ARCH *Alert*

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

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ARCH Disability Law Centre

Mourning the Loss of Our President

By Robert Lattanzio, Executive Director

On January 3, 2018, ARCH's President, Teresa Daw, lost her short and unexpected battle with cancer. Our ARCH family continues to mourn this devastating loss. All of us at ARCH express our sincerest condolences to Teresa's family and friends. Our thoughts continue to be with Teresa's parents, Eileen and Lorne Daw, her sister, Allison and family, and brother, Trevor and family.

The funeral service honouring Teresa was incredibly moving and powerful. It was officiated by Pastor Crystal Moore, Teresa's very close friend, and I was humbled and honoured to deliver a eulogy. With all the moving tributes in an overcrowded hall, it became clear just how broad and deep Teresa's impact was, not only on organizations like ARCH and within political circles, but on a distinctly individual level.

Photo courtesy of the Law Society of Ontario.
Photo of Teresa Daw speaking at Access Awareness 2017.

Teresa had an ability to truly connect with people, and develop meaningful, positive, and sometimes life changing relationships. Teresa welcomed any opportunity to meet and speak with members of our communities and listen to their experiences. She impacted all of us: Board members, staff, and our communities.

Teresa inspired everyone at ARCH to be better, work harder as a team, and set a higher standard for ourselves. Her goal was for ARCH to have more impact, make more significant systemic change, and empower marginalized communities to find their voices. She always reminded us to remain accountable to the people that really need us. Her influence at ARCH was significant.

During the past year, one of her primary focuses was leading ARCH's Strategic Planning process. Teresa was not able to witness the conclusion of this work as our new Strategic Plan was passed by the Board of Directors in March. Nonetheless, ARCH's new Strategic Plan is one of her many triumphs. She focused on the opportunities that this process

afforded ARCH to continue to strengthen our internal structures and practices as well as how we deliver services to our communities.

Teresa had a very clear and sophisticated understanding of governance and the role of community-run boards of directors. She approached board work as an opportunity to build capacity within the grassroots disability rights movement by supporting the growth of a new generation of leaders with disabilities. In addition to all the roles and responsibilities that she routinely reminded the Board of, Teresa believed that ARCH had an important role to play in offering opportunities to hone and develop leadership skills as an extension of our community development work.

Photo courtesy of the Law Society of Ontario.
Photo of Teresa Daw and Shineeca McLeod at Access Awareness 2016.

Teresa's strength of character was inspiring. She had an ability to use the barriers and challenges that she faced with strength and grace, and focus her energies on helping others. She impacted both Board and staff with her relentless commitment and dedication to ARCH and our communities. Below are select messages from Board and staff members:

Bonnie Quesnel, 2nd Vice-President, ARCH Board
Teresa was a strong and talented leader. What a gift she had when she would bring in everyone on the Board to speak about what was on the agenda and to make them feel very much that their opinion mattered to her. She was a caring person and at the same time she wanted meetings to start promptly and wanted board members to be present, active and to participate fully. She just cared about people. I am going to miss Teresa--what a LEADER she was.

Doreen Way, ARCH Office Manager
I first met Teresa when she joined the Board in 2014. At about her fifth meeting, it became apparent that she was going to be the type of Board member who asked tough questions, who liked order and procedure and wanted everyone to follow Robert's Rules. Teresa very quickly distinguished herself as a leader. She was acclaimed President of the Board in 2016 and that's when she and I, as the Board liaison, began spending more time together. Being a list maker myself, I found a kindred spirit in Teresa. I marvelled at her efficiency, her administrative prowess and I really admired her ability to juggle many thoughts and tasks at once, always keeping an eye out for process and making sure things were being done the way they were supposed to be done. In short, I thought she was brilliant.

I also grew to really like her as a person. She always asked how I was doing, how things at ARCH were going, how staff were doing. We often talked about her new house and the renovations. I marvelled at how someone, with the type of disabilities she had, could do all the work that she was doing and still keep on top of her commitments at ARCH. But she did it, even when she was buying a house, even when she didn't have a phone and had to call in from a phone booth in town, even when she was in the hospital. Teresa gave ARCH her all and always had ARCH's best interest at heart. I miss her. I can say with certainty that ARCH is a better organization for her having been part of it. I will try to continue to live up to her standards.

Kerri Joffe, ARCH Staff Lawyer

Those who knew Teresa Daw knew that she was incredibly committed to disability rights advocacy. As the President of ARCH's Board of Directors, Teresa demanded that ARCH be the strongest organization it could possibly be, to enable our staff and Board to be the most effective advocates for disability rights that we could possibly be. Teresa's commitment to our organization, and her energy, thoughtfulness and vision were inspiring.

One of the issues Teresa was very passionate about was using the Convention on the Rights of Persons with Disabilities to advance disability rights in Canada. The Convention itself is an inspiring and aspirational document. It is an international treaty which sets out a legal framework to promote respect for the dignity of persons with disabilities and promote, protect and ensure their full and equal enjoyment of all human rights and freedoms. The Convention specifically addresses rights and freedoms for persons with disabilities in areas which cover virtually all aspects of life, including education, health, work, situations of risk, making decisions, accessing justice, being free from torture, exploitation and violence, living independently in the community, personal mobility, respect for privacy, family and home, and participation in political, cultural and recreational life. In short, it envisions a world in which all persons with disabilities are included and participate as full citizens.

Teresa was not afraid to think big. Several times we shared our mutual frustration that although Canada ratified the Convention in 2010, it has not yet taken steps to implement the Convention into Canadian law. Many of the rights and freedoms laid out in the Convention remain elusive for persons with disabilities in Canada. Despite the legal, political, social and attitudinal barriers to realizing the aspirations of the Convention, Teresa was clear that ARCH must continue to advocate strongly for the implementation of the Convention into Canadian law and policy. She understood the strategic and practical

importance of advocating internationally and nationally in order to improve the lives of persons with disabilities in Ontario.

ARCH received an overwhelming outpour of condolences and sympathies from our partners, members, friends and stakeholders. Thank you for all your messages. It is a true testament to Teresa's impact. I also wish to sincerely thank everyone who made donations to ARCH *In Memorium.* As per Teresa's request, donations were made to ARCH in lieu of flowers. ARCH will be honouring Teresa in a number of ways and we will provide new information via the ARCH Alert and ARCH's website.

Teresa has left the Board and ARCH in a very strong place, due in large part to all her work and dedication. Teresa's passion and vision will continue to inspire us to achieve excellence in the work we do.

Photo of Teresa Daw addressing ARCH membership at ARCH AGM 2015. Next to Teresa is Past President Gary Malkowski.

Teresa Daw's Important Contributions to Advance the Rights of Canadians with Disabilities

By Gary Malkowski, Past President, ARCH Disability Law Centre

In the autumn of 2014, Teresa was elected ARCH Board member during my capacity as President of ARCH's Board. We had the opportunity to discuss ideas and suggestions regarding ARCH's strategic planning and priorities. Teresa demonstrated her passion to put individuals with disabilities first, and to ensure that ARCH had updated By-Laws, appropriate resources, creative public education strategies, and effective services to reach out to support people with disabilities residing in rural, northern, western and eastern areas across Ontario.

Teresa was well-liked, respected, and recognized by everyone including clients, staff, Board and key stakeholders in ARCH internally and externally. She is best described by her colleagues, ARCH Board members, clients who received ARCH services, volunteers at ARCH, Federal and Provincial NDP delegates, and individuals with disabilities as a very talented and brilliant woman with well-developed political and diplomatic skills. She was known to have an exceptional capacity to synthesize, and to be a consensus-builder.

Teresa was a very active advocate and participated in numerous riding associations, conferences and political conventions to get delegates to pass resolutions for advancing and protecting the rights of Canadians with disabilities. She was also dedicated to improving the quality of life for persons with disabilities and to helping them get out of poverty. Teresa assisted a significant number of persons with disabilities to ensure that they had equal access to the democratic and electoral system during municipal, provincial and federal election campaign activities and election polls.

Teresa will be remembered as a champion public educator, mobilizing all individuals with disabilities regardless of their political membership status to participate in the political process. She wanted to ensure that all individuals with disabilities were aware of their rights and responsibilities to communicate with political candidates in all provincial and federal all-candidates meetings, MP/MPP constituencies, riding association meetings, political conventions, and election campaign activities.

Thank you for your wonderful contribution to ARCH Disability Law Centre and advancement of the rights of persons with disabilities. Teresa Daw will be missed.

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Save the Date!

ARCH will be hosting our Access Awareness event this coming June 2018!

It will be held at the Law Society of Ontario (formerly Law Society of Upper Canada).

Check your inbox or our website for more details in the coming months.

Supreme Court Of Canada Rules on Who Can Bring a Case in the Public Interest

By Dianne Wintermute, Staff Lawyer

The Supreme Court of Canada (SCC) has made an important decision that could have a positive impact for persons with disabilities. The case is about who can bring a case in the "public interest".

Dr. Gabor Lukács made a complaint to the Canadian Transportation Agency (Agency) about the discriminatory way that Delta Air Lines (Delta) treated large passengers (described as obese in the complaint). He said that Delta publicly stated that if a passenger complained that the person they shared a space with was too large, Delta would try to move that passenger if other seats were available. If there were no available seats, the large passenger would be asked to take a different flight or to book two seats, so that Delta could "guarantee" comfort for all.

Dr. Lukács himself is not a large person. The Canadian Transportation Agency decided that because he was not actually affected by the outcome of the complaint, he could not bring the complaint in the public interest. The Canadian Transportation Agency then dismissed the complaint.

The issue before the Supreme Court of Canada was whether the Agency's decision was reasonable. This means was the Agency's decision "…within a range of possible, acceptable outcomes".[1] The SCC said it was not.

One of the ways a case can be brought to court is by someone who is affected by the outcome of the case. This is called private interest standing.

Another way for a case to be brought to court is "in the public interest". The factors to be considered for public interest standing are:

- There is a serious issue about the validity of the law
- The person seeking public interest standing is affected by the law OR has a genuine interest in the effect of the law
- There is no other reasonable way to bring the issue before the courts or tribunals

The SCC stated that the test for public interest standing must be applied in a flexible manner, and with regard to the purpose of granting public interest standing. The factors

[1] Delta Air Lines Inc. v. Lukács, 2018 SCC 2 (CanLII) at para 12.

listed above are not rigid criteria. If they were, that would defeat the purpose of public interest standing. The factors must be balanced between judicial resources and access to justice. Courts or Agencies must be aware of the purpose of the laws under which they operate. One significant purpose of the *Canada Transportation Act* is to make sure that discriminatory actions or harms are corrected before persons with disabilities experience them. The Agency's decision to deny public interest standing to Dr. Lukács would prevent any public interest group or representative group from bringing a complaint to the Agency. Refusing a complaint because the person bringing it did not have the necessary identity characteristics prevents the Agency from hearing important complaints about accessibility issues, which goes against the *Canada Transportation Act*. The SCC sent the case back to the Agency for a new decision that would take into account the SCC's concerns about public interest standing.

There are many reasons why it is important for the law to allow legal cases and complaints to be brought in the public interest. Persons with disabilities and persons from other equity-seeking groups may not have the resources to bring forward a case on their own, or cannot do so on their own for fear of reprisal. Public interest standing enables disability and other community organizations to bring forward legal cases in order to advance equality for the communities they represent. The SCC's decision maintains a flexible legal test for public interest standing, and does not make it more difficult to bring forward cases in the public interest.

Bill 175 – Safer Ontario Act, 2017

By Mariam Shanouda, Staff Lawyer

Background on Bill 175[1]

On March 8, 2018, Bill 175, *the Safer Ontario Act, 2017,* was passed by the Ontario Government.[2] The passage of this Bill comes four months after it was first introduced in the House of Commons and following extensive consultations with stakeholders from the community.

[1] Bill 175 was carried after First Reading on November 2, 2017 and was carried on division and referred to the Standing Committee on Justice Policy after Second Reading on December 5, 2017.
[2] McQuigge, Michelle. *Ontario passes law overhauling policing rules in province*. March 8, 2018. Web. March 9, 2018. Available: https://www.ctvnews.ca/canada/ontario-passes-law-overhauling-policing-rules-in-province-1.3835666

Bill 175 was initially introduced on November 2, 2017, by the Hon. Marie-France Lalonde, Minister of Community Safety and Correctional Services, and Attorney General Yasir Naqvi.

The *Safer Ontario Act, 2017* was described as a "comprehensive community safety legislative package"[3], and proposed to repeal and replace the current *Police Services Act*, amend the *Coroners Act,* and create the following new Acts:

i. Policing Oversight Act, 2017;
ii. Ontario Policing Discipline Tribunal, 2017;
iii. Missing Persons Act, 2017; and
iv. Forensic Laboratories Act, 2017.

One of the more significant aspects surrounding the introduction of the *Safer Ontario Act, 2017* is the fact that this is the first major update to the *Police Services Act* in more than 25 years.[4]

Many of the changes proposed in the *Safer Ontario Act, 2017* are taken from the recommendations proposed in Justice Michael Tulloch's report, *Independent Police Oversight Review*.[5] In that report, Justice Tulloch made more than 100 recommendations regarding police oversight in Ontario. A review of the *Safer Ontario Act, 2017* makes it clear that many of Justice Tulloch's recommendations were adopted and incorporated into the new Act.

Bill 175 is approximately 400 pages in length and quite detailed. For the purposes of this article, we have provided a brief overview of the Acts and provisions that persons from disability communities may find relevant.

[3] Ontario. Ministry of Community Safety and Correctional Services. *Ontario Building Stronger, Safer Communities*. News Release.November 2, 2017. Web. November 22, 2017. Available: https://news.ontario.ca/mcscs/en/2017/11/ontario-building-stronger-safer-communities.html

[4] Jones, Allison. *SIU given more authority under new Safer Ontario Act.* CityLine. November 2, 2018. Web. November 22, 2017. Available: http://toronto.citynews.ca/2017/11/02/siu-given-authority-new-safer-ontario-act.html

[5] Hon. Michael H. Tulloch. *Report of the Independent Police Oversight Review.* 2017. Web. February 2018. Available: https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/police_oversight_review/#_idParaDest-23

Police Services Act, 2017[6]

Some of the newer provisions in the *Police Services Act, 2017* aim to highlight the importance of diversity on municipal policing and police service boards that is reflective of the municipality's population,[7] and the development and inclusion of a "diversity plan" by each board.[8] With respect to disability, the Act stipulates that police service boards and the Commissioner are required to accommodate the disability-related needs of a member of the police service who has a disability.[9]

One of the more discussed amendments concerns holding officers accountable for their misconduct.[10] Currently in Ontario, police officers who are suspected of misconduct are suspended with pay.[11] Under the current *Police Services Act*[12], a police officer is suspended without pay only if and when they are convicted of an offence and sentenced to a term of imprisonment.[13] The *Police Services Act, 2017*, if passed, will allow suspensions of police officers without pay when an officer is in custody or in the case that they have been charged with a serious offense they committed while off-duty.[14]

Policing Oversight Act, 2017[15]

Both the *Police Services Act* and the *Policing Oversight Act* strengthen the powers of the Special Investigations Unit (SIU) to investigate potentially wrongful police conduct. An example of this can be found in section 16 of the *Policing Oversight Act, 2017* whereby the SIU director can initiate an investigation if, as a result from the conduct of an official,[16] (a) a person dies, (b) a person is seriously injured, or (c) a firearm is discharged at a person.[17] This is particularly important because there have been many examples of persons with mental health disabilities whose interactions with the police have resulted in death, injury and instances where officers have discharged a firearm[18]. It is hoped that this provision,

[6] Schedule 1 in Bill 175, *A Safer Ontario Act, 2017*
[7] Bill 175, Schedule 1 *Police Services Act, 2017,* Section 28
[8] *Ibid*.
[9] Bill 175, Schedule 1, *Police Services Act, 2017*, Part VII
[10] *Supra*, note 2
[11] Section 89(1) and (2), *Police Services Act,* RSO 1990, c. P. 15
[12] *Police Services Act*, RSO 1990, c. P.15
[13] Section 89(6) *Police Services Act*, RSO 1990, c. P.15
[14] Bill 175, Schedule 1, *Police Services Act, 2017,* Section 151
[15] Schedule 2 in Bill 175, *A Safer Ontario Act, 2017*
[16] An "official" is defined in Bill 175 as police officers, special constables, auxiliary members of a police service and any other person who may be prescribe dB the regulations.
[17] Bill 175, Schedule 1, *Policing Oversight Act, 2017*, Section 16(1)
[18] For example, the deaths of Sammy Yatim, Michael MacIsaac and Andrew Loku. Each of these individuals was a person with a mental health disability whose interaction with the police resulted in

along with the implementation of de-escalation techniques recommended in Iacobucci's report,[19] will contribute to officials resorting less often to use of force when interacting with members of the public, including persons with mental health disabilities.

The *Policing Oversight Act, 2017* also takes into consideration the fact that some complaints against the police are not based only on individual experiences of civilians, but rather, are of a systemic nature. To address this, section 45 of the *Act* enables the Complaints Director of the Ontario Policing Complaints Agency to undertake reviews of systemic issues that have been identified in public complaints or investigations.[20] Further provisions enable the SIU to undertake investigations in the public interest,[21] even in the absence of a complaint by a member of the public.[22]

Coroners Act[23]

The current *Coroners Act* will not be repealed by the *Safer Ontario Act, 2017* but several amendments to the current *Act* are being proposed. Pursuant to the current *Coroners Act*, a Coroner can hold an inquest to determine the circumstances of the death of a person for the purposes of informing the public.[24] An inquest is a public hearing, the purpose of which is not to place blame on a particular party, but rather to propose recommendations so that a similar type of death may be prevented from happening again. An inquest is conducted by a Coroner and is before a jury made up of five community members.[25]

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their violent death. For more information, see ARCH Alert "*Sammy Yatim Decision Highlights Need for Improved Police Interactions with Persons with Mental Health Disabilities*" June 29, 2016 (online): http://www.archdisabilitylaw.ca/node/1133. See also the following links for more information on Sammy Yatim: https://www.thestar.com/news/crime/2015/10/20/murder-trial-begins-for-const-james-forcillo-in-sammy-yatim-shooting.html; Michael MacIsaac: https://www.thestar.com/news/gta/2014/06/05/michaels_life_was_worth_more_than_12_seconds_grieving_family_says_of_cops_instant_decision_to_shoot.html; and, on Andrew Loku: https://www.thestar.com/news/gta/2016/03/18/no-charges-for-police-officer-who-shot-andrew-loku.html

[19] Hon. Frank Iacobucci. *Police Encounters with People in Crisis.* July 2014. Web. February 16, 2016. Available: https://www.torontopolice.on.ca/publications/files/reports/police_encounters_with_people_in_crisis_2014.pdf

[20] See also: Bill 175, Schedule 2, *Policing Oversight Act, 2017*, Part IV

[21] Bill 175, Schedule 2, *Policing Oversight Act, 2017,* Section 57

[22] *Ibid.,* Section 63

[23] Schedule 6 in Bill 175, *A Safer Ontario Act, 2017*

[24] Ontario. Ministry of Community Safety and Correctional Services, Office of the Chief Coroner. *Aid to Ontario Inquests*. 2015. February 2018. Available: https://www.mcscs.jus.gov.on.ca/sites/default/files/content/mcscs/docs/ec078303.pdf

[25] *Ibid.*

One of the more interesting amendments to the *Coroners Act* is the power given to the Coroner to direct a judge, a retired judge or a lawyer to hold or continue an inquest if the Presiding Coroner finds that procedural or legal issues are likely to be raised in the inquest and would be better handled by a person with legal training.[26] This is important because often times these inquests raise issues that are of extreme importance to the public, but that require a legal determination on a procedural or substantive issue that a Coroner may not be able to make because it is not within their area of expertise. Enabling the Coroner to request that a judge or lawyer preside over the inquest may provide an opportunity for more robust legal arguments to be made at an inquest.

Reactions to Bill 175

Stakeholders who shared their reactions to Bill 175 were both opposed to and in support of the proposed amendments set out in the Bill. On March 1, 2018 the Chief Commissioner of the Ontario Human Rights Commission (OHRC) presented the OHRC's submissions to the Standing Committee on Justice Policy at the Legislative Assembly of Ontario.[27] According to the OHRC, Bill 175 puts forward a modern vision of policing which may help build trust between communities and the police force especially since it "recognizes and enshrines *Charter* and Human Rights Code as essential to adequate and effective policing."[28] However, the OHRC also urged the Government to require the collection of human rights-based data on incidents, including, stops of civilians, use of force, and interactions where police officers request information on a person's immigration status.[29] This recommendation does not appear to have been adopted and incorporated into the final version of the Bill.

The Ombudsman of Ontario also provided his submissions to the Committee, in February 2018.[30] While the Ombudsman expressed satisfaction with respect to the implementation of many of Justice Tulloch's recommendations, he also identified several gaps in Bill 175 that he encouraged the Government to pay attention to, and provided corresponding recommendations. One of the Ombudsman's recommendations was that complaints by the public about alleged police misconduct should be investigated by civilians and not by other

[26] Bill 175, Schedule 6 *Coroners Act*, section 9(1) amending Section 25 of the current *Coroners Act*
[27] Ontario Human Rights Commission. *Presentation by Chief Commissioner Renu Mandhane to the Standing Committee on Justice Policy – Bill 175, Safer Ontario Act*. March 1, 2018. Web. March 3, 2018. Available: http://www.ohrc.on.ca/en/standing-committee-justice-policy-%E2%80%93-bill-175-safer-ontario-act-chief-commissioners-remarks
[28] *Supra,* note 26
[29] *Ibid.*
[30] Ombudsman Ontario. *Oversight Enhanced: Submission to the Standing Committee on Justice Policy regarding Bill 175, Safer Ontario Act, 2017.* February 2018. Web. March 2018. Available: https://www.ombudsman.on.ca/Media/ombudsman/ombudsman/resources/Speeches/OversightEnhanced-OmbudsmanSubmissionBill175-EN-accessible.pdf

police officers or former police officers.[31] Another recommendation made by the Ombudsman is the inclusion of de-escalation training for police officers which the Ombudsman highlighted as a very important piece that the current Bill overlooked.[32] These recommendations do not appear to have been adopted and incorporated into the final version of Bill 175, either.

Conclusion

The passage of Bill 175 is not without contention. While the Ontario Association of Police Services Boards seem to be welcoming of the changes brought about by Bill 175, the Police Association of Ontario and the Ontario Provincial Police Association are criticizing some of the clauses in the new Bill, including what has been described as the Bill's failure to define what a police officer's "core duties" are.[33] Nevertheless, it is evident that the changes brought about by this Bill demonstrate that the government has considered human rights issues that have been raised by equity-seeking communities, including disability communities. ARCH will continue to monitor the implementation of this new Act.

[31] *Ibid.,* p. 8
[32] *Ibid.*, p. 14
[33] Gillis, Wendy. *Policing in Ontario takes 'a large step forward' with sweeping new law*. March 8, 2018. Web. March 9, 2018. Available: https://www.thestar.com/news/gta/2018/03/08/policing-in-ontario-takes-a-large-step-forward-with-sweeping-new-law.html

Recognizing the Rights of Prisoners with Mental Health Disabilities and the Impact of Solitary Confinement

By Lila Refaie, Staff Lawyer

Introduction

The term "solitary confinement" is used by the United Nations to define the placement of a prisoner[1] separately from the general prison population for a certain period. The United Nations has created a set of standard minimum rules for countries to follow when using any

[1] An incarcerated person is commonly known as a prisoner. However, Canadian legislation uses the term "inmate" to describe an incarcerated person. For the purposes of this article, the term "prisoner" will be used.

form of solitary confinement, to ensure that its use doesn't violate prisoners' rights while incarcerated. The *United Nations Standard Minimum Rules for the Treatment of Prisoners,* also known as the *Nelson Mandela Rules*[2]*,* were revised and adopted by resolution before the General Assembly of the United Nations on December 17, 2015. In Canada, both provincial and federal legislation use the term "segregation" to describe these placements.

Segregation has been part of Canada's correctional system for almost two centuries. Originally, it was established as an alternative to a harsher punishment and was deemed a more humane placement than regular incarceration. However, over the years, it became clear through various psychology studies that the practice has a serious detrimental effect on prisoners. Prisoners with mental health disabilities are often more negatively affected by segregation than other prisoners.

Difference between Federal and Provincial Prisons in Canada

Canadian prisons[3] are divided between provincial and federal institutions. A prisoner's placement in one or the other is determined by the length of his or her sentence. In cases where a prisoner is sentenced to serve less than two years, he or she shall be placed in a provincial prison. Where a prisoner is sentenced to two years or more, he or she is placed in a federal prison. Despite the fact that provincial and federal prisons follow similar rules and regulations, they are governed by their respective legislation and level of government.

Developments applicable to Prisons in Ontario

In Ontario, provincial prisons are governed by the *Ministry of Correctional Services Act*[4] ("Ontario Act") and its regulation[5]. Each prison is managed by a Superintendent. Under provincial law, there are two types of segregation: disciplinary segregation and administrative segregation. Disciplinary segregation[6] may occur when a prisoner commits a serious misconduct within the prison. It is served as a form of punishment, and the placement is limited to a maximum of thirty days. Administrative segregation[7] is a more flexible placement for prisoners in certain circumstances. A prisoner may be placed in administrative segregation if the Superintendent believes it is for the safety or security of either the prisoner in question or other prisoners in the prison. A prisoner can also request to be placed in segregation. Although the Superintendent must review the prisoner's

[2] UN Resolution A/RES/70/175
[3] While it is commonly known as a "prison", Canadian legislation uses the term "correctional institution". For the purposes of this article, the term "prison" will be used.
[4] R.S.O. 1990, c. M.22
[5] General, R.R.O. 1990, Reg. 778
[6] *Ibid.,* sections 29 to 33.
[7] *Ibid.,* section 34.

placement in segregation every five days, there are no limits to the length of stay in administrative segregation.

Ontario Government Agrees to put Parameters around Administrative Segregation[8]

In 2012, Christina Jahn filed a human rights application against the Minister of Community Safety and Correctional Services, representing the Ontario Government, at the Human Rights Tribunal of Ontario ("HRTO"). While incarcerated in a provincial prison, she was placed in segregation for approximately 210 days, representing the entire period of her incarceration. During her placement in segregation, she experienced brutal and humiliating treatment, due to her mental health disabilities and gender. The Ontario Human Rights Commission ("OHRC") intervened in her application and requested systemic remedies. The OHRC argued that administration segregation was overly used in provincial prisons and the treatment of prisoners with mental health disabilities within the Ontario correctional system contravened their rights under the *Human Rights Code*.

In September 2013, the parties reached an agreement and settled the application[9]. The Ontario Government agreed to implement certain public interest remedies ("*Jahn v. MCSCS* settlement"). The province will complete a report and implement its recommendations to better serve female prisoners with "major" mental health disabilities[10]. The province also committed to screen all prisoners for mental health issues upon their arrival to a prison and to ensure a physician will conduct an assessment and follow-ups, if necessary, for prisoners in need. It will require physicians to develop appropriate treatment plans for prisoners with mental health disabilities. The Ontario Government further agreed to train its frontline staff and managers on their obligations under the *Human Rights Code*, mental health, the impact of punitive measures on mental health, and vulnerable prisoners' needs. The terms of settlement also included a review and distribution of the "Inmate Handbook", which informs prisoners of their rights and responsibilities. Finally, the Ontario Government will amend the procedure used to determine whether a prisoner should be placed in disciplinary segregation under the "Inmate Management Policy on Discipline and Misconduct" and other related policies, including taking into consideration whether the prisoner has a mental health disability, and strictly limiting the use of this type of segregation as a last resort option.

With regards to administrative segregation, the Ontario Government recognized the potential adverse impact that segregation may have on prisoners with mental health disabilities. As a result, it agreed to review and amend its policies and procedures related

[8] *OHRC v. Ontario (Community Safety and Correctional Services)*, 2018 HRTO 60
[9] *Jahn v. Ontario (Community Safety and Correctional Services)* (2013; Unreported)
[10] The terms of settlement specifically use the term "major", but do not define what is considered a "major" mental health disability.

to administrative segregation. In doing so, the Ontario Government agreed to restrict its use if the prisoner has a mental health disability, unless all other possible alternatives would result in undue hardship, such as security and/or health and safety concerns. If a prisoner is placed in segregation, a review of their placement shall be conducted at least once every five days and again after 30 continuous days. In the case of a prisoner with a mental health disability, a physician must conduct an assessment, with the prisoner's consent, before each review. In 2015, the parties further agreed that prisoners shall be given information handouts regarding their rights while placed in segregation.

Unfortunately, following the *Jahn v. MCSCS* settlement, the OHRC became concerned about the lack of its implementation by the Ontario Government. In September 2017, the OHRC filed a contravention of settlement application against the government, alleging that the province failed to comply with the terms of settlement related to public interest remedies.

On January 16, 2018, the OHRC secured another agreement with the Ontario Government to effectively end indefinite segregation in provincial prisons. This agreement is reflected in a consent order filed with the HRTO. In addition to the terms listed above, the parties further agreed to conduct a system-wide review of the province's use of segregation in relation to prisoners with mental health disabilities, including whether the prisons are following the *Jahn v. MCSCS* settlement. The results of this review will be made public in spring 2018. The Ontario Government will also conduct system-wide review in relation to the treatment of prisoners with mental health disabilities in the various prisons' general populations, which will be published in summer 2018. The parties agreed to hire an Independent Expert on human rights and corrections and an Independent Reviewer to assist in the implementation of the terms of this agreement. Prisons will establish and begin tracking segregation placements, and will identify prisoners with mental health disabilities. The Ontario Government will ensure proper use of mental health alerts within prisons, which will serve as indicators to restrict the use of segregation for these prisoners. The parties agreed to several timelines for each agreed term.

Developments applicable to Federal Prisons

Federal prisons follow a similar regime as the provincial prisons. These prisons are governed by the *Corrections and Conditional Release Act*[11] ("Federal Act") and its regulations, and each prison is managed by the Institutional Head. In federal prisons, there are two types of segregation placements. A prisoner can be placed in disciplinary segregation or administrative segregation. Placing a prisoner in disciplinary segregation occurs when a prisoner has acted in violation of a rule while incarcerated and serves as a punishment. The procedure behind placing a prisoner in disciplinary segregation follows a

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

strict process, and the law limits the length permissible for a prisoner to be in segregation to a maximum of 30 days. On the other hand, administrative segregation[12] provides much more discretion to the Institutional Head. In fact, the Institutional Head holds the power to place a prisoner in administrative segregation, and has the final word on any review of the prisoner's placement, despite any recommendation put forward by the Segregation Review Board.

On June 19, 2017, Bill C-56 - *An Act to amend the Corrections and Conditional Release Act and the Abolition of Early Parole Act*, was introduced before the House of Commons, and passed first reading. If it becomes law, this bill would amend the Federal Act, particularly certain provisions pertaining to administrative segregation. However, at the time of writing this article, there has been no further substantial development on its status since its introduction and first reading.

Administrative Segregation Declared Unconstitutional by the Supreme Court of British Columbia[13]

On January 17, 2018, the Supreme Court of British Columbia ruled that the current format of administrative segregation is unconstitutional because it infringes prisoners' rights guaranteed by sections 7 and 15 of the Canadian *Charter of Rights and Freedoms* ("*Charter*"). Particularly, the Federal Act permits prolonged and indefinite segregation of any prisoner. It allows the Institutional Head to act as prosecutor and judge of its own case during segregation hearings and reviews, while prisoners are deprived of the right to counsel at these hearings. The Court also recognized that administrative segregation has a notable effect on prisoners with disabilities and indigenous prisoners. The Court suspended its ruling for 12 months to allow the federal government to appropriately amend the law, in keeping with prisoners' constitutional rights. This case was brought forward by the British Columbia Civil Liberties Association and the John Howard Society of Canada. To read the full decision, go to https://www.canlii.org/en/bc/bcsc/doc/2018/2018bcsc62/2018bcsc62.html?resultIndex=1

In coming to this landmark decision, the Court began with an analysis of the rights guaranteed by the *Charter*. Section 7 of the *Charter* guarantees everyone "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Based on extensive scientific and psychological research presented as evidence, the Court concluded that administrative segregation poses significant risk of serious psychological harm to all prisoners, including an increased risk of suicide and self-harm. This effect is intensified for prisoners with mental health disabilities. Thus, the current form of segregation violates prisoners' rights to

[12] *Ibid.,* sections 31 to 37
[13] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62

life and security of the person because of the heightened risk of suicide, self-harm, and psychological harm.

Section 15 of the *Charter* guarantees everyone the right to equal protection and equal benefit of the law without discrimination. Mental and physical disabilities are among the grounds protected from discrimination. The Court analyzed the effect of the Federal Act on prisoners with mental health disabilities. The evidence before the Court showed that prisoners with mental health disabilities are over-represented in administrative segregation. While the federal government slightly changed its policy in August 2017 with regards to the treatment of certain prisoners with mental health disabilities, the Court determined that the new policy was inadequate and fails to properly address the issues. It was found that it is more difficult for these prisoners to cope with being in segregation. The federal government failed to respond to the actual capacities and needs of prisoners with mental health disabilities, and imposed burdens on them in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage. For all these reasons, the right of prisoners with mental health disabilities to equal treatment without discrimination is being violated in segregated placements.

A month after this landmark ruling, the Government of Canada announced its intention to appeal the decision. According to the Government, the purpose of the appeal is to seek clarity from the courts, considering a decision on the same constitutional issue from the Ontario Superior Court, released in December 2017.

***Ontario Superior Court Declares Only Part of Legislation Related to Administrative Segregation Unconstitutional*[14]**

On December 18, 2017, the Ontario Superior Court delivered its ruling on a similar challenge to administrative segregation. However, the Court in this matter limited its decision to procedural issues regarding the review process associated with allowing administrative segregation of a prisoner to continue. The Canadian Civil Liberties Association ("CCLA") brought a constitutional challenge to the Federal Act, concerning the provisions related to administrative segregation. CCLA claimed that the current form of administrative segregation breached prisoners' rights under sections 7, 11(h), and 12 of the *Charter*, particularly for prisoners with mental health disabilities. To read the full decision, go to https://www.canlii.org/en/on/onsc/doc/2017/2017onsc7491/2017onsc7491.html?resultIndex=1

[14] *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491

While analyzing a potential breach of section 7 of the *Charter*, the Court accepted that administrative segregation causes psychological stress to prisoners, which can result in harmful mental health effects. The Court focused on the lack of procedural fairness to the prisoner during proceedings related to administrative segregation, particularly during the review of their placement before the Segregation Review Board. The lack of an independent review to decide whether the placement should continue was found to infringe prisoners' section 7 rights.

Finally, the Court rejected CCLA's argument that segregating prisoners with mental health disabilities infringed their rights under section 12 of the *Charter*. Section 12 guarantees protection against cruel and unusual treatment or punishment. Under subsection 87(a) of the Federal Act, the Institutional Head has the obligation to consider a prisoner's mental health when deciding whether to segregate him or her. In that sense, the Court was satisfied that a prisoner's right was adequately protected. The Court also accepted that visits from a health care practitioner negated any potential harmful psychological effects arising out of segregation, and thus prisoners were sufficiently protected in this regard. Nonetheless, the Court accepted that negative effects are foreseeable and can be expected. According to the Court, the Federal Act recognizes the danger of prolonged segregation. The Court also recognized the harmful effect of indefinite and prolonged segregation. However, the Court concluded that the Federal government appropriately monitors their prisoners in segregation in accordance with its procedures, including visits with medical practitioners. The Court determined that CCLA had not proven that these procedures were inadequate.

Therefore, only placements beyond the review process (held within five days) were declared unconstitutional because of the lack of an independent review. The Court suspended its ruling for 12 months, to allow the federal government to properly amend the Federal Act in accordance with this ruling. CCLA is appealing this decision.

Conclusion

The Government of Canada and the Government of Ontario, as well as the courts and the HRTO, have recognized the heightened risks for psychological harm, including a higher risk of suicide and self-harm, for prisoners with mental health disabilities who are placed in administrative segregation. The Government of Ontario has agreed to put safeguards in place to protect these prisoners in provincial prisons. At the same time, however, the Government of Canada seems uncertain as to where it stands on the issue. Despite the introduction of Bill C-56 and its commitment to end indefinite segregation, the federal government is currently appealing the landmark British Columbia court decision.

Meanwhile, some firms have begun class actions related to this very issue. Koskie Minsky LLP has commenced two class action proceedings for prisoners who have been placed in prolonged administrative segregation and suffered harm as a result, including psychological and physical harm. One of the proceedings, launched on April 20, 2017,

refers to provincial prisons in Ontario, and is against the Ontario Government. This class action alleges that the Ontario Government has violated prisoners' human rights through the over-use of administrative segregation in its prisons, breached its fiduciary duties and infringed on prisoners' constitutional rights, concerning specifically prisoners with mental health disabilities. The second proceeding, launched on March 3, 2017, refers to federal prisons, and is against the federal government. It is argued that the government has failed in its fiduciary duties and infringed prisoners' constitutional rights by subjecting them to prolonged administrative segregation. Both of these class action proceedings are currently before the courts. In Saskatchewan, a similar class action has been commenced by Merchant Law Group LLP, pertaining specifically to provincial prisons in Saskatchewan, as well as federal prisons.

Medical Assistance in Dying: Will Our Voices Count?

By Catherine Frazee, Professor Emerita, Ryerson University

In the last issue of ARCH Alert, published in November 2017 (http://www.archdisabilitylaw.ca/node/1261), we reported on the rising number of medically assisted deaths in Canada – a number that is now believed to exceed 3000. As physicians have become more comfortable with the practice of ending the lives of their patients, and as public opinion increasingly normalizes MAiD as a response to human suffering, we wrote about a growing urgency to better understand the impact of these profound and rapid social changes upon the lives of people with disabilities.

In recent weeks, these concerns have come sharply to the foreground. In December of last year, the Federal Minister of Health published draft regulations for a nationwide system of monitoring Medical Assistance in Dying – you can find these online by going to http://www.gazette.gc.ca/rp-pr/p1/2017/2017-12-16/html/reg6-eng.html These proposed regulations unfortunately fall far short of what is required to ensure that MAiD is not exploited or misused as a "quick fix" to human suffering rooted in poverty, stigma, discrimination and exclusion, especially as these factor in the lives of disabled people.

Fortunately, although the draft regulations were very technical and difficult to digest, a number of organizations and individuals worked hard to prepare detailed responses to the government's draft. The disability rights group Toujours Vivant/Not Dead Yet (TVNDY), for example, prepared a submission that you can read by going to http://tvndy.ca/en/2018/01/comments-on-health-canada-maid-regulations/. My own personal submission can be found by going to https://fragileandwild.files.wordpress.com/2018/03/submission-from-catherine-frazee.pdf.

And an important submission prepared by Advisors to the Vulnerable Persons Standard is online at https://static1.squarespace.com/static/56bb84cb01dbae77f988b71a/t/5a845f84ec212da3285ab163/1518624645431/VPS+Submission+on+Federal+MAiD+Monitoring+Regulations+-+FINAL.pdf.

Although the language of regulations can be difficult to penetrate, the rules that will require health care practitioners to report on MAiD-related activities are not merely a technical exercise. These regulations will specify the information that physicians, nurse practitioners and pharmacists will be required to report each time they authorize or perform a medically assisted death. That information will be our only source for understanding the lives and circumstances of the people who turn to MAiD for relief from intolerable suffering.

Information collected in a national MAiD monitoring program must provide disabled Canadians with some assurance that MAiD does not become a modern tool of eugenics, ushering certain kinds of persons and certain social problems toward quiet annihilation. A transparent system of reporting, and high levels of accountability for those who practice MAiD – these are what lie at stake as the Minister of Health proceeds toward finalizing the MAiD regulations this summer.

For a straightforward review of the deficiencies in the government's initial draft regulations, you can read the VPS summary of recommendations by going to http://www.vps-npv.ca/in-a-nutshell-vps-recommendations-for-monitoring.

Perhaps the most significant defect in the government's proposal is that it makes no provision to hear directly from patients who request MAiD about why they have made this choice to end their lives, or in some cases, why they have changed their mind and decided not to pursue a medically assisted death. According to the draft regulations, only the opinions of medical practitioners will be taken into account. Such an approach flies in the face of a human rights approach, by excluding people at the receiving end of MAiD from any meaningful opportunity to report on their experience and to participate in MAiD monitoring and oversight. Moreover, without hearing directly from people who choose to die by MAiD, we can only speculate about what made their lives intolerable, and about whether better options for personal care, home support, assistive technology, communication assistance, peer support or pain relief, for example, might have eased their suffering and despair.

ARCH Alert readers will likely have little difficulty imagining situations where a person with disabilities could find themselves succumbing to MAiD because they feel themselves to be a burden to others, or because they dread having to leave their homes and surrender to institutional living, or because they do not have the supports they require to communicate, or because they are trapped in abusive or impoverished circumstances. But without probing for detailed information in a MAiD monitoring process, we will never know if these kinds of pressures are driving people toward assisted death.

Where Monitoring Fits in the "Big Picture"

Under our current law, the requirements for a medically assisted death are clear and unconditional. A person must be suffering intolerably as a result of a medical condition, and their natural death must be "reasonably foreseeable". To receive MAiD, the person must be an adult who has made a voluntary request, and who is capable of giving informed consent. As we have noted in earlier articles in this series, these thresholds for eligibility and approval are actively being contested. Studies are underway that consider lowering the age requirement, making an exception to the foreseeable death requirement for persons who find life intolerable because of a mental health condition, and relaxing the requirement of decision-making capacity for persons who have consented to MAiD by advance directive. Although many of us have strong views on whether MAID should be expanded in these directions, few would argue against careful study of the questions that these issues raise.

Similarly, court challenges underway in Québec and British Columbia seek to do away with the requirement of reasonably foreseeable natural death, which would make MAiD available to people who consider living with disability for many years to be an intolerable prospect. While disability rights groups in Canada will mount the strongest possible defence against these challenges, there can be little dispute that public court hearings are the proper forum for determining whether any law is just or unjust.

Put simply, it is reasonable for a law as important as Canada's MAiD law to be subjected to further study and to be adjudicated in court – provided that those studies and trials are conducted honourably and impartially, are informed by relevant and reliable evidence, and give respectful attention to the insights and perspectives of groups likely to be impacted by the outcome.

It is in this context that the importance of MAiD monitoring must be understood. Obviously, studies and court cases ongoing and in the future must build from a solid basis of fact. The data gathered from reliable monitoring will be the source of this important evidentiary base. Our monitoring system is therefore the crucial foundation as we continuously test whether our MAiD law is a fair, humane and safe law. If we fail at the outset to collect all of the data that we will need, we will fail to meet the law's delicately balanced objectives.

But there are other less obvious dimensions to the importance of MAiD monitoring. Government studies and court cases take place in the light of day, with prescribed opportunities for input and decision-making processes that are reported in the media and open to public scrutiny. Individual MAiD-related discussions, assessments and decisions, on the other hand, are necessarily private exchanges involving patients and their healthcare providers. This is as it should be, but only within the limits of the law. No practitioner is authorized to tinker at the edges of the law, for example by lowering the bar for informed consent or by stretching the meaning of reasonably foreseeable death. Calling upon practitioners to report fully on all of the inquiries, observations, efforts and judgments

of their MAiD assessments provides a simple check that everyone is complying with the safeguards written into the law.

Finally, good MAiD monitoring is important because it is our only window into the first and most fundamental threshold for MAiD. Medically assisted death is for persons who suffer intolerably because of a medical condition. For good reason, MAiD is an option for relief from medical suffering, but not for relief from social suffering. While social conditions such as poverty, neglect, abandonment, insecurity and abuse are the cause of immense human suffering and the motivation for tragic rates of suicide, these are not conditions for which MAiD is offered or available.

Our MAiD laws entrust doctors and nurse practitioners to recognize this distinction and to perform MAiD only when a patient suffers medical, and not social or existential distress. But the distinction is not always crystal clear, and our medical colleges and regulators are not actually trained to detect the many layers of trauma and hardship that may form the unique backdrops to their patients' lives. Stories of loneliness, loss, cruelty and shame call for help, but they do not call for MAiD. Keeping this distinction clear is perhaps the most important role for good monitoring.

For people who understand the disability experience, barriers, inequality and exclusion are understood to frequently cause more suffering than impairments and disability itself. Yet we also know firsthand how quickly – and wrongly – others presume the opposite, pointing to disability and not social conditions as a fate worse than death. For this single reason above all, the process for monitoring MAiD must invite and support patients to give voice to their own suffering, to describe their own circumstances and to express their own unfiltered reasons for wanting to die. We have much yet to learn from and about MAiD.

If you would like to make your voice heard, as the Federal Minister of Health proceeds to finalize the regulations for MAiD monitoring, write directly to The Honourable Ginette Petitpas Taylor at Ginette.PetitpasTaylor@parl.gc.ca. If you would like to read more about why the government's proposed regulations for MAiD monitoring are inadequate, go to http://www.vps-npv.ca/blog/2018/2/22/how-to-listen-monitoring-101.

Other MAiD-related Developments, in Brief

In future issues of ARCH Alert, we will continue to provide MAiD-related updates, particularly on the court cases and government studies referred to above. In the meantime, here is a brief summary:

The Council of Canadian Academies has reported that it is "on track" for public release of its three government-commissioned reports "towards the end of 2018". You can check for more details on their process by going to http://www.scienceadvice.ca/en/assessments/in-progress/medical-assistance-dying.aspx.

In early February, the Québec Superior Court granted intervener status to the Council of Canadians with Disabilities (CCD) and the Canadian Association for Community Living (CACL) in the case known as Truchon and Gladu. At the same time, the Court denied CCD and CACL permission to introduce evidence and expert testimony, thus severely limiting their ability to influence the outcome of the case. (Truchon and Gladu is a case we described in an earlier issue of ARCH Alert, in which two individuals with disabilities are challenging the provision in the law that limits MAiD to persons for whom natural death is reasonably foreseeable.) You can see how the media is reporting this case by going to https://www.theglobeandmail.com/news/national/montrealers-file-legal-action-contesting-restrictions-on-assisted-dying/article35308414/.

CCD and CACL have filed a request for intervener status in preliminary hearings related to the Lamb case in British Columbia. No decision has yet been issued on this request. Lamb is the other current case filed by a disabled woman challenging the reasonably foreseeable natural death provision of the current law. You can read a media report about this case by going to http://www.cbc.ca/news/health/medically-assisted-dying-court-case-julia-lamb-1.4067629.

In January of this year, the Ontario Divisional Court upheld the regulations requiring that practitioners' rights of conscientious objection to MAiD do not shield them from the obligation to refer their patients to physicians willing to perform MAiD. You can read about the "conscience objection rights" case by going to https://www.theglobeandmail.com/news/national/ontario-court-rules-doctors-who-oppose-assisted-death-must-refer-patients/article37802558/.

For ongoing updates on all MAID-related matters, you may wish to check http://www.vps-npv.ca/where-next-for-the-standard.

Medical Assistance in Dying remains a difficult and controversial topic for all Canadians. If you have questions or concerns arising from this article, you may contact the author at cfrazee@ryerson.ca or ARCH Disability Law Centre at archlib@lao.on.ca. Both are committed to open and respectful dialogue.

Stewart v. Elk: Judicial Treatment by the Human Rights Tribunal of Ontario

By Mariam Shanouda, Staff Lawyer and Rafeea Abdulla, DLI Law Student

Background on the Decision in *Stewart v. Elk Coal Corporation*[1]

On June 15, 2017, the Supreme Court of Canada (SCC) released its decision in the case of *Stewart v. Elk Valley Coal Corporation* (*Stewart v. Elk*). The importance of this decision lay in the Supreme Court's determination on whether the lower courts had understood and applied the *prima facie* case of discrimination correctly in a case where the factors included a person with an addictions disability who had not complied with a workplace policy prohibiting the use of substances by employees.[2]

The SCC decision was comprised of three judgments: a majority judgment, a minority judgment and a dissent. The differences between the majority decision[3] and the dissenting decision[4] are stark; not necessarily in the way that the *prima facie* test of discrimination was applied, but in the outcome reached by each judgment in the application of that test to the facts. In particular, the majority judgment found that there was no *prima facie* test of discrimination because Mr. Stewart, the employee with a disability, was not terminated because of his addictions disability, but rather for the breach of a policy.[5] On the other hand, Gascon J., in his dissent, found that the policy in and of itself discriminated against Mr. Stewart and as such constituted *prima facie* discrimination.[6]

Interestingly, since the release of this SCC decision, it appears that lower courts, in particular the Human Rights Tribunal Ontario (HRTO), have looked to Gascon J.'s dissenting judgment for guidance on the *prima facie* test of discrimination, and not to the majority judgment. This article will explore the ways in which lower courts have treated the decision in *Stewart v. Elk*. The majority of the decisions that have been released since June 2017 have focused on Gascon J.'s description of the *prima facie* test of discrimination. In these decisions, the general pattern has been recognition that although

[1] 2017 SCC 30.
[2] For a brief summary of the facts in *Stewart v. Elk*, and the positions of the interveners, the Council of Canadians with Disabilities and the Empowerment Council, please see the article entitled "Updates to the Law Regarding Addictions Disabilities: Supreme Court Hears Case on Addictions Disabilities in a Safety Sensitive Workplace, Canadian and Ontario Human Rights Commissions Release New Guide and Policy" in the March 2017 issue of ARCH Alert by going to: http://www.archdisabilitylaw.ca/node/1188
[3] As per McLachlin C.J. and Abella, Karakatsanis, Côté, Brown and Rowe JJ
[4] As per Gascon J.
[5] *Supra*, note 1 at para. 35
[6] Ibid. at para. 60

the majority judgment did not agree with Gascon J.'s application of the principles to the facts, His Honour correctly identified and described the applicable legal principles.

A Brief Refresher: The Facts in *Stewart v. Elk*

In *Stewart v. Elk*, the employer, Elk Valley Coal Corporation, had a policy in place prohibiting the use of drugs or alcohol by its employees. The policy stated that if Elk's employees had addictions disabilities, they could disclose those disabilities to their superiors without fear of repercussion, and they would be provided treatment. The policy further stated that if an employee did not disclose their addictions disability and an incident occurred on the worksite and where drugs or alcohol were found to be in the employee's system, then that employee would be terminated. Stewart used cocaine on his days off, did not inform his employer and was involved in an accident on the worksite. Stewart tested positive for drugs and in a following meeting with Elk, disclosed that he thought he was addicted to cocaine. His employment was terminated nine days later as part of a 'no free accident' rule.

Stewart challenged this decision at the Alberta Human Rights Tribunal (AHRT). The AHRT found Stewart was terminated not because of his addiction but because he did not comply with the policy. Based on this understanding of the facts, the AHRT found that Stewart had not established a prima facie case of discrimination. The Alberta Court of Queen's Bench agreed with the tribunal's conclusion that there was no *prima facie* discrimination, but did not agree with the tribunal's analysis of accommodation. The Alberta Court of Queen's Bench found that Stewart could not have reasonably been expected to comply with the policy as he was not aware that he had an addiction. The Alberta Court of Appeal agreed with the AHRT and the Alberta Court of Queen's Bench's finding of no prima facie discrimination and disagreed with the findings of reasonable accommodation of the Alberta Court of Queen's Bench. The Court of Appeal's findings were upheld by the majority of the SCC.

The Judgments in *Stewart v. Elk:* The Majority and Dissent

In the SCC's dissenting judgment, Gascon J. set out the three step legal test for *prima facie* discrimination: it must be shown first, that the complainant has a protected ground under the relevant human rights legislation, second, that the complainant experienced an adverse impact, and third, that the ground was a factor in the adverse impact .[7] Gascon J. found that an appropriate interpretation of the third part of the test focused on the discriminatory effect of the policy and not what the policy intended to achieve.

[7] *Supra*, note 1 at para 69.

After finding *prima facie* discrimination on this basis Gascon J. also concluded that Stewart was not accommodated as Elk had other reasonable and practical options available with the same deterring effect as termination. Gascon J. felt the employer had failed to undergo an individualized analysis involving both substantive duties (providing either a more accommodating standard or explaining why such a standard cannot be offered) and procedural duties (providing a procedure to assess accommodation). Based on this reasoning, Gascon J. would have allowed the appeal in favour of Stewart.

The majority opinion described the *prima facie* test by stating that "complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact".[8] The majority, similar to the dissenting opinion, focused on the third step of the analysis. They concluded that addiction was not a factor in the termination of Stewart's employment. The majority found that, as indicated by Stewart's termination letter, his failure to comply with the policy was the factor leading to his termination. They reasoned that he would have been terminated regardless of whether he was an addict or casual user and that since he had the capacity to make choices about his drug use, he also had the capacity to comply with the policy.

Stewart v. Elk **at the Human Rights Tribunal of Ontario**

At the (HRTO there have been at least four decisions that have referenced *Stewart v. Elk*. Most notably, the HRTO decisions have made reference to, or relied upon, Gascon J.'s dissenting opinion in the case. In each of these decisions, Gascon J.'s summary of how to establish *prima facie* discrimination is quoted, with a focus on whether the applicable ground was a factor in the complainant's harm. In *Rajic v. Omega Tool Corp*[9] the HRTO commented that Gascon J.'s summary of the *prima facie* test offered more guidance into the approach a tribunal should take when dealing with discrimination on the ground of disability in the workplace compared to the majority decision.[10] In *Rajic*, the applicant alleged that he was terminated due to his disability but the employer argued it was due to a breach of company policy requiring employees who were going to be late or absent to call in prior to the start of their shift.[11] On review of the third step in the *prima facie* analysis, the HRTO found that the call-in requirement did not exclude or restrict the employee on the basis of his disability and that his disability did not prevent him from calling in.[12] The tribunal found no evidence to suggest he had a reason related to his disability for not calling in.

[8] *Supr*a, note 1 at para 24.
[9] 2017 HRTO 818.
[10] *Ibid*, at para 36.
[11] *Supra,* note 5.
[12] *Supra,* note 5.

Another decision at the HRTO similarly focused on the third step of the test for *prima facie* discrimination. In this decision, the applicant claimed discrimination in employment based on her pregnancy.[13] In its analysis, the HRTO focused on discriminatory effect and not discriminatory intent, a distinction that was discussed in Gascon J.'s dissent.[14] At paragraph 57, the HRTO stated that whether the respondent had reasons unrelated to the *Human Rights Code* to terminate the applicant was not the question; rather, the question was whether her pregnancy-related accommodation contributed to termination.[15]

Other Decisions referring to *Stewart v. Elk*

Three other decisions refer to the dissent in *Stewart v. Elk* but each with a different focus. At the Alberta Human Rights Commission[16], a quote in Gascon J.'s dissenting opinion was used to support the idea that having an accommodation policy is part of an employer's procedural duty of ensuring that a proper analysis and exploration of accommodation possibilities takes place when issues surrounding accommodation arise.[17]

Gascon J.'s dissenting judgment was referenced in a motion to dismiss a British Columbia Human Rights Tribunal claim against a hospital for discrimination based on mental and physical disability in the provision of public services.[18] The judgment was referenced in a discussion of the stigma attached to mental health disability in society at large. It was used to describe how the intersection of the law and addiction and other mental health disabilities affects the most vulnerable in society.[19] Through this discussion, the tribunal suggested that matters surrounding mental health and addiction need to be considered with an awareness of the surrounding stigma.[20]

In the recent Supreme Court of Canada case, *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron*, the Court used Gascon J.'s dissent in an overview outlining the principles of the duty to accommodate, quoting paragraphs 125-128 of his decision. These paragraphs were quoted in a review of the law surrounding the duty to accommodate at the beginning of the decision. Gascon J.'s dissent was not referenced in the analysis since the majority of this case dealt with the statutory

[13] *Sellner v Canadian Cab Ltd*, 2017 HRTO 1060.
[14] *Ibid*.
[15] *Ibid.*
[16] *Custer v Bow Valley Ford Ltd*, 2017 AHRC 21.
[17] *Supra*, note 12 at paras 60 and 63.
[18] *P. obo J.R. v The Hospital and The Correctional Centre*, 2018 BCHRT 4.
[19] *Ibid.*
[20] *Ibid.*

interpretation of the *Act Respecting Industrial Accidents and Occupational Diseases* and the application of the Quebec *Charter*.[21]

Conclusion

Thus far, courts and tribunals in a number of Canadian jurisdictions have cited Gascon J.'s dissenting judgment in *Stewart v. Elk* as authority for the applicable principles related to the legal test for *prima facie* discrimination, the stigma related to mental health issues, and the duty to accommodate. The application of Gascon J.'s reasoning to future cases, especially those involving persons with addictions, is important for ensuring that the law recognizes the pervasive stigma surrounding mental health and addictions, and the realities faced by individuals with disabilities in their struggle to be appropriately accommodated. ARCH continues to monitor the impact that *Stewart v. Elk* has on Canadian human rights law.

[21] 2018 SCC 3.

The Convention on the Rights of Persons with Disabilities and Living Independently in an Inclusive Community

By Luke Reid, Staff Lawyer

Canada ratified the Convention on the Rights of Persons with Disabilities (CRPD) in 2010. Since that time, the United Nations Committee on the Rights of Persons with Disabilities has worked to clarify and develop the meaning of the rights and freedoms articulated in the CRPD to promote a better understanding of the obligations they impose on States Parties. This often occurs in the form of a "general comment" on a particular Article of the CRPD. The most recent general comment released by the Committee is on Article 19, the right of persons with disabilities to live independently and be included in the community.

Article 19 states that:

> States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

According to the general comment, Article 19 emphasizes that persons with disabilities should be able to live an independent and dignified life in their own community and should have access to meaningful choices about how and where they live. The general comment articulates the inter-relatedness between Article 19 and the other Articles of the CRPD. For instance, in order for a person with a disability to have meaningful choices about where they live, they must have the legal capacity to make their own decisions. This is a right that is conferred under Article 12 of the CRPD. Or as another example, one could look at Article 20, which guarantees support for personal mobility. Mobility barriers continue to impede the ability of many persons with disabilities to live independently, and the provision of affordable and quality mobility aids or assistive technologies is a precondition for the full inclusion and participation of persons with disabilities in community life.

Article 19 builds on other Convention rights in significant ways. For instance, not only does Article 19 demand greater mobility and independence for persons with disabilities, it also demands a more accessible physical environment, allowing persons with disabilities to make more meaningful choices about where they live and ensuring that they are not geographically restricted to the limited areas where accessible housing and facilities exist.

In a similar vein, the general comment explains that Article 19 places great emphasis on deinstitutionalization and avoiding the congregation of persons with disabilities into segregated and isolated environments for reasons of "efficient service delivery". The general comment states that not only do such environments cut persons with disabilities off from their communities, they also can circumscribe the choices that persons with disabilities have as they often become beholden to the schedules and mandates of the service providers. Instead the general comment promotes the idea that service delivery should be individually tailored to the person, delivered in the community and designed to maximize the independence and inclusion of persons with disabilities.

For those advocating in the field of disability rights, the general comment may be useful as it describes the scope of some of Canada's international legal obligations regarding housing and support services for persons with disabilities. Such information can help in guiding advocacy efforts, and analyzing programs and social policies.

These are just some highlights from the general comment. To read and appreciate the full scope of the general comment on Article 19, go to http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx

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Changes to Ontario's *Family Law Act* Include Support for Some Adults with Disabilities

By Jessica De Marinis, Staff Lawyer

In November 2017 the Ontario Government announced Bill 177, which included proposed changes to the Ontario *Family Law Act*. [1] Bill 177 received Royal Assent and became law in December 2017. Ontario's *Family Law Act* now requires that parents provide support payments for unmarried persons with disabilities of any age who are "unable … to withdraw from the charge of his or her parents."[2]

Previously, parents who separated under the Ontario *Family Law Act* were only required to pay support payments for their children who were under the age of 18, unless the child was attending school full-time.[3] This was different than the requirements under the federal *Divorce Act*, which allow persons over 18 to receive support payments from their parents if they are unable to "…withdraw from their charge or to obtain the necessaries of life."[4] Practically, this difference meant that adults with disabilities whose parents separated under the Ontario *Family Law Act* had fewer entitlements to support payments than adults with disabilities whose parents divorced under the federal *Divorce Act*.

The changes made by Bill 177 mean that adults with disabilities who are "unable … to withdraw from the charge of…" their parent will fall within the scope of the *Family Law Act* and their parent may be required to pay support payments. These changes make Ontario support payment laws consistent with the federal *Divorce Act* and family law legislation in

[1] Bill 177, *An Act to implement Budget measures and to enact and amend various statutes*, 2nd Sess, 41st Leg, Ontario, 2017, Sch 15.
[2] *Family Law Act,* RSO 1990, c F.3, s 31(1)
[3] See past version of the *Family Law Act*, RSO 1990, c F.3, in force between Jan 1, 2017-Dec 13, 2017 at s 31(1), which stated: Every parent has an obligation to provide support for his or her unmarried child who is a minor or is enrolled in a full time program of education, to the extent that the parent is capable of doing so.
[4] *Divorce Act,* RSC 1985, c. 3 (2nd Supp) ss. 2(1), 15.1

many other provinces in Canada. As a result, reactions to these changes are largely positive.

Current legal information is that receipt of child support payments will not have any impact on a person's ODSP eligibility.[5] For more information on how support payments may affect ODSP, you may wish to contact your local community legal clinic.

The changes to the Ontario *Family Law Act* continue to use the word "child" to describe the relationship between a person and their parent, regardless of whether the child is a minor or an adult. While this may be appropriate in the context of family law legislation, some disability rights advocates find this language concerning because it reflects ableist attitudes that equate having a disability with being child-like. ARCH continues to advocate for changes to laws that incorporate a disability-rights perspective, including, for example, language and concepts such as self-determination, equal opportunity, participation, and inclusion in society for persons with disabilities.

[5] See: Ministry of Community and Social Services, *Ontario Disability Support Program – Income Support*, online: https://www.mcss.gov.on.ca/en/mcss/programs/social/directives/odsp/is/5_15_ODSP_ISDirectives.aspx. See also: Steps to Justice, *Does getting child support affect my income support from the Ontario Disability Support Program?*, online: https://stepstojustice.ca/common-question-plus/social-assistance/does-getting-child-support-affect-my-income-support-ontario.

Forcillo Update: Lawyers Plan to Argue for New Trial Based on "Fresh Evidence"

By Mariam Shanouda, Staff Lawyer

Officer James Forcillo was convicted in January 2016 of attempted murder in the death of 18 year old Sammy Yatim and sentenced to six years in prison in July 2016. In November 2017, Forcillo was arrested for breaching his bail conditions and is currently in jail serving his six-year sentence while waiting for his Appeal.

Forcillo's lawyers are now planning to argue that "fresh evidence" has been uncovered and that this newly discovered evidence supports their position that Forcillo should be granted a

new trial.[1] "Fresh evidence"[2] does not necessarily mean "new" evidence. Rather, more often than not, it refers to evidence that existed at the time of the initial trial, but for some reason or another, it was not presented as evidence at that time.[3]

In this case, Forcillo's lawyers are arguing that this new evidence is a study [4] conducted by a University of Toronto professor that demonstrates that police officers' stress levels are so high in stressful situations that Forcillo himself may have been experiencing "perceptual distortions"[5] which led him to act in the way he did on the night he shot Yatim.

In the initial trial, Forcillo's lawyers argued that he fired the second round of shots (which led to Forcillo's guilty verdict for attempted murder) because he believed that Yatim was sitting up and re-arming himself. Evidence at trial, including video evidence, proved that Yatim did not get up – and he couldn't have, since it is now known that Yatim was already dead at that time. Forcillo's lawyers are now arguing that this new study proves that while Yatim did not in fact get up and re-arm himself, Forcillo may nevertheless have perceived that Yatim was getting back up and that he had no choice but to shoot.

If the lawyers are successful in arguing that Forcillo was acting under a perceptual distortion, this may lead to the conclusion that Forcillo did not have the *intent* to shoot and kill Yatim and as such, the guilty verdict handed down by the jury in January 2016 will be overturned. This would lead to a new trial, which is exactly what Forcillo's lawyers are arguing should happen.

From a brief review of the study that Forcillo's lawyer are relying upon, as well as a review of similar studies conducted by the same University of Toronto professor, it is clear that the intent of these studies is to create a training method specifically for police officers to teach them how to make better decisions when deciding whether to use force, when to use force, and how much force to use.[6] It is interesting that Forcillo's lawyers are using the study, the intent of which is for police to learn de-escalation techniques, to defend Forcillo's actions.

[1] Gillis, Wendy, *Lawyers for cop who shot Sammy Yatim say `fresh evidence' warrants new trial.* Toronto Star. February 17, 2018. Web. February 20, 2018.
[2] The Supreme Court of Canada laid out the test for `fresh evidence' in *R v. Palmer* (1980) 1 S.C.R. 759 (S.C.C.).
[3] `Fresh evidence' is sometimes referred to as `Newly Discovered Evidence', the definition for which can be found in Black's Law Dictionary, Ninth Edition, Bryan A. Garner (Editor In Chief), 2009 at p. 638.
[4] The study was conducted by J. Andersen, who has published several studies on resilience training for police officers.
[5] *Supra*, note 1
[6] See for example: Andersen, J. P., & Gustafsberg, H. (2016). A training method to improve police use of force decision making: A randomized controlled trial. Journal of Police Emergency Response; Andersen, J. P.; Dorai, M., Papazoglou, K., & Arnetz, B. B. (2016). Diurnal and

Forcillo's lawyers are expected to raise this argument at his Appeal hearing which is currently scheduled to be heard in April 2018.

ARCH first reported on the death of Sammy Yatim and the Forcillo trial because of its relevance to persons with disabilities, in particular mental health disability communities and their allies. To read our previous articles, go to the June and September 2016 ARCH Alerts as well as the November 2017 ARCH Alert: http://www.archdisabilitylaw.ca/arch-alerts. ARCH continues to monitor this case.

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reactivity measures of cortisol in response to intensive resilience and tactical training among special forces police. Journal of Occupational and Emergency Medicine; and, Andersen, J. P., *Pitel, M., *Weerasinghe, A., & *Papazoglou, K. (2016). Highly realistic scenario based training simulates the psychophysiology of real world use of force encounters: Implications for improved police Officer Performance. Journal of Law Enforcement, among others.

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We welcome your comments, questions and feedback. We will endeavour to include all information of general interest to the community of persons with disabilities and their organizations, but reserve the right to edit or reject material if necessary. Please address communications regarding **ARCH *ALERT*** to: Theresa Sciberras, Program and Litigation Assistant, ARCH Disability Law Centre, 55 University Avenue, 15th Floor Toronto, ON M5J 2H7, Fax: 416-482-2981 or 1-866-881-2723, TTY: 416-482-1254 or 1-866-482-2728, e-mail: scibert@lao.on.ca **Website: http://www.archdisabilitylaw.ca/**

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