndrome (AS) and mother of a daughter with AS, looks at the implications for all members of her family and offers practical suggestions.
- Centre for Independent Living in Toronto. ***Parenting With a Disability Network (PDN) website***. Online at <https://www.cilt.ca/programs-and-services/parenting-with-a-disability-network/>
The cross-disability network for parents with provides opportunities for networking, peer support, information-sharing and education both in person and online. Join the mailing list for new events, the PDN Facebook, and download free parenting guides.

Due to the COVID-19 pandemic, please note that ARCH's Resource Centre is currently closed to the public. ARCH maintains an online collection of materials which can be accessed using the following link:

<https://archdisabilitylaw.ca/resources/>

ARCH on Social Media

ARCH is on social media. You can find us at:



<https://twitter.com/ARCHDisability>



<https://www.facebook.com/ARCHDisabilityLawCentre>

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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