

# Within REACH

Fall, 2006

## Disability and the Law

### Court finds no discrimination in autism programs: *Wynberg v. Ontario*

By Julie Facchin

In July, the Ontario Court of Appeal released their decision in the cases of *Wynberg v. Ontario* and *Deskin v. Ontario* (heard together as one case). There were two main issues in this case: whether Ontario's failure to provide the Intensive Early Intervention Program (IEIP) to autistic children aged six and over discriminated against those children on the grounds of either (a) age or (b) disability, as each is defined in s.15(1) of the *Canadian Charter of Rights and Freedoms*. At the trial level, the trial judge found that the Ontario government had discriminated on both grounds. At the second level, however, the Court of Appeal disagreed.

IEIP is targeted at autistic children aged two to five. It involves twenty to forty hours per week of intensive work with the child, carried out by specially-trained staff in a variety of settings, including one-to-one work, throughout the calendar year. IEIP was introduced by the Ontario government in 2000, and was expected to provide services to all autistic children in the two-to-five age bracket. However, it soon became apparent that not enough staff were being trained to meet the demand for IEIP, and consequently many children turned six and became ineligible for IEIP without having received any services. At that same time parents of autistic children found that the public education system was not adequately providing for autistic children aged six and over.

Since autistic children aged six and over were therefore not receiving appropriate services, the Wynberg and Deskin families' first argument was that the Ontario government discriminated against autistic children over six years old as compared to autistic children aged two to five because the older children were not eligible for IEIP. In contrast to the trial judge, who found that there was discrimination, the Court of Appeal found none. While agreeing that Ontario treated autistic children aged six and over differently than those aged two to five, they found that this difference in treatment did not amount to discrimination.

The Court of Appeal focused on the fact that the IEIP is targeted at and designed to benefit the younger age group. For example, IEIP usually requires more hours per week than the twenty-five spent in school; much of that time is spent in one-on-one settings as opposed to the group setting of a classroom; and IEIP is to be delivered throughout the year, not only during the ten months of the school year. In addition, evidence from the trial showed that the two-to-five age group presented a particular "window of opportunity" at which autistic children responded best to IEIP. According to previous decisions of the Supreme Court of Canada, when a program is targeted at and designed to benefit a specific disadvantaged group, here autistic children aged two to five, excluding another disadvantaged group, in this case autistic children aged six and over, from that program does not constitute discrimination. The Court of Appeal therefore held that since IEIP is targeted at the younger children, Ontario was not discriminating against the older children on the basis of age.

The Wynberg and Deskin families' second claim was based on disability; that is, they argued that autistic children aged six and over were discriminated against in comparison to either typically-developing children or children with other disabilities because no appropriate programming was offered for them through the public school system. IEIP was named by the plaintiffs as the only appropriate program. This claim also failed.

Discrimination by definition involves a comparison between the group allegedly discriminated against and another group who are similar in all but the characteristic which is the basis for the discrimination. During the hearings portion of the trial, the only time when evidence can be presented, the Wynberg and Deskin families argued that typically-developing children were the appropriate comparator group, and presented evidence following from this assertion. However, after the end of the hearings but before the trial judge issued her reasons, the Supreme Court released their decision in *Auton v. British Columbia*, another case relating to autistic children. In *Auton*, the Supreme Court held that the appropriate comparator group for autistic children was children with other disabilities. The trial judge was bound by this precedent to use the same comparator group. However, while they were able to amend their legal arguments, as the hearings had finished when the *Auton* decision came down, the Wynberg and Deskin families were unable to present further evidence with other disabled children as the comparator group.

Following the trial judge's decision, Ontario appealed. At this stage the Wynberg and Deskin families dropped typically-developing children as a comparator group and focused on other children with disabilities as the appropriate comparator group. Despite their sympathy for the plaintiffs, the Court of Appeal found that there was simply not enough evidence to support a finding of discrimination on the basis of disability in comparison to children with other disabilities. That is, the plaintiffs had not shown that IEIP was an appropriate program to be delivered through the public school system, let alone the only appropriate program, or that other children with disabilities were receiving programs appropriate to their disability. Essentially, therefore, autistic children were not shown to be in any worse a position than other children with disabilities, and so there was no discrimination. The issue of whether all of the children with disabilities were being discriminated against if none had appropriate programming available was not raised.

Finally, while it may not help the Wynberg and Deskin families, the Court of Appeal's decision on this second issue does leave open the possibility that discrimination could be found if the plaintiffs presented evidence about the appropriateness of IEIP as opposed to other programs for autistic children and in comparison to programs available for children with other disabilities. This would, however, require a new trial.

On a related note, over 250 cases regarding the age cut-off for IEIP have been brought before the Ontario Human Rights Commission. While these cases have been brought under the Ontario *Human Rights Code* and not the *Canadian Charter of Rights and Freedoms* and therefore different law applies, nonetheless the finding of no discrimination by the Ontario Court of Appeal is likely to affect the decisions in these cases.

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### **Will Ontario's human rights reforms achieve reductions in inequalities?**

*By Mary Cornish and Fay Faraday*

*This article originally appeared in The Lawyers Weekly published by LexisNexis Canada Inc., reprinted with permission.*

The Ontario government has moved one step closer to substantially reform how human rights are enforced in the province as Bill 107 - the Human Rights Code Amendment Act - passed Second Reading on June 6. The Legislative Committee on Justice Policy is expected to conduct province-wide public hearings over the summer.

The government has committed itself to achieving an accessible and effective human rights system.

Bill 107 is a major start in that direction, but significant gaps in the Bill must still be addressed to achieve this goal.

The government acknowledges this is a work in progress. Referring to the Bill as "draft legislation", the premier stated he looked forward to "improving it further" through the committee consultation process. Public hearings on the Bill will enable stakeholders to make submissions on how the details of the system - especially legal services and support - could be developed to ensure access to justice.

Bill 107 establishes what Attorney General Michael Bryant calls a "direct-access-plus-public support" model of human rights enforcement with "three pillars": the Human Rights Commission, the Human Rights Tribunal of Ontario and a new publicly-funded human rights legal support centre.

Bill 107 draws on the 1992 Ontario Human Rights Review Task Force Report "Achieving Equality" for the basic outline of direct access enforcement supported by a proactive commission, tribunal and publicly-funded legal assistance. However, to date, the Bill has not included some key recommendations needed to ensure an independent, effective and integrated system. In particular, while Bill 107 sets out the general structure of the first two "pillars" , it does not provide details on the critical third pillar of legal support for human rights claimants. Nor have there been assurances to guarantee the funding necessary for all three pillars.

Bill 107 significantly changes the existing roles of the Human Rights Commission and Human Rights Tribunal of Ontario.

Under Bill 107, claimants will file applications directly with the Human Rights Tribunal rather than the Human Rights Commission. The commission would no longer investigate, mediate or settle

complaints, nor would it screen complaints to determine whether the complaint can be heard by the Tribunal.

The commission's re-oriented mandate would focus on proactive efforts to ensure human rights compliance and to eliminate systemic discrimination, including the power to initiate complaints and to participate in tribunal hearings on issues of systemic discrimination.

The Human Rights Tribunal, which has the power to develop its practices and procedures, will address all complaints through either a hearing or an alternative dispute resolution mechanism which may be developed in its rules. The tribunal's remedial powers will be amended to eliminate the cap on monetary compensation for discrimination.

The third pillar of publicly funded legal support will be the critical piece in Bill 107's redesign. How these services and representation are structured and how their funding is guaranteed will determine how readily fundamental human rights enforcement can be accessed by those who need the Code's protection.

In introducing Bill 107, the attorney general promised to provide "full access to legal assistance" , including information, support, advice and legal representation to all persons seeking a remedy. At First Reading the government committed to "ensure that, regardless of level of income, abilities, disabilities or personal circumstances, all Ontarians would be entitled to share in receiving equal and effective protection of human rights, and all will receive that full legal representation."

While promised as a cornerstone of the reform, Bill 107 presently contains only a brief provision granting the government power to enter agreements to provide legal and other services which may be publicly funded.

At Second Reading, the attorney general acknowledged that more must be done to shore up this pillar, stating "there's no question that providing public legal support through the human rights legal support office is a critical component of the human rights reforms. ... This is something that needs to be entrenched by way of legislation."

The real measure of success for a human rights system as a whole is whether it can achieve significant and ongoing reductions in the inequalities facing those who are protected by the Human Rights Code and whether it can secure a culture of proactive human rights compliance. This test should provide a useful touchstone as equality seekers review the Bill and assess the alternatives for reform.

As the Bill moves into public hearings, a range of questions arises regarding each of the proposal's three 'pillars'. For example, does Bill 107 give the commission the independence and full range of powers it needs to conduct and require participation in effective proactive inquiries into systemic discrimination? Should the commission have the power to conduct public inquiries - a power that is not unusual for public institutions charged with investigating compliance with legal standards? Are other supports or accountabilities needed to secure human rights compliance, particularly in respect of government's proactive obligations as employer, service provider and policy maker?

What kind of tribunal hearing and dispute resolution procedures will ensure the tribunal can focus on the merits of an application, guarantee natural justice and yet be flexible enough to deal effectively and efficiently with the range of issues and complexities that come before it?

What supports do complainants need to effectively claim their Code rights? How can these services be provided in a way that accommodates the needs of different equality-seeking communities? How can claimants be assisted to obtain and advance the evidence to support their claims? How can community input, independence from government, public accountability and province-wide standards in the system be achieved? How can these services be assured a secure and appropriate funding base?

It is now well-established that employers, service providers, accommodation providers, governments and others who hold human rights obligations under the Code have a legal duty to secure equality proactively in the absence of any complaint. The human rights system as a whole, then, must not only have a fair and effective way to address and resolve human rights complaints but must also look beyond complaints to set up institutions and policies which will secure compliance without complaints.

Bill 107 and this summer's public hearings present a historic opportunity to work constructively in a non-partisan way to build a solid foundation for advancing human rights into the future.

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### **Commentary: Considering "disability tax fairness" amendments**

*By Yude M. Henteleff*

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The Technical Advisory Committee on Tax Measures for Persons with Disabilities ("TAC") was established in 2003 by the then ministers of finance and National Revenue ("CRA") to advise them on ways to improve tax fairness for persons with disabilities. TAC's report titled "Disability Tax Fairness" was presented to the ministers in December 2004.

As a member of TAC, I was pleased that certain tax measures announced in the Federal Budget 2005 implemented several of TAC's recommendations that are of particular benefit to persons with impairment in their mental functions such as those with learning disabilities.

However, I have major concerns with two responses by Finance and CRA to these recommendations.

Previously, a claimant with learning disabilities was required to demonstrate difficulties in perceiving, thinking and remembering to be eligible for the Disability Tax Credit Certificate ("DTCC"). Because this so limited eligibility, as a result of TAC's recommendation the Income Tax Act was amended as now found in section 118.4(1)(c). The former phrase "perceiving, thinking and remembering" has now been replaced with a more expansive phrase, namely "mental functions necessary for everyday life."

Section 118.4(1) (c.1) was added to the Act to define what was meant by "mental functions necessary for everyday life". These mental functions include:

- \* memory;
- \* problem-solving, goal-setting and judgment; and
- \* adaptive functioning.

Although no examples of the above functions are given in the section, some are given at page 10 of the Explanatory Notes, part of the Release issued by the Finance Ministry in 2005, which states that:

- \* memory - refers to the ability to remember the following: simple instructions; basic personal information such as name and address; or material of importance or interest;
- \* problem-solving, goal-setting and judgment - refers to the ability to solve problems, set and keep goals, and make appropriate decisions and judgments; and
- \* adaptive functioning - refers to abilities related to self-care, health and safety, social skills and common, simple transactions.

By using the word "include" in section 118.4(1)(c.1), the list of what comprises "mental functions" and the examples given in the Explanatory Notes in respect to each category are not exclusive. There may be impairment in other mental functions that the qualified professional (QP) can as well give opinion as being a qualifying impairment for the DTCC .

It is to be noted that in outlining the various functions under the heading "memory" in the Explanatory Notes, by using the word "or", impairments in any one of the mental functions listed under memory would be sufficient to qualify. However, in the next paragraph describing the mental functions of problem-solving, goal-setting and judgment, by using the word "and" means that the applicant must be markedly restricted in all of these mental functions in order for the QP to certify that the applicant is markedly restricted and therefore entitled to DTCC.

Finance gives no rationalization why the separate components of some mental functions such as memory can be considered disjunctively and yet in another function must be considered conjunctively to qualify for the DTCC.

Finance's position is a blatant disregard of the TAC professionals who were appointed by the Minister because of their expertise and who state that it makes no sense clinically to require that impairments in problem solving, goal setting and judgment always occur together. The Tax Court of Canada, in *Radage v. Her Majesty the Queen* [96 DTC 1615](#) Tax Court of Canada, July 12, 1996, in dealing with like mental functions components, namely think, perceive and remember as found in previous section 118.3 of the Income Tax Act, found that they must be considered disjunctively and not conjunctively. This is analogous to new section 118.4(1)(c.1). In other words, proof of sufficient impairment in one of the three mental functions of problem solving, goal setting or judgment is sufficient.

The Ministry's and CRA officials' position requiring impairment in all three mental functions of problem solving, goal setting or judgment to be present, has only to do with limiting fiscal costs. Furthermore, it flies in the face of achieving fairness and equity, their clearly stated objective in establishing TAC.

Counsel representing applicants for DTC should seek professional consultation if CRA continues to insist that impairment in all three processes of those particular mental functions is required to be present to qualify for the DTCC.

My second concern is with respect to the revised application form T2201E (05) for securing a Disability Tax Credit Certificate. It is confusing and discriminatory.

In the form, the phrase "markedly restricted" is defined on page 3 of the Introduction and the phrase "an inordinate amount of time" is defined on page 6, each phrase having distinctly different meanings.

Part B of the form is to be completed by a QP as defined on page 1 of the form. The QP, in determining whether the applicant qualifies, must be satisfied that "your patient must have an impairment in physical or mental functions which is both severe and prolonged."

In Part B, in addition to the QP being satisfied that the applicant has impairment in mental functions which are both severe and prolonged, the QP must apply two criteria regarding the patient's impairment and do so separately:

1. Consider the effects of the impairment, not just the presence of it, and determine that the effects of the impairment results in a marked restriction in a basic activity of daily living.
2. Consider the duration of the impairment. It must be "prolonged" , which is defined as being an impairment that has lasted or is expected to last for a continuous period of at least 12 months.

On the one hand it appears that a QP has to demonstrate that the applicant is, at all times or substantially all the time, unable to perform a task or it takes that person an inordinate amount of time to perform one of the activities of daily living by comparing the applicant to an average person. On the other hand, Part B requires that the QP must demonstrate that the applicant has an impairment that is both severe and prolonged. One must ask - which must be proven? This is most confusing and should be clarified immediately.

The ministers of finance and revenue should have their respective departments immediately issue an information bulletin correcting the T2201 E (05) form reflecting the above concerns and appropriately amending the Release and Explanatory Notes so that the declared objective of achieving fairness will be accomplished.

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### **The Fidler Case**

*By Caroline Schulz*

On June 29<sup>th</sup>, The Supreme Court of Canada upheld a lower court's award of \$20,000 in mental distress damages and overturned an award of \$100, 000 in punitive damages to a woman who had been cut off long-term disability benefits by Sun Life Assurance Company of Canada, because the later wrongly maintained that she was capable of working. This decision clarifies the law on mental distress damages and places increased weight on disability insurance contracts, while also establishing, to the relief of

the insurance industry, that insurance companies must demonstrate severely crooked conduct before incurring punitive damages.

Canadian courts have traditionally not awarded mental distress damages for breach of contract. In keeping with the English case of *Addis v. Gramophone Co.*, [1909] A.C. 488, the courts have maintained that to be awarded damages for mental distress for breach of contract, the claim must be grounded in “independent actionable conduct”, like fraud or defamation for example.

However in *Fidler*, the Supreme Court modified its usual stance. The Court concluded that mental distress damages ought to be recoverable for breach of contract as long as such distress was within the contemplation of both parties at the time the contract was made. As such, the Court effectively ruled to include mental distress damages in the *Hadley v. Baxendale* principle, which states that damages for breach of contract must be “such as may fairly and reasonably be considered either arising naturally...from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties.”

According to the Court, normal commercial contracts would not qualify for mental distress damages, but contracts “to give a particular psychological benefit” would. The Court stated that when parties enter into a contract, “an object of which is to secure a particular psychological benefit”, “damages arising from such mental distress should in principle be recoverable where they are established on the evidence and shown to have been within the reasonable contemplation of the parties at the time the contract was made. The basic principles of contract damages do not cease to operate merely because what is promised is an intangible, like mental security.”

The Supreme Court decided that a disability insurance contract is not an ordinary commercial contract, but one that is designed to provide a reasonable expectation of psychological security:

“Mental distress is an effect which parties to a disability insurance contract may reasonably contemplate may flow from a failure to pay the required benefits. The intangible benefit provided by such a contract is the prospect of continued financial security when a person’s disability makes working, and therefore receiving an income, no longer possible. If benefits are unfairly denied, it may not be possible to meet ordinary living expenses. This financial pressure, on top of the loss of work and the existence of a disability, is likely to heighten an insured’s anxiety and stress. Moreover, once disabled, an insured faces the difficulty of finding an economic substitute for the loss of income caused by the denial of benefits.”

In establishing that damages for mental distress resulting from a breach of contract are payable “where such damages were in the reasonable contemplation of the parties at the time the contract was made,” the Supreme Court has modified the common law and provided relief to persons with long term disability. In recognizing that disability insurance contracts are more than commercial contracts as they provide more than mere financial support in the event of disability, but also the expectation of this financial security, the Supreme Court has clarified the importance of disability insurance contracts and made it more difficult for insurance companies to falter in their obligations- though not impossible.

The Supreme Court overturned \$100, 000 in punitive damages that *Fidler* had been awarded by the British Columbia Court of Appeal. The Supreme Court found that while Sun Life’s conduct was at times “zealous”, the insurer had not acted in bad faith and as such, the defendant was not entitled to punitive damages.

With regard to the \$100,000 claim for punitive damages, McLachlin and Abella held that "an insurer will not necessarily be in breach of the duty of good faith by incorrectly denying a claim that is eventually conceded, or judicially determined, to be legitimate." They emphasized that "to attract punitive damages, the impugned conduct must depart markedly from ordinary standards of decency – the exceptional case that can be described as malicious, oppressive or high-handed and that offends the court's sense of decency."

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## **Personal Essays:**

### **The UN Committee on the Rights of Persons with Disabilities**

*By Martin Saidlaw*

For the last six years, the United Nations *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, chaired by New Zealand Ambassador Don MacKay, has been negotiating an international convention that will oblige States to take positive measures to enhance the situation of persons with disabilities. On August 25<sup>th</sup> of this year, a final text was agreed upon. If all goes to plan, the convention will be adopted by the General Assembly at some point over the next year, and then will be open to signing and ratification. Once it enters into force, the *Convention on the Rights of Persons With Disabilities* will create an international legal obligation for countries to enact legislation addressing disability issues.

The purposes of this convention, similar to those of the *Convention on the Rights of the Child* and the *Convention on the Elimination of All Forms of Discrimination Against Women*, are to bring attention to the particular difficulties faced by persons with disabilities, and to propose concrete manners in which their situation might be improved. With 29 substantive articles, the draft text goes into significant detail on issues ranging from basic needs (accessibility to public facilities) to more subtle difficulties (participation in cultural life). Although the UN website underlines that the convention does not create any *new* rights, it does create obligations on states to pass legislation improving the situation of persons with disabilities. Currently, only about 45 countries have such specific legislation. As Ambassador MacKay put it, "What we're basically doing in the convention is setting out a code for governments so that they implement these broad rights that people with disabilities already actually are entitled to but are not receiving."

In addition, an optional Protocol to the Convention gives the Committee on the Rights of Persons with Disabilities the ability to hear complaints from individuals or groups who allege violations of the Convention. The Committee, after hearing these complaints, can then make recommendations to the State Party concerned, and ask for a report on measures taken within six months. This Protocol, by providing an independent overseer of compliance with the Convention, should encourage signatories to be diligent, and may bring to their attention problems that they had chosen to ignore.

The negotiations, however, were not without their difficulties. Five countries objected to a mention of "foreign occupation" in the preamble. Others were concerned that the obligation for equal provision of sexual and reproductive health services would force countries to allow abortion. Even the definition of "disability" was a contentious issue; Nevertheless, these issues were all finally sorted out,

and a consensus reached. The result is a comprehensive, detailed text which should make a clear difference for persons with disabilities, particularly in countries that do not yet have suitable legislation.

As mentioned above, the Convention will likely come into force sometime over the next year. For more information and news on the Convention, please visit <http://www.un.org/disabilities/convention/>

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## **Disability and Employment**

### **Be careful discontinuing an employee's disability coverage after termination**

*By Ainslie Benedict*

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Employers may wish to reassess the common practice of discontinuing a terminated employee's short- and long-term disability coverage at the end of the minimum notice period specified in provincial employment standards legislation. In a recent decision, the Ontario Court of Appeal confirmed that an employer who had continued group insurance coverage only during the statutory notice period mandated by the Employment Standards Act was liable for paying disability benefits when a terminated employee became disabled during her reasonable notice period: *Egan v. Alcatel Canada Inc.*, [2006] O.J. No. 34.

In 2000, Mary Egan was recruited into a managerial position at Alcatel after almost 20 years of continuous employment with the Bell Canada family of companies. At the time she moved to Alcatel, she was 40 years of age and was earning \$85,000 annually, plus benefits.

Two of Egan's former colleagues at Bell, who had moved to Alcatel, encouraged her to seek employment with Alcatel and then recommended her to an executive at the company. Unbeknownst to Egan, the two employees shared an \$8,000 bonus paid by Alcatel when she was hired.

Egan asked for and received an annual base salary of \$125,000 from Alcatel, which she felt she needed to make up her pension loss at Bell Canada. She also received a \$5,000 signing bonus. Shortly after commencing her new employment, her base salary was increased to \$135,000.

In July 2002, after a period of employment of less than 21 months, Egan was dismissed as part of a mass termination. She was given 12 weeks salary in accordance with the Ontario Employment Standards Act. Alcatel offered additional compensation in exchange for a full and final release. In the termination letter, Alcatel advised Egan that she would remain covered for group insurance benefits, including short- and long-term disability, until the end of the 12-week statutory notice period.

Subsequent to her dismissal, Egan became ill. By Oct. 1, 2002, approximately 13 weeks after her termination and one week after Alcatel had discontinued her insurance coverage, Egan was totally disabled. She remained disabled for a period of one year.

Egan sued for wrongful dismissal. Part of her claim was for losses incurred as a result of Alcatel's failure to maintain her disability insurance throughout the reasonable notice period.

The trial judge concluded that, notwithstanding Egan's relatively short period of employment with Alcatel, the reasonable notice period was nine months. The trial judge noted that in *Wallace v. United Grain Growers Ltd.* (1997), [152 D.L.R. \(4th\) 1](#) (S.C.C.), the Supreme Court of Canada had confirmed that one of the additional factors that could tend to lengthen the period of reasonable notice was inducement from secure employment. He concluded that Egan had been "encouraged" by Alcatel and its employees to leave Bell Canada and that this constituted inducement.

The trial judge found that Egan was not entitled to damages for her lost disability insurance benefits, which he concluded would have amounted to a double recovery.

Alcatel appealed the trial judge's award of a nine-month notice period based on Egan's less than two years of employment. Egan cross-appealed the dismissal of her claim for lost disability benefits.

With respect to the finding of inducement, the Court of Appeal indicated that the trial judge's use of three different words in relation to the actions of Alcatel - "encouraging" , "inducements" and "enticed" - "can only lead and did lead to confusion" . The court nonetheless agreed that Egan had been induced to join Alcatel and that a nine-month notice period was appropriate in light of her 20 years of service with Bell Canada and her almost two years at Alcatel.

The court agreed with the trial judge that Alcatel was responsible for maintaining Egan's disability insurance coverage throughout the nine-month notice period. It also concluded that Alcatel was liable to Egan for the disability benefits she would have received had she been properly covered during the notice period.

The Court of Appeal ordered Alcatel to pay Egan's salary for 13 weeks, from her termination date until the date on which she became disabled, and then to pay her an amount equivalent to the disability benefits under her group coverage (an amount less than her full salary) until she recovered one year later.

The court ordered that the short- and long-term disability payments component of the damages should be grossed up to compensate Egan for the fact that the damages for wrongful dismissal paid by Alcatel were taxable, whereas payments from her insurance company would not have been.

As a result of this decision, employers who fail to maintain short- or long-term disability coverage throughout the reasonable notice period will be deemed to have stepped into the shoes of the disability insurer. If a former employee becomes disabled during the reasonable notice period, the employer may find itself responsible for paying the disability payments until the employee recovers or, potentially, to age 65.

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## **What are the real effects of Ontario's end to mandatory retirement?**

*By Morton G. Mitchnick*

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On Dec. 12, Bill 211, the Ending Mandatory Retirement Statute Law Amendment Act will come fully into effect, making it a violation of the Human Rights Code for employers under Ontario provincial jurisdiction to discriminate in employment for employees above the age of 65 (previously the cut-off for protection under the Code). Other than for jobs for which being younger than 65 can be shown on a blanket basis to be a "bona fide occupational qualification", this will bring an end to all contracts or policies calling for the mandatory retirement or termination of an employee simply on the basis that the employee has reached the age of 65.

The ability of employees to choose to retire, with or without an employer pension or severance package, continues as before, at any age. What will be missing is the ability of the employer to decide unilaterally whether it wishes to have any or all employees reaching the age of 65 "retire" or otherwise bring an end to their employment. How much difference do we anticipate that that will make?

For starters, a number of other Canadian provinces (some as far back as the early 1980's) have already abolished "mandatory retirement". And studies done to track the ensuing pattern of retirement in those provinces show virtually no difference before and after the change in the law (in Quebec the rate of retirement actually went up). It is apparent, therefore, that the decision by employees to retire or not is, in the main, driven by considerations separate and apart from their strict legal rights. Beyond that, governments and employers everywhere are being forced to come to grips with the demographic fact that employees (and in particular the higher level of skilled ones) are retiring from the workforce faster than younger employees are entering the workforce (and able to be trained) to replace them. Apart from the enormous issue that that is raising from the point of view of the ongoing funding of pension benefits for those now expecting to draw them, it is becoming apparent that for many employers, the real human-resource issue that they are being faced with is not how to sever their more senior, experienced employees, but how to keep them.

Be that as it may, it is important to recognize for employers what will and will not change when Bill 211 comes fully into play. The government has elected, at this stage at least, not to effect any changes to the Pension Benefits Act, meaning that the rules regarding entitlement to pensions will not change. But the federal rules for "registration" of pension or retirement savings plans (and thus maintenance of their tax-deferral status) also remain unchanged. That means that employees under such registered plans may not continue to make contributions or accumulate credits for such plans beyond the date they reach 69.

The existing allowances under the Employment Standards Act for differentiation based on age in pension and disability plans are stated by the government to have been maintained as well (although some doubt exists as to whether the language used in Bill 211 actually accomplishes this). More clearly, the current caps on entitlements under the Workplace Safety and Insurance Act are preserved by Bill 211, meaning that benefits for those under 63 cut off at age 65, and for those suffering an injury after age 63, after a benefit-period of two years. This continued differentiation in the Bill on the basis of age may well be faced with a Charter challenge (as may the purported continuance of the

Employment Standards Act exceptions), but in the meantime its effect is to leave employers the practical burden of providing disability benefits for their post-65 group, as well, it would seem, as being vulnerable to suits by this group in tort.

Clearly, however, the most immediate effect of the elimination of the age cap is to place on employers the burden of now demonstrating that a terminated employee even above the age of 65 was unable to perform the essential duties of the job. And where the employer's case is based on growing physical or mental incapacity, the Code's protection for "disability" may come into play; in which event the employer will have to show that the employment could not have been continued without "accommodation" beyond the point of "undue hardship".

Where no collective agreement or other contract is in existence stipulating that the dismissal of an employee may only be for "cause", the employer may be able to demonstrate that the position itself, for reasons unconnected to age, has become redundant or expendable, and effect a termination simply by the giving of reasonable notice (or pay in lieu). As age and length of service are both key factors in the assessment of what constitutes a "reasonable" period of notice, however, it will be interesting to see what the assessment of that period of notice may be by Ontario courts in this era of post-"mandatory retirement". It might be added that the statutory minima for notice of termination will likely now become applicable under the Employment Standards Act as well; as employers would appear no longer able to rely on the exemption in the Regulations for an "established practice" of retiring employees (such "practice", after Dec. 12, no longer being lawful).

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## **Disability and Education**

### **Older autistic children did not face age discrimination**

*By Jean Cumming*

*This article originally appeared in The Lawyers Weekly published by LexisNexis Canada Inc., reprinted with permission.*

Ontario's government may have won its appeal on two actions raised on behalf of 35 autistic children over six years of age, and their parents - but it's not bragging.

First, the momentous children's educational needs (and parental sacrifice) have cast a seriousness over the proceedings, and then there's the quieting effect of a promise Dalton McGuinty made when he was campaigning for the Premier's job. The Ontario Autism Coalition declared the group is "as committed as ever to holding Premier Dalton McGuinty accountable for breaking a promise made during the last election campaign that he would end the age six cut-off for autism treatment in Ontario."

Hotly contested here is the issue of whether or not it is discriminatory, i.e. against the Charter, for the government to restrict its Intensive Early Intervention Program (IEIP" ) to autistic children between the ages of two and five.

In March 2005, Justice Frances Kiteley of the Ontario Superior Court of Justice, held that the government's exclusion of children six years of age and over, "and the failure to provide it to them as a special education program in school, discriminates against them on the basis of age and disability, and therefore violates the equality guarantee in the Charter of Rights and Freedoms. Moreover, it is not a reasonable limit that can be justified in a free and democratic society."

Ontario's Court of Appeal panel, comprising Justices Stephen Goudge, Janet Simmons and Eileen Gillese, held to the contrary.

Describing the IEIP according to government ministry guidelines, the Court noted that it was "to be delivered as a direct service, which, to be effective, ranges from twenty to forty hours per week ... The program will occur in a variety of settings and involve parents and caregivers directly in the child's treatment."

But as the program moved ahead, "it became apparent that the need was greater than the capacity of the program." By October 2002, many children reached age six without having ever been in the program. Moreover, noted the Court, "the education system was not responding to the special needs of these children when they entered school, through a special education program consistent with the Guidelines."

On the claim of age discrimination, i.e. that autistic children six and over were discriminated against compared to autistic children age two to five, the trial judge found that the age cutoff "reflects and reinforces the stereotype that autistic children age six and over are virtually unredeemable."

But the appeal court could "see no basis for concluding that prior to the implementation of the IEIP, autistic children age six and over had historically suffered disadvantage because of their age compared to autistic children two to five."

And, the appeal court held, the IEIP was "carefully targeted to the special capacities of the children [age two to five] to receive assistance, which is exemplified by the window of opportunity they present because of their younger age." For the claimant group, continued the court, "what may well be needed is something that will be a different but equally exemplary program for them..."

One plaintiff counsel on the case, Scott C. Hutchison of Stockwoods LLP told *The Lawyers Weekly* his clients were disappointed, but also noted that "the Minister said things that indicate they're prepared to modify the program to address some of the concerns that animated the litigation in the first place. Moreover, he added, "we're studying the judgment very carefully."

Reasons: Wynberg v. Ontario, [\[2006\] O.J. No. 2732](#).

## **Disability and the Arts**

### ***The Next Generation High-School Students Discover Accessible Media***

*By Charles Silverman*

*This article was originally published in the Arts department of [Abilities](#), Issue 67, pp.42–43, Summer 2006*

Several years back, my teenage daughter started her high-school journey at Ursula Franklin Academy in Toronto. She became involved in videography, loved it and learned to make movies, everything from documentaries to film noir. Each year, the young filmmakers, their parents and teachers attend “Night at the Movies,” a special screening of their works at the National Film Board of Canada.

As I sat in the theatre with the other parents, I realized I couldn’t fully share in the experience. I have severe to profound hearing loss, and although I did my best to guess at what was going on, I soon realized it was a hopeless task without captioning. Instead of dwelling on the barrier this presented, I did the next best thing and started daydreaming about getting the kids interested in accessible media. There are so many high-school students who want to make a difference and who care passionately about the big issues affecting the world. Shouldn’t accessibility be right up there with justice and equity concerns? Wouldn’t it be interesting to teach them about the benefits of captioning and video description, universal design and how accessible media can benefit everyone, including people with disabilities?

Incredibly, what I wished for that evening actually came true. Two years later, I was presented with the opportunity to work with high-school kids on creating accessible new media. Two projects, Stretch and Artists as Innovators, enabled this to happen. Both are funded by the Canadian Culture Online Program of Canadian Heritage. Artists as Innovators is part of a larger research network, CulturAll, a multi-partner initiative aimed at discovering innovative ways to include people with disabilities in Canada's online cultural exchange. The opportunity to work on the project was not just timely, but also uniquely personal. Ursula Franklin Academy was identified as one of the schools that would partner in the Stretch project, along with Vaughan Secondary School and Parkdale Collegiate in Toronto.

So, there I was, actually living out my daydream of teaching those students about accessible media. I spent quite a bit of time in the classroom, exploring the twin themes of accessibility and inclusion with kids and teachers, talking about media accessibility from a curb-cut metaphor point of view, and actually making access happen (not to mention working very hard not to embarrass my teenage daughter).

The efforts of the Stretch staff, teachers and students culminated in an exhibit at the Design Exchange in Toronto at the end of March. You can view the students’ video works in Stretch’s online gallery (<http://stretch.atrc.utoronto.ca>) — you’ll note they all have captions and video descriptions.

So, why was it so important to tackle accessible media in high schools? A lot has changed in what and how schools teach young people today. In schools, as in society at large, we’ve adopted digital technology. Computers, iPods, camcorders, cell phones—these are the protractors, pencils and crayons of yesteryear. Today’s English class is an English Media class. In some schools, every kid has an iBook, and instead of producing a year-end play, students are required to produce video dramas, which they write, direct and edit. We live in a post-literate world in which traditional linear print media is being supplanted by an electronic, non-linear, multimedia experience.

In terms of access, video and audio can be quite challenging. Most broadcast and video rentals are captioned, and broadcasters have begun to provide Descriptive Video for people with vision disabilities. Unfortunately, the web is lacking in this regard. Examples of captioning on the web are few and scattered, and video description for web-based content is practically non-existent.

If we want to make sure that media is accessible from the get-go, we can deal with the current industry and all the attitudes and barriers. There's another way: why not work with the kids who one day will make up this industry?

To get the students started with the idea of universal design, we explored the most compelling example of real-world accessibility solutions—the curb cut. Sure, these were introduced for people using wheelchairs to make it easier for them to get onto the sidewalk. But ask a kid why curb cuts exist and you'll get a long list. They'll say that the curb cut is for a kid on wheels, a skateboarder, a scooter, a bike, pulling a wagon, a mom with a stroller, or even a Segway. Wheelchairs are there, but not at the top of the list. The kids don't see these things as labels, but as function. The curb cut becomes a metaphor and a good example of how, when something is designed well, it meets the needs of many different people and situations.

Shifting from curb cuts to ways to design online and create inclusive, media-rich experiences, we explored some of the reasons to add captioning or description to video:

1. Watch TV in bed without annoying sleeping spouse.
2. Talk on phone and watch "House" at the same time.
3. Become adept at trivia e.g., What was Dorothy's last name in "The Wizard of Oz"?
4. Never miss another spoken word.
5. Name background music.
6. Salvage video when the quality of the audio is terrible.
7. Retrieve transcript from captured closed captions.
8. Gain text exposure for second language speakers and people with learning disabilities.
9. Potential access to searchable database.
10. Access for Deaf and Hard of Hearing viewers.

Video description, as we explained to the students, is about providing critical visual information when the viewer doesn't have visual access to television, movies or even live theatre and other events for any number of reasons. A person may be blind or have low vision, may be away from the television or doing other tasks, or may simply need or desire clarification about what is being viewed. People for whom English is a second language have commented that video descriptions help them to understand the content. With this approach, captioning and video description became easy leaps in understanding for the students.

In the Stretch project, we assisted students with adding captions and descriptions to their work. Often, the addition of captions and descriptions resulted in creative leaps for the students, too. The students used CapScribe, a software program developed by yours truly to add captioning and description to online video. (By the way, CapScribe is a free program and is available for download at the Stretch website and [www.capscribe.com](http://www.capscribe.com).)

Did the kids “get it”? I think they did. In the words of Mac Pepler, one of our students:

"How to begin? I only recently got involved in the whirlwind of activity that is the Stretch project. It began with a visit to the University of Toronto to learn about accessibility issues and what could be done for time-based multimedia. Instantly, I knew that this would not be one of those in-and-out projects. It has been a continuous roller coaster of excitement and I wouldn't trade it for anything. For people who can't hear or see, this concept of bridging the gap is essential. But what we discover is the universality of this bridge, how it can apply to everyone. What is it about description, what makes it intriguing? As a filmmaker at heart, description gives me yet another medium in which to convey my messages. Captions bring clarity. The concepts of universal design, the idea that something can be created so perfectly that it is accessible to everybody, and would be impossible to determine its original application, and so ingrained in our society that we could not imagine life without it."

Students like Mac who plan on becoming part of the broadcast and media industry are now armed with an understanding that media access is too important to ignore, and view captions and audio descriptions not as afterthoughts but as key parts of what we need to do.

As for me, I finally got to have the full experience of those student videos. Charles Silverman teaches accessibility and technology at Ryerson University's School of Disability Studies. He would like to thank everyone involved with the Stretch project for all of their hard work and big dreams—hats off to you!

To view student works, please visit <http://stretch.atrc.utoronto.ca>. For more information about Artists as Innovators and the CulturAll Research Network, please visit <http://culturall.atrc.utoronto.ca>. Charles Silverman can be reached at [charles@captionweb.ca](mailto:charles@captionweb.ca).

## **Disability and Travel**

### **Disabled Friendly Travel Resources**

The following disabled friendly travel internet resources provide a wealth of information on the organizations and companies who cater to the needs of mobility challenged individuals.

#### **Society for Accessible Travel and Hospitality (SATH)**

Founded in 1976, SATH is an educational nonprofit membership organization whose mission is to raise awareness of the needs of all travelers with disabilities, remove physical and attitudinal barriers to free access and expand travel opportunities in the United States and abroad. Members include travel professionals, consumers with disabilities and other individuals and corporations who support our mission. [sath.org](http://sath.org)

#### **Handicapped Travel Club (HTC)**

Formed in 1973, HTC encourages RV traveling for people with a wide range of disabilities. HTC encourages people with disabilities and their families to travel, to meet and to share information on making recreational vehicles accessible for the disabled. [handicappedtravelclub.com](http://handicappedtravelclub.com)

### **Rolling Rains Report on Travel, Universal Design & Disability**

This site provides reviews of the tourism industry from a disability perspective and follows the development of accessible leisure and travel opportunities worldwide. [rollingrains.com](http://rollingrains.com)

### **Access-able Travel Source**

Dedicated to mature and disabled travelers 1995, Access-able provides information on disability magazines, how to travel with special needs, guides for cities, resorts and attractions, and where to find wheelchair and scooter rentals when you are on the road. [access-able.com](http://access-able.com)

### **Disabled Travelers**

Provides information on businesses from around the world that specialize in travel for the disabled, including travel agents, tour operators, adventure travel companies, accessible cruise specialists, accessible van and equipment rentals, travel companions, home exchanges, and access guides for wheelchair users and other disabled travelers. [disabledtravelers.com](http://disabledtravelers.com)

### **World on Wheels**

This site dedicated to first-hand accounts of disabled friend travel and, specifically, travel by those in a wheelchair. The site is mainly comprised of traveler trip reports that concentrate on a particular destination's accessibility, as well as its attractions. [geocities.com/Heartland/6295/](http://geocities.com/Heartland/6295/)

### **The Opening Door**

With its mission to open doors to persons with disabilities so they can enjoy all that the world has to offer, this organization's web site, [travelguides.org](http://travelguides.org), offers disabled friendly travel links, access guides, databases and publications. [travelguides.org](http://travelguides.org)

### **World on Wheelz**

Originally created to be a helpful tool for disabled travelers who were planning their own trips, World On Wheelz now works with a travel agency to arrange and book accessible trips for disabled travelers. [worldonwheelz.com](http://worldonwheelz.com)

### **Rolliday**

An international disabled friendly travel resource that provides information on different types of holidays and a database of 3000 lodging accommodations for people with disabilities. [rolliday.net](http://rolliday.net)

### **Swedish Independent Living Center. Vacation Home Swap**

Providing accessible vacation home exchange for people around the world with disabilities. [independentliving.org](http://independentliving.org)

### **E-bility Access Travel: Australia**

An accessible travel web site featuring disability related travel information, Australian tours, articles resources, services and products. [e-bility-com](http://e-bility-com)

### **Emerging Horizons**

A consumer oriented online magazine covering disabled friendly travel, Emerging Horizons' primary focus is travel for people with mobility disabilities; everybody from wheelchair-users to slow walkers. Information covers resources, news and travel tips. [candy-charles.com](http://candy-charles.com)

**PREPARE FOR TAKEOFF!**  
**Travelling with a Guide Dog**

By Avril Rinn

*"This article first appeared in the Summer 2006 issue of Abilities Magazine (www.abilities.ca)."*

The yelp of pain was followed by a busload of sympathetic groans. "I'm so sorry!" cried the horrified young man who had stepped on the tail of Bismarck, my three-year-old German shepherd. Chin on my knee, the rest of him squeezed as close to me as possible, my trusty guide stoically endures our weekly trips on the overcrowded No. 2 bus. I try to keep track of his tail, but don't always succeed. When I used a white cane, I could fold it up and stow it in my backpack if things got crowded, but 75-pound Bismarck is not quite that compact.

Aside from the occasional stepped-on tail, however, Bismarck and I get around town fairly easily. Traveling with a guide dog presents unique challenges whether you're going across town or around the globe, but planning and research can reduce the frustration and hassle.

In Canada and the U.S., guide dogs are permitted in taxis and on all other forms of public transportation. Each province and state has its own laws, but they are basically the same: guide dogs can go anywhere people can, and guide dog users cannot be denied service or charged an extra fee because the dog is along for the ride. Individuals or organizations found guilty of violating these laws can be charged, with penalties ranging from fines of up to \$5,000 to jail time.

Transportation companies large and small have policies governing access. All allow guide dogs, but the details can vary - check when planning your trip. For example, VIA Rail offers guide dog users a double seat at no extra charge, while Amtrak's policy states that if the dog is found to be causing a "significant disturbance," the crew can turn it over to animal control officials.

Graduates of accredited guide dog schools are issued an ID card that includes a picture of the guide dog and master. Carry this card at all times - you and your dog could be denied access without it. Going abroad, including visits to territories of the U.S., can be more complicated.

"Detailed research is necessary," says Marie Stark of Ottawa, who has traveled extensively and always takes her dog, Zena. "Procedures change all the time and are different with each country."

Canadian consulates and embassies in your destination country are a good place to start your research. (Visit [www.dfaitmaeci.gc.ca/world/embassies/menu-en.asp](http://www.dfaitmaeci.gc.ca/world/embassies/menu-en.asp) for a list.)

Typically, travelers with guide dogs are asked to provide a vaccination record, a recent health certificate, proof that their dogs are trained guide dogs and not pets, and forms unique to the country they are visiting. Arranging all the paperwork can take weeks, so start the process early.

It's also important to consider your dog's needs. Dogs, like people, are individuals who may or may not adapt well to the stresses of travel, and they have unique needs around relief times, eating,

drinking and sleeping. Traveling will be much less stressful for both you and your dog if you take this into account.

"You really need to know your dog," says Dawn Crockett, from London, Ontario, explaining that though her dog, Zeek, likes to travel on a full stomach, some dogs don't, and withholding food until the end of the trip is necessary.

Crockett says another challenge is that some dogs will only "go" on grass, which is not the easiest thing to find in airports and train stations. She suggests "practicing" with your dog on alternative surfaces prior to the trip if you think this might be a problem.

With forethought and planning, guide dogs and their owners can have safe and enjoyable travel experiences. Bismarck and I can hardly wait for our next adventure!

*Avril Rinn and Leader Dog Bismarck live and work in London, Ontario.*

## PLANNING YOUR TRIP

Here are several tips from experienced travelers to help ensure your dog's comfort and safety on your next journey:

- \* Use a travel agent to make arrangements that include your dog.
- \* Have your guide dog's existence noted on all travel documents.
- \* On long trips, ensure the dog has enough room to lie down, cannot be stepped on, and is not too close to a heater or air conditioner.
- \* Arrange flights around the dog's schedule when possible.
- \* Insist on a bulkhead seat when flying so that there is space for your dog. Allow the dog to move around during the flight, and feed your dog ice to keep her from becoming dehydrated.
- \* Bring the dog's regular food and use bottled water.
- \* Carry a pet first-aid kit.