

## **Overcoming Barriers to Accessibility: The Ontario Experience**

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### Background

In 2005, Ontario became the first province in Canada to pass legislation with respect to establishing a goal and time-frame for accessibility. The *Accessibility for Ontarians with Disabilities Act, 2005* (the “AODA” or the “Act”)<sup>1</sup> enabled the government to develop mandatory accessibility standards aimed at identifying, removing and preventing barriers for persons with disabilities in key areas of daily living.

Other provinces followed suit shortly after the AODA’s enactment, with Manitoba passing the *Accessibility for Manitobans Act* in 2013 and Nova Scotia passing the *Accessibility Act* in 2017. With the development of the *Canadians with Disabilities Act* now underway, which will apply to all areas under the control of the Government of Canada (e.g. interprovincial/international transportation, broadcasting and telecommunications, banks and financial sectors, and federal lands), it will be important for the federal government to learn from the experiences of provincial governments who already have accessibility legislation in place.

Accordingly, the following sections provide an overview of Ontario’s experience in drafting and implementing accessibility legislation, including: (1) a review of human rights cases prior to the development of accessibility legislation; (2) Ontario’s experiences with the *Ontarians with Disabilities Act* (“ODA”),<sup>2</sup> the precursor to AODA; and (3) the framework and implementation of the AODA, including ongoing criticisms of the legislation.

### Accessibility in Human Rights Case Law

Prior to the enactment of the ODA and AODA, the Ontario *Human Rights Code* (the “Code”)<sup>3</sup> was the one of few pieces of legislations in Ontario under which accessibility matters were addressed. The *Code* provided for an individual complaints mechanism, whereby Ontarians could bring applications alleging discrimination under one or more of the enumerated grounds, including disability. This mechanism initially involved a two-step process: (1) human rights complaints would be filed with the Ontario Human Rights Commission (“OHRC”), which would investigate claims of discrimination; and (2) the OHRC would then have the discretion to refer appropriate

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<sup>1</sup> *Accessibility for Ontarians with Disabilities Act, 2005*, S.O. 2005, c. 11, s. 1 [AODA].

<sup>2</sup> *Ontarians with Disabilities Act, 2001*, S.O. 2001, c. 32 [ODA].

<sup>3</sup> *Human Rights Code*, R.S.O. 1990, c. H.19 [ODA].

claims of discrimination for a hearing at the Ontario Board of Inquiry and later the HRTO.<sup>4</sup> Notably, this system was very similar to the current human rights regime in place at the federal level.

On June 30, 2008, the Ontario legislature changed this framework and shifted the OHRC's responsibility for processing new individual human rights complaints to the HRTO. The HRTO became responsible for dealing with all discrimination applications filed under the *Code*, while the OHRC's mandate focused on preventing discrimination through public education and public policy.<sup>5</sup>

During the period in which the two-step complaints process was in effect, many of the cases heard by the Ontario Board of Inquiry/HRTO regarding accessibility concerned issues of physical accessibility. For example, in both *Turnbull v Famous Players Inc.* ("*Turnbull*")<sup>6</sup> and *Brock (Litigation Guardian of) v Tarrant Film Factory Ltd.* ("*Brock*"),<sup>7</sup> the Ontario Board of Inquiry heard complaints with respect to wheelchair accessibility in movie theatres. The Board determined that by failing to provide accessible facilities, the theatre respondents had discriminated against the complainants.

In *Turnbull*, the complainants were awarded between \$8,000-\$10,000 each for infringement of their rights. The Board of Inquiries also required the respondent to make its theatre locations wheelchair-accessible within a certain timeframe and file an implementation plan with respect to same with the Board. The respondent was also ordered to review its training program for employees that deal with issues about providing service to persons with disabilities.<sup>8</sup>

In *Brock*, the complainant was awarded \$3,000 for infringement of his rights. The respondent was also ordered to renovate the movie theatre to make it wheelchair accessible and formulate a plan and timetable for implementation based upon an expert's report. The maximum amount to be spent on the renovation was \$60,000, which took into account the feasibility of the work from an architectural/engineering perspective and satisfaction of statutory/regulatory requirements.<sup>9</sup>

The series of cases between David Lepofsky and the Toronto Transit Commission ("*TTC*") at the HRTO also concerned physical accessibility issues, particularly with respect to *TTC* vehicles. In the

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<sup>4</sup> Ontario Human Rights Commission, "The transformation continues," Ontario Human Rights Commission, online: <<http://www.ohrc.on.ca/it/node/3073>>.

<sup>5</sup> *Ibid.*

<sup>6</sup> [2001] OHRBID No. 20 [*Turnbull*].

<sup>7</sup> [2000] OHRBID No. 5 [*Brock*].

<sup>8</sup> *Turnbull*, *supra* note 6 at para. 282.

<sup>9</sup> *Brock*, *supra* note 7 at para. 100.

2005 decision,<sup>10</sup> the (previous) HRTO ordered the TTC to commence announcing subway stations and conduct educational seminars regarding the importance of doing so. The 2007 decision<sup>11</sup> concerned accessibility for visually-impaired TTC-riders on other vehicles, such as streetcars and buses. The HRTO not only ordered the TTC to announce all stops on buses and streetcars, but also awarded the complainant \$35,000 in damages for infringement of his rights. The respondent was also ordered to hold an open, accessible and advertised public forum annually for the next three years on issues of accessibility and accommodation on the TTC.<sup>12</sup>

Other examples of early human rights cases involving issues of accessibility can be found in *Brown v Trebas Institute Ontario Inc. ("Brown")*<sup>13</sup> and *Di Marco v Fabcic ("Di Marco")*.<sup>14</sup> In *Brown*, the complainant alleged that the respondent failed to provide him with course materials and programs in an alternate format that accommodated his visual impairment. The HRTO awarded \$12,500 in general damages to the complainant. In *Di Marco*, the complainant brought an application with respect to the absence of a ramp and railing at her residential building. The HRTO awarded the complainant with \$2,000 in general damages.

Bearing in mind the facts of the foregoing, with the enactment of the ODA and the AODA, the understanding of accessibility expanded to include the removal of non-physical barriers in addition to physical ones. Both the ODA and AODA describe "barrier" as "anything that prevents a person with a disability from fully participating in all aspects of society because of his or her disability, including a physical barrier, an architectural barrier, an information or communications barrier, an attitudinal barrier, a technological barrier, a policy or a practice".<sup>15</sup> In the following sections, we discuss the ways in which the ODA and AODA have attempted to overcome these kinds of barriers.

### **Ontarians with Disabilities Act, 2001**

The ODA was passed by the provincial legislature in 2001 and came into force on February 7, 2002. The ODA applied only to the public sector, however, and required public buildings, government services and publications to be accessible to all Ontarians. The ODA focused on barrier identification, barrier removal planning, and reporting requirements for government and

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<sup>10</sup> *Lepofsky v Toronto Transit Commission*, [2005] OHRTD No. 20.

<sup>11</sup> *Lepofsky v Toronto Transit Commission*, [2007] OHRTD No. 41.

<sup>12</sup> *Ibid* at para. 12.

<sup>13</sup> [2008] OHRTD No. 8.

<sup>14</sup> [2003] OHRTD No. 4.

<sup>15</sup> *AODA*, *supra* note 1 at s. 2(1); *ODA*, *supra* note 2 at s. 2(1).

public institutions.<sup>16</sup> Unlike the AODA, the ODA did not provide standards under which government plans and guidelines for accessibility were to be developed.

Accordingly, the ODA was viewed merely as a public sector planning document, as it did not create new rights for persons with disabilities in Ontario and it did not compel barrier removal. The ODA contained no enforcement mechanisms, such as a legislative route to the courts or an administrative tribunal charged with interpretation of the statute. Rather, the Government retained the power to interpret the ODA as well as the power to exempt any public sector entity from application of the statute. Finally, and most notably, the ODA did not apply to the private sector.<sup>17</sup>

As discussed in the following section, the Government of Ontario attempted to address the shortcomings of the ODA by introducing the AODA in 2005. The new legislation established a mechanism for prescriptive accessibility standards and timelines for both the public and private sectors to implement the standards.

Following the enactment of the AODA, the Ontario legislature repealed sections of the ODA addressed by the AODA and its regulations, such as the requirement upon certain public organizations to develop accessibility plans and accessibility advisory committees. Other provisions of the ODA continue to be in effect and most government and major public institutions now have accessibility obligations under both acts.

## **Accessibility for Ontarians with Disabilities Act (AODA)**

### **A. Framework of the AODA**

With the enactment of the AODA in 2005, the Government of Ontario was able to address some of the major criticisms of the ODA. The purpose of the AODA is to achieve accessibility for Ontarians with disabilities in goods, services, facilities, accommodation, employment and buildings in all sectors (except for those within the charge of the federal government) by January 1, 2025. Thus, the AODA set out a timeframe for achieving accessibility and also empowered the Ontario government (with the involvement of persons with disabilities) to develop accessibility standards.<sup>18</sup>

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<sup>16</sup> Ontario Human Rights Commission, *Ontario Human Rights Commission Submission regarding Accessibility for Ontarians with Disabilities Legislative Review* (Toronto: Ontario Human Rights Commission, 2009).

<sup>17</sup> Phyllis Gordon et al., "An Analysis of the Ontarians with Disabilities Act, 2001" (2000) *Journal of Law and Social Policy* 17 at 21.

<sup>18</sup> AODA, *supra* note 1.

Accessibility standards set out steps to identify and remove existing barriers to accessibility, as well as prevent the creation of new barriers, in five areas of daily life:

1. Customer service standard
2. Information and communications standard
3. Transportation standard
4. Employment standard
5. Design of public spaces standard<sup>19</sup>

The accessibility standards require the government, businesses, non-profits and public sector organizations to carry out the steps within a specific period of time.<sup>20</sup> The AODA further requires persons or organizations to whom an accessibility standard applies to file publicly available accessibility reports with the director appointed under the AODA, either annually or as specified by the director.<sup>21</sup>

B. Accessibility Standards for Employment

The accessibility standards with respect to employment are found in Part III of O Reg 191/11, *Integrated Accessibility Standards* (the “Employment Standard”). The purpose of the Employment Standard is to integrate accessibility into regular workplace processes and ensure that employers provide for accessibility across all stages of the employment life cycle.<sup>22</sup> The Employment Standard applies only to paid workers, including full-time and part-time employees, seasonal workers, and paid apprenticeships. It does not apply to volunteers or other unpaid staff.<sup>23</sup>

The following is an overview of the requirements of the Employment Standard:

*Recruitment, Assessment and Hiring of Employees*

- Employers must notify job applicants selected to participate in an assessment or selection process about the availability of accommodation during recruitment

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<sup>19</sup> *Ibid* at s. 6 (3).  
<sup>20</sup> *Ibid* at s. 6 (6).  
<sup>21</sup> *Ibid* at s. 14.  
<sup>22</sup> *Ibid* at s. 20.  
<sup>23</sup> *Ibid* at s. 20.

- Employers must consult with applicants and provide or arrange for suitable accommodation when requested
- When making offers of employment, employers must notify the successful candidate of their accommodation policies
- Employers must provide assessment and selection materials in an accessible format

#### *Management of Employees*

- Employers must develop a written process for the development of accommodation plans
- Employers must provide individualized workplace emergency response information to employees who have a disability
- Employers must develop a return to work process for employees who have been absent due to disability and require accommodation
- Employers must consider accessibility when performance managing, providing career development or when redeploying as an alternative to layoff
- Employers must provide training on the requirements of the accessibility standards to all employees

#### *Information and Communication*

- Employers must provide all employment-related information in accessible formats (e.g. application forms, employee orientation materials, etc.)
- When requested, employers must provide information that is needed for the employee to perform his or her job that is generally available to employees in an accessible format

#### *Policies*

- Employers must develop an organizational accessible employment policy statement
- Employers must develop, adopt, document and maintain policies that support the implementation of the commitments made in the policy statement
- Employers must inform employees about these policies

It should be noted that ensuring accessibility will not only require employers to remove physical barriers (such as providing ramps and elevators for employees with mobility issues, or documents in large print, brail or audio format for visually-impaired individuals) but also to remove attitudinal barriers. Such barriers often include stereotypes about persons with disabilities, particularly with respect to what they can and cannot do, as well as prejudices suggesting they are inferior or should be pitied.

Breaking down attitudinal barriers can be more difficult than addressing physical ones and will often require ongoing training with respect to these issues. Training and workshops provided to employees should highlight the internal biases and prejudices we may have about persons with disabilities and encourage them to actively identify and correct behaviour arising out of such misunderstandings. Furthermore, one of the best remedies to attitudinal barriers is familiarity; the more that coworkers engage and develop relationships with persons with disabilities, the more likely that these attitudes will give way to comfort, respect and friendship.

### C. Enforcement and Case Law

#### *1. Inspection*

In order to ensure compliance with accessibility standards, the *AODA* permits inspectors appointed under the Act to enter and inspect places during business hours without warrant and demand that a document, record or thing be produced for inspection. Warrants may also be obtained from a justice of the peace where there is reasonable ground for believing that a person or organization has contravened the *AODA* or the regulations.<sup>24</sup>

#### *2. Director's Orders and Penalties*

If it is determined that a person or organization has contravened the *AODA* or its regulations, the director may, upon providing notice, make an order requiring the person or organization to do any or all of the following:

- File an accessibility report that complies with the *AODA* within a specified period of time
- Provide the director with reports or information relating to compliance with accessibility standards
- Pay a fine or an administrative penalty<sup>25</sup>

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<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid* at s. 21 (3).

For corporations, the maximum administrative penalty for non-compliance is \$15,000.<sup>26</sup> However, fines for offences under the AODA (e.g. contraventions posing a health or safety risk) are much higher. A guilty corporation or organization in such circumstances can be fined up to \$100,000 per day under the AODA. Directors and officers of a contravening corporation or organization can also be fined up to a maximum of \$50,000 per day.<sup>27</sup>

It should be noted that before a director's order is made, the AODA provides the person or organization with the opportunity to make written submissions with respect to the alleged contravention within 30 days of receiving notice of the order.<sup>28</sup>

### *3. Appeal of Director's Order*

Director's orders under the AODA may be appealed to the License Appeal Tribunal (the "Tribunal") within 15 days after the day the order is made.<sup>29</sup> Such appeals are conducted via written hearing unless a party satisfies the Tribunal that there is good reason for an oral hearing.<sup>30</sup> After holding a hearing, the Tribunal has the power to confirm, vary or rescind the director's order.<sup>31</sup>

To date, the Tribunal has heard four appeals with respect to a Director's order under the AODA.<sup>32</sup> In each of these cases, the director had imposed an administrative penalty of \$2,000 on each organization for failing to file an accessibility report. The director reasoned that failure to file an accessibility report amounted to a major contravention because the AODA relies on self-reporting to monitor compliance.

The Tribunal disagreed with the orders, finding that failing to file an accessibility report was a minor contravention. Furthermore, since the organizations were in their first AODA reporting cycle, there was no contravention history (which would normally militate towards a greater penalty). Accordingly, the Tribunal reduced the penalty to \$500 for three of the organizations and \$250 for the remaining smaller organization.<sup>33</sup>

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<sup>26</sup> *Integrated Accessibility Standards*, O. Reg. 191/11, Schedule 2 [*Integrated Accessibility Standards*].

<sup>27</sup> *Ibid* at s. 83.

<sup>28</sup> AODA, *supra* note 24 at s. 22 (3).

<sup>29</sup> *Ibid* at s. 27 (1); *Integrated Accessibility Standards*, *supra* note 31 at s. 86.

<sup>30</sup> *Ibid* at s. 27 (4).

<sup>31</sup> *Ibid* at s. 27 (7).

<sup>32</sup> *8750 v Director under the Accessibility for Ontarians with Disabilities Act, 2005*, 2014 CanLii 46587 (ON LAT); *8647 v Director under the Accessibility for Ontarians with Disabilities Act, 2005*, 2014 CanLii 46363 (ON LAT); *8677 v Director under the Accessibility for Ontarians with Disabilities Act, 2005*, 2014 CanLii 46359 (ON LAT); *8635 v Director under the Accessibility for Ontarians with Disabilities Act, 2005*, 2014 CanLii 53673 (ON LAT)

<sup>33</sup> See *Integrated Accessibility Standards*, *supra* note 31 at Schedule 2.

## Criticisms of the AODA

Although the *AODA* is a positive step forward towards establishing accessibility in the daily lives of Ontarians, there have been many concerns that the *AODA* lacks “teeth”.

The most common criticism is the lack of any mechanism under the *AODA* for an individual to initiate a complaint against an employer or organization. Rather, the Act relies on the Ministry of Community and Social Services (the “Ministry”) to identify, initiate and enforce compliance. There is no public complaint mechanism for enforcement of the *AODA*, which is concerning given the Act’s goal of re-imagining, redesigning, and modifying public spaces for to ensure accessibility.

Since the *AODA* began applying to the public sector in 2010, there have been a handful of cases at the Human Rights Tribunal of Ontario (“HRTO”), in which applicants have referred to the *AODA* as a minimum standard of accessibility and have attempted to enforce the *AODA* at the HRTO.<sup>34</sup> However, in *Bishop v Hamilton Entertainment and Convention Facilities*, the HRTO clarified that it does not enforce the *AODA*.<sup>35</sup> This is reasonable from a statutory perspective since the *AODA* does not make any references to the HRTO. Accordingly, Ontarians are left to rely on the activities of the Ministry – specifically the Ontario Accessibility Directorate – to enforce compliance with the *AODA*.

On June 21, 2017, the Accessibility Directorate released the Ontario *AODA Compliance and Enforcement 2016 Report* (the “Report”). The Report details that the Accessibility Directorate conducted 1604 compliance activities, including Phase 1 and Phase 2 audits. Phase 1 audits focus on an organization’s requirement to submit a self-certified accessibility compliance report online. Phase 2 audit documents are requested and reviewed for the purposes of verifying compliance with other requirements beyond reporting.

According to the Report, the Accessibility Directorate conducted 1205 audits at the Phase 1 level in 2016. Organizations audited were those that had failed to file an accessibility compliance report, reported that they had not met their requirements under the law, or filed a report in 2012 but not in 2014. Of the Phase 1 audits, 5% were escalated to Phase 2 or enforcement.

Despite these enforcement activities undertaken by the Ministry, compliance with the *AODA* remains a significant problem. The Report indicates that in 2016, only 43% of businesses/non-profit sector organizations submitted their most recent version of the accessibility compliance

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<sup>34</sup> For example, see *Martel v Ontario (Minister of Community and Social Services)*, [2014] OHRTD No 1383.

<sup>35</sup> *Bishop v Hamilton Entertainment and Convention Facilities*, [2012] OHRTD No 716 at para 19.

report.<sup>36</sup> Furthermore, in 2015, 65% of organizations had still failed to submit their 2012 reports.<sup>37</sup> Thus, the provincial government’s general reliance on voluntary compliance and reporting has understandably made many Ontarians doubtful in the AODA’s ability to deliver wide scale accessibility.

**Conclusion**

Based on the foregoing, it is apparent that the AODA is not perfect; mechanisms for compliance rest with the Ministry, which as a publicly funded body is subject to many restraints, and to date the nominal fines levied cast the impetus for deterrence and voluntary compliance into doubt. Still, there is no question that the AODA is vastly superior to its predecessor. It is also clear that the public attention given to AODA’s requirements have increased the public’s awareness of the everyday challenges faced by differently-abled individuals. While more study is needed to quantify the net benefit from this increased awareness, at minimum the momentum it has created, as shown by upcoming federal accessibility legislation, gives us every reason to be optimistic.

**Authors**

Ryan Edmonds and Nabila Khan are lawyers with Ryan Edmonds Workplace Counsel, a boutique firm that provides workplace law services to both employers and employees. Prior to starting the firm, Ryan practiced in the labour and employment law group of national law firm and clerked at the Ontario Labour Relations Board, where he was seconded during his articles. An academically-decorated graduate of Osgoode Hall Law School, Ryan has authored a number of award-winning law journal articles on labour and employment law and frequently contributes to various industry publications. Ryan is active in the community. In addition to being a former executive of the OBA’s Equality Committee and Sexual Orientation & Gender Identity Conference, he was also a founding Director of Start Proud/Out on Bay Street.

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<sup>36</sup> Government of Ontario, *Accessibility compliance and enforcement report 2016* (Toronto: Government of Ontario, 2017), online: <<https://www.ontario.ca/page/accessibility-compliance-and-enforcement-report-2016>>.

<sup>37</sup> Michael McKiernan, “Feds can improve accessibility legislation,” *Law Times* (10 July 2017), online: <<http://www.lawtimesnews.com/author/michael-mckiernan/feds-can-improve-accessibility-legislation-13476/>>.