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AN ANALYSIS OF THE *ONTARIANS WITH DISABILITIES ACT, 2001*

PHYLLIS GORDON, HARRY BEATTY, AND BILL HOLDER*

RÉSUMÉ

Le 13 décembre 2001, la loi de 2001 sur les personnes handicapées de l'Ontario (« LPHO ») a été déposée en troisième lecture et a été adoptée par l'Assemblée législative de l'Ontario. Le lendemain, elle a reçu la sanction royale. La LPHO qui a été adoptée n'est pas, toutefois, le solide texte législatif que les personnes handicapées avaient tant recherché et espéré depuis des années. Il s'agit plutôt d'une loi qui pourrait avoir une portée très limitée et qui est particulièrement connue pour son utilisation inhabituelle d'un langage ayant un mobile politique. La LPHO offre toutefois certains moyens qui pourraient être utilisés pour commencer à supprimer les nombreux obstacles auxquels font face les personnes handicapées en Ontario. Cet article examine l'élaboration de la LPHO et analyse ses dispositions clés. On tente ensuite de prévoir une utilisation maximale de la loi malgré ses limites. À cette fin, on entreprend un examen des moyens potentiels appliqués que la LPHO soit interprétée et mise en œuvre conformément aux principes énoncés dans la législation portant sur les droits de la personne et dans la *Charte canadienne des droits et libertés*.

I. INTRODUCTION

On December 13, 2001, the *Ontarians with Disabilities Act, 2001*¹ (*ODA*) was given Third Reading and passed by the Ontario legislature. The next day, it was given Royal Assent.² The *ODA* that was enacted is not, however, the strong law for which, over the course of many years, the community of persons with disabilities had lobbied and hoped. It is, rather, a statute that may have a very limited effect and is notable for its unusual use of politically motivated language. The *ODA* does, however, provide some tools that may be utilized to begin removing the many barriers facing persons with disabilities in this province. In this article, the development of the *ODA* is discussed and an analysis of its key provisions is provided. Consideration is then given to making

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1. S.O. 2001, c. 32.

2. At the time of writing, some provisions of the *ODA* have been proclaimed, but much of the *Act* has not. Refer *infra* to Part VI of this article.

maximum use of the *Act* despite its limitations. To this end, an examination is undertaken with respect to potential ways of ensuring that the *ODA* is interpreted and implemented in accordance with the principles enunciated in human rights legislation and the *Canadian Charter of Rights and Freedoms*.³

II. THE DEVELOPMENT OF THE AMERICANS WITH DISABILITIES ACT

After decades of activism led by African-Americans, the tumultuous decade of the 1960s witnessed the enactment of legislation in the United States to protect minority groups from discrimination in the exercise of their civil rights. Significantly, the scope of civil rights was extended beyond voting power and legal status to include employment, public accommodations and education. African-American activists led the way for other rights seeking groups by bringing a series of lawsuits challenging discriminatory public actions, and by taking both individual and coordinated acts of civil disobedience. A key achievement of the civil rights movement was the first general *Civil Rights Act* passed by the U.S. Congress in 1964 to prohibit racial, religious and gender-based discrimination.⁴

As a consequence of the success of the African-American civil rights movement, many other communities began organizing around other patterns of systemic discrimination, seeking protection on grounds including age, sexual orientation, and mental and physical disability. These communities have met with varying degrees of success in using federal and state legislation and constitutional guarantees of equal protection to challenge discriminatory practices.⁵

By the late 1980s, the community of persons with disabilities was still a major disadvantaged minority group that had not achieved significant civil rights protection in the United States. A broad coalition of organizations came together with disability law experts to create a detailed proposal for rights legislation. Their efforts to obtain political support for the proposal were aided greatly by the leadership of organizations of veterans who were disabled during the Vietnam War, as their moral claim to public support was widely recognized across the political spectrum. During the 1988 Presidential election campaign, both the coalition and its supporters within Congress made significant efforts to advance civil rights protection for persons with disabilities as an

3. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 (hereinafter *Charter*).

4. The *Civil Rights Act* covered discrimination based on race, colour, religion, sex, and national origin. The ground of "sex" was added during congressional debates by segregationist Senator Harry Byrd, whose apparent intent was to sabotage the passage of the entire *Act* by extending its coverage to women. Although the *Act* managed to pass notwithstanding the amendment, a practice of "diminished scrutiny" developed with respect to sex discrimination. This problem would have been corrected through the passage of an Equal Rights Amendment to the Constitution, set in motion in 1972, but the proposal was narrowly defeated.

5. Three cornerstones of civil rights legislation enacted during the 1960s were the *Civil Rights Act* (1964), the *Voting Rights Act* (1965), and the *Fair Housing Act* (1968). Refer to Young, *infra* note 7 at ch. 1.

important issue, and succeeded in obtaining a commitment to pass such legislation from Republican Party candidate George Bush.

Upon his election, President Bush kept his promise, no doubt motivated at least in part by a Louis Harris and Associates poll which showed the disability rights issue to have played a significant role in his margin of victory.⁶ The *Americans with Disabilities Act (ADA)*⁷ was signed into law on July 26, 1990 and was widely hailed as a major step toward the recognition of the equality rights of persons with disabilities and their inclusion into the mainstream of society through mandating barrier removal and legislating rights protection.

The *ADA* is very far-reaching legislation, covering major areas such as:

- Employment accommodation and prohibitions on discrimination
- Accessibility of public transit systems, including air, rail and bus
- Accessibility of services, such as hotels, restaurants and stores
- Accessibility of telecommunications systems, such as telephones
- Non-discrimination provisions relating to insurance

The *ADA* has several provisions defining what is a physical or mental disability, and in principle these provisions are quite inclusive (although in subsequent litigation a key issue has become whether an individual is a “qualified person with a disability”).⁸

Despite attempts in Congress to weaken the remedies available under the *ADA*,⁹ the *Act* as passed mandated proactive measures to end exclusion and discrimination. There was provision for enactment of detailed regulations and for enforcement by specialized government agencies such as the Equal Employment Opportunity Commission and the Department of Transportation. Complaints could also be heard by the courts, and effective remedies were available.

6. Refer to Young, *infra* note 7 at ch. 4. Bush was generally much more conservative on social issues than Michael Dukakis, the Democratic Party candidate, but the *ADA* concept was one that Bush felt his supporters would be comfortable with, while the Dukakis camp was wary of being seen as endorsing yet another “special interest group.”

7. 42 U.S.C. 12101 (1990). For an in-depth history of the development of the *ADA*, refer to J.M. Young, “Equality of Opportunity: The Making of the Americans with Disabilities Act,” online: National Council on Disability <<http://www.ncd.gov/newsroom/publications/equality.html>>.

8. For a full discussion of the definition of disability, see the *ADA* Technical Assistance website: <www.adata.org/whatsada-definition.html>. The courts have adopted a somewhat restrictive interpretation of these apparently wide definitions. Especially significant in this connection is a recent decision of the United States Supreme Court that a woman with carpal tunnel syndrome did not have a “disability” within the meaning of the *ADA*: *Toyota Motor Mfg., Ky., Inc. v. Williams* (00-1089) 224 F.3d 840, reversed and remanded.

9. Refer to Young, *supra* note 7 at ch. 5.

Responsibility for the equal, inclusive and fair treatment of American citizens with disabilities was assigned by the *ADA* on a broad basis to the private sector, not just to governments.

While there was (and continues to be) a wide range of opinion regarding the potential value and impact of the *ADA*, there is a widespread public perception that it represented a significant victory for the community of persons with disabilities in the United States.

III. THE PUSH FOR AN *ONTARIANS WITH DISABILITIES ACT (ODA)*

Persons with disabilities in Canada watched the development of the *ADA* with great interest and growing enthusiasm. Having experienced frustratingly slow progress in achieving barrier removal and integration, they naturally looked to the *ADA* approach as a way of moving forward. There were links established with American activists who had played a prominent role in bringing about the *ADA*. For example, in March, 1992, Justin Dart, the Chair of the President's Committee on the Employment of People with Disabilities, spoke in Ottawa, and brought a strong message regarding the legislative protections that were required:

Most importantly, any real human rights package should, taken in combination with already existing legislation, constitute a dramatic, highly visible, enforceable mandate that all people with disabilities must have full equal access to every significant social process. There must be no compromise with the principle of equality.¹⁰

It was recognized from the outset that there were significant differences between Canada and the United States, which would have to be taken into account in the development of Canadian proposals. In Canada, there had already been a decade of experience with a constitutional equality right under the *Charter*,¹¹ and all jurisdictions, provincial and territorial as well as federal, had recognized "disability" as a ground of discrimination within their human rights legislation by the early 1980s.¹² Nonetheless, the implementation and enforcement of these rights had been sporadic at best, and people were willing to look closely at the *ADA* model as a source of new ideas.¹³

A second major difference was that many of the major areas addressed by the federal *ADA* fell under provincial jurisdiction in Canada. Employment, for example, is in

10. J. Dart, "Equality Means Empowerment: An American Perspective" *ARCH TYPE* 10:4(b) (July 1992) 4 at 4-5.

11. Section 15(1) of the *Charter* provides as follows: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on . . . mental or physical disability."

12. Refer to W.S. Tarnopolsky & W.F. Pentney, *Discrimination and the Law* (Toronto: Carswell, 2001) at 7A-2 ff.

13. For an early assessment of what could (and could not) potentially be achieved by an *ODA*, refer to: B. Black, "What an Ontarians with Disabilities Act Is and Isn't About" *ARCH TYPE* 10:4(b) (July 1992) at 8-10.

provincial jurisdiction for the most part, as are hotel, restaurant, and store services. So it would be important to have provincial, as well as a federal, ADA-type statutes in Canada. Accordingly the concept of an *Ontarians with Disabilities Act* was developed.

The idea of an *ODA* received broad and often enthusiastic support from the disability community in Ontario, and this led to the formation in 1995 of an advocacy group called the “*ODA Committee*.” The Committee was to reach out and gain grassroots support throughout the Province, and has played a highly visible and important role in the development and eventual passage of an *ODA* over the past several years.¹⁴

The *ODA Committee* envisioned an Act that would compel public- and private-sector entities to investigate the barriers for persons with disabilities that existed within their organizations and make plans to remove the barriers within reasonable time frames. The Committee sought an *ODA* that would provide a mandate to a governmental agency to enforce the legislation.¹⁵ Broad-based requirements for the removal of barriers throughout society and an enforcement mechanism were regarded as fundamental elements of a strong and effective *ODA*.

When the *ODA Committee* was formed, the New Democratic Party (NDP) was the government of Ontario. Through the Ministry of Citizenship, they showed some interest in the *ODA* by funding research and holding some limited consultations. But the Government, having already put forward two very controversial disability-related statutes (the *Advocacy Act*¹⁶ and the *Employment Equity Act*)¹⁷ was reluctant to introduce another major initiative in the area of disability rights. A private member’s bill was introduced by NDP member Gary Malkowski, a long-time activist in the Deaf community, but was not referred to a legislative committee.¹⁸

During the 1995 election campaign, the *ODA Committee* sought commitments from the three major parties¹⁹ in Ontario that, if elected, they would introduce an *ODA*. A commitment to enacting, or at least seriously considering, an *ODA* was received from all parties, including the Progressive Conservative Party, led by Mike Harris.²⁰

14. Extensive information regarding the *ODA Committee* and its activities is available on its website, together with a great deal of information on the new legislation. Refer to <www.odacommittee.net>.

15. Refer to the *ODA Committee*’s brief submitted to the Ontario Legislature on 22 April 1998, entitled “Making Ontario Open for People with Disabilities: A Blueprint for a Strong and Effective *Ontarians with Disabilities Act*.”

16. *Advocacy Act, 1992*, S.O. 1992, c. 26 as rep. by the *Advocacy, Consent and Substitute Decisions Statute Law Amendment Act, 1996*, S.O. 1996, c. 2, s.1.

17. *Employment Equity Act, 1993*, S.O. 1993, c. 35 as rep. by the *Job Quotas Repeal Act*, S.O. 1995, c. 4, s. 1.

18. Bill 168, *Ontarians with Disabilities Act*, 3d. Sess., 35th Leg., Ontario, 1994.

19. The three major parties in Ontario are the NDP, the Liberal Party, and the Progressive Conservative Party.

20. The *ODA Committee* submitted the following question to the three parties: “If your Party is elected as the next government, will you commit to the prompt passage of an *Ontarians with Disabilities Act* no later than January 1996? The responses of the parties were as follows: Liberal: “A Liberal government will work with the *ODA Committee* to establish an *Ontarians with Disabilities Act*.”

When the Conservatives were elected, however, it proved difficult to keep them to their commitment. Premier Harris had campaigned on the promise of a "Common Sense Revolution," based on less government, lower taxes, lower spending, and making Ontario open for business. In fact, this platform included the repeal of both the *Advocacy Act* and the *Employment Equity Act*, and these steps were taken after coming to power, in short order. Against this background of deregulation and cutbacks, it was difficult to imagine the Government imposing specific regulations on itself and the business community, as *ADA*-type legislation would require.

In light of their political platform it was not surprising that the Government delayed dealing with the issue. There were consultations on an *ODA*, but no bill would be introduced into the legislature for quite some time. On October 29, 1998, under pressure from the opposition parties, the Government cooperated in the unanimous passage of a resolution calling for an *ODA* that would be "more than mere window dressing" and have "real force and effect." The resolution called for an *ODA* that would compel the removal of barriers within both the public and private sectors and would establish an "effective mechanism of enforcement."

The *ODA* Committee continued to insist that the Premier keep his commitment to passing an *ODA*, and finally in late 1998, with a provincial election imminent, Bill 83, the *Ontarians with Disabilities Act, 1998*, was introduced. The Bill was brief, general, and very limited in its approach. The Bill applied only to Government ministries, and compelled the preparation of plans to remove barriers without a corresponding requirement to execute them. It was roundly condemned, not only by the *ODA* Committee, but also by the opposition parties in the legislature and the media. It was allowed to die on the order paper, approximately three weeks after its introduction.²¹

With the re-election of the Conservatives in 1999, the community pressure to enact a strong and effective *ODA* was renewed. Dozens of municipalities and counties in Ontario passed resolutions calling upon the Government to enact the *ODA*.²² A new

NDP: "The Bob Rae government believes strongly in the goal of a barrier-free society in which all Ontarians can participate fully. The private member's bill introduced by New Democrat Gary Malkowski outlined an innovative approach to accelerating the process of ensuring that people with disabilities have full access to education, transportation and other services in Ontario. Public hearings on such a bill would be a valuable means to consult broadly on how best to achieve these goals, as well as a way to promote province-wide discussion of this important issue. This is an issue that will be considered by the government in its second term." Progressive Conservative: "A Harris government would be willing to enact an *Ontarians with Disabilities Act* in the first term of office within the economic goalposts of the Common Sense Revolution. The accommodation issue is often the stumbling block when it comes to financing access to post-secondary institutions, transportation, government publications, training programs and communications. We hope through cost efficiencies achieved in other areas of government to direct much needed funding to accommodation." "Election Special", *ARCH TYPE* 13:2 (May-June 1995) at 13.

21. Bill 83 was introduced on 23 November 1998 and expired on the order paper on 17 December 1998.
22. The municipalities and counties were Niagara Falls, Ottawa-Carleton, Mississauga, Lindsay, Durham, Toronto, London, St. Catharines, Whitby, Windsor, Chatsworth, Port Colbourne, Thunder Bay, Kitchener, Kingston, Guelph, St. Thomas, Waterloo, Sarnia, Burlington, Barrie, Ajax, Clarington, Brockville, and Leeds and Grenville.

Minister of Citizenship with considerable background in disability issues, Cam Jackson, was appointed. He undertook to develop a more substantial *ODA*, to the extent that this could be achieved within the framework of Government policy.

On November 5, 2001, Minister Jackson introduced the *Ontarians with Disabilities Act, 2001*, into the Ontario legislature, as Bill 125. The Bill was dealt with quickly in the legislative process. While there were Standing Committee hearings in a number of different Ontario communities, the Bill was passed into law on December 13, 2001, six weeks after its introduction, with only minor amendments.

IV. THE *ODA* AS A POLITICAL DOCUMENT

The *ODA* is substantially a public sector planning statute. It is very different in content and approach from the *ADA*. There can be no doubt that a more accurate title would be the "The Ontario Public Sector Accessibility Planning Act." Given the American historical precedent, its name—the *ODA*—engenders expectations that the legislation simply makes no attempt to address.

Unlike the *ADA*, the *ODA* does not create new rights for persons with disabilities in Ontario. It neither ensures accessibility nor compels barrier removal. It contains no enforcement mechanisms and does not create an oversight agency to ensure compliance. Significantly, unlike the American legislation, it does not apply to the private sector. In the absence of a legislated route to the courts or an administrative tribunal charged with its interpretation, the meaning to be given to the *ODA* will rest with the Government.²³ Not only does the Government retain the power to interpret its meaning, it is explicitly given the authority to exempt any public sector entity from the application of the statute.

The misleading title does, however, permit the Government to claim that it has fulfilled its political commitment to pass an "*Ontarians with Disabilities Act*." It is too early to tell whether this sly move is one which will be politically successful in the long run. The passage of the legislation may negatively impact upon the momentum of the disability rights movement that has rallied around the call for an *ODA* for so long. The community will need to re-organize in its struggle for a barrier-free Ontario and not permit the Government to undermine its struggle through the appropriation of language that had united many within the community of persons with disabilities for more than a decade.

It is legitimate for the community of persons with disabilities to feel that the *ODA* that was passed was not the *ODA* that was expected or promised. Moreover, it was not only the *ODA* Committee that envisioned a strong and effective *ODA*. The Government issued a consultation paper in 1998 that implied that strong legislation was being contemplated.²⁴ Dozens of municipalities in the province passed resolutions calling

23. In Part VII we explore some litigation possibilities that may be available.

24. Refer to the Government's publication "Preventing and Removing Barriers for Ontarians with Disabilities: A Discussion Paper" (Ministry of Citizenship, Culture and Recreation, July 1998).

for strong legislation. The legislative resolution, referred to earlier, had called for a strong and effective *ODA*, to apply to the private sector and contain an enforcement mechanism. Just prior to the tabling of the *ODA*, the Government issued a “vision statement” pledging that it would build a “province in which no new barriers to persons with disabilities are created and existing ones are removed.”²⁵ There was broad consensus regarding the scope and the nature of the legislation sought. The law as passed is not consistent with the consensual understanding.

The highly political nature of the *ODA* is also evident in its curiously drafted preamble. The preamble begins with the following statement of principles and commitments:

The people of Ontario support the right of persons of all ages with disabilities to enjoy equal opportunity and to participate fully in the life of the province.

Ontarians with disabilities experience barriers to participating in the mainstream of Ontario society. The number of persons with disabilities is expected to increase as the population ages, since the incidence of disability increases with age.

The Government of Ontario is committed to working with every sector of society to build on what it has already achieved together with those sectors and to move towards a province in which no new barriers are created and existing ones are removed. This responsibility rests with every social and economic sector, every region, every government, every organization, institution and association, and every person in Ontario.

By setting out broad principles, preambles generally establish the legislative goals and define the wrong that the statute is designed to redress. In this case, while the preamble describes responsibilities of every social and economic sector, the law itself does not compel any action. Indeed, the absence of mandatory obligations is the quieter political message of the *ODA*: that there is no present obligation on the private sector to plan and implement barrier removal.

While the preamble acknowledges that “Ontarians with disabilities experience barriers to participating in the mainstream of Ontario society,” it also implies that the situation is not really all that bad—the Government is going “to build on what it has already achieved together with those sectors.”²⁶ The Government’s implied good record on disability issues is then made explicit in the next paragraph as follows:

The rights of persons with disabilities to equal treatment without discrimination in accordance with the *Human Rights Code* is addressed in a number of Ontario statutes and regulations.

This leads to a list and description of how a number of statutes treat disability-related issues. The statutes are: the *Assessment Act*,²⁷ the *Blind Person’s Rights Act*,²⁸ the

25. “Independence and Opportunity: Ontario’s Vision for Persons with Disabilities” (1 November 2001).

26. This is a rewording of the Government’s “vision statement,” *ibid.*, which includes the following sentence: “the Government of Ontario pledges to work in partnership with Ontarians to build on what we have already achieved together.”

27. R.S.O. 1990, c. A-31.

28. R.S.O. 1990, c. B-7.

*Building Code Act, 1992;*²⁹ the *Corporations Tax Act*³⁰ and the *Income Tax Act*;³¹ the *Education Act*;³² the *Ontario Disability Support Program Act, 1997*;³³ and the *Workplace Safety and Insurance Act, 1997*.³⁴

It is certainly arguable that none of these statutes *promote* the equality rights of persons with disabilities as claimed. Their highly unusual inclusion in the preamble does not enhance the *ODA*, except in a self-serving manner.

The preamble continues with a reference to the *Charter* and a statement of the Government's belief that all governments in Canada have a responsibility to enact legislation for barrier removal. This again adds no effective content, but it does act as a reminder that Ontario is the first Canadian jurisdiction to enact any form of disability specific barrier-removal related legislation.³⁵

The preamble ends with a self-congratulatory statement of the Government's past record on disability issues:

The Government of Ontario believes that it is desirable to demonstrate continued leadership in improving opportunities for persons with disabilities.

This type of self-affirmation is not ordinarily found in a statute. However, advocates can use it as a positive statement of the Government's intention to improve opportunities.

There is a final note about the political nature of this legislation. The *ODA* establishes two bodies with no real independence from Government. By not creating an effective oversight agency, the legislation ensures that the Government retains control over the bodies that were created. The *ODA* establishes an Accessory Advisory Council of Ontario³⁶ to advise the Minister of Citizenship, Culture and Recreation on issues regarding the *ODA*. A majority of Council members, all of whom are appointed by the Minister and will be paid by the Government, must be persons with disabilities. The size of the Council is not indicated and there is no requirement for the Council to include persons with a range of disabilities. The Council is required to prepare an Annual Report for the Minister. The mandate of the Accessibility Advisory Council is directed by the Minister. Its consideration of issues is to be at the direction of the Minister. This implies the Council will not have the independence to address the disability issues it chooses, or to initiate consultations with respect to issues.

29. S.O. 1992, c. 23.

30. R.S.O. 1990, c. C-40.

31. R.S.O. 1990, c. I-2.

32. R.S.O. 1990, c. E-2.

33. S.O. 1997, c. 25, sch. B.

34. S.O. 1997, c. 16, sch. A.

35. The irony is, of course, that the *ODA*, as enacted, does not require the removal of any barriers.

36. *ODA* at s. 19.

The *ODA* also establishes a new government office, called the Accessibility Directorate of Ontario,³⁷ which will support the Accessibility Advisory Council and the implementation of the *ODA*. The Directorate is a branch of the Government, staffed by civil servants, working under the direction of the Minister.

For both offices, Ministerial control is strongly affirmed. While there will be participation by persons with disabilities, they will need to exert strong leadership and moral persuasion. This is because the *ODA* itself leaves final authority on every matter to the Government.³⁸ In the absence of an enforcement mechanism and an independent commission or tribunal entrusted with the interpretation of the statute, the statute contemplates that the Government holds the discretionary power to implement its provisions.

V. WHAT THE *ODA* DOES (AND DOES NOT) OFFER

While the *ODA* is certainly much less of an affirmation of rights than many in the community had hoped for, it nevertheless provides some opportunities for advocacy and community development. Persons with disabilities, their families, individual advocates, and organizations will want to consider the routes provided by the *ODA* for advancing accessibility rights in Ontario. Some of the most important of these will be highlighted in what follows.

As we have seen, the *ODA* mandates committees and plans and does not order barrier removal. Gains may be achieved by using the mandated consultation process, flawed as it is. Regulations, if passed, will hopefully provide more teeth to the legislation. As well, the community can continue to work, as suggested by the *ODA* Committee, toward a revised *ODA* that will be truly “strong and effective.”³⁹

(i) Duties of the Government of Ontario

The Provincial government will be required to develop barrier-free design standards for its buildings, structures, and premises, but these will be guidelines rather than regulations.⁴⁰ This means the standards will not have the force of law and will presumably not be subject to an enforcement mechanism.

The guidelines will apply to buildings, structures, or premises (or parts of them) that the Government “purchases, enters into a lease for, constructs or significantly renovates after this section comes into force.”⁴¹ The Government will not be compelled to

37. *Ibid.* at s. 20.

38. In a news release (5 November 2001) coinciding with the introduction of the *ODA*, the Government claimed the legislation would put “persons with disabilities at the forefront of change.” Although persons with disabilities will be involved in the *ODA*, they will be selected by Government and not have any power except to advise.

39. The Committee’s ongoing call for a “strong and effective” *ODA* began with its aforementioned 1998 brief to the Ontario legislature. Refer *supra* note 14.

40. *ODA* at s. 4.

41. *Ibid.* at ss. 4(1), 4(4), 4(5). What constitutes a “significant renovation” and what constitutes a “new

develop guidelines for retrofitting buildings, structures, or premises that it owns or leases presently. This is basically the same approach taken in the *Building Code Act, 1992*,⁴² which contains no retrofit provisions, and permits a range of renovations to be carried out on existing buildings without addressing accessibility. The guidelines may equal or exceed the requirements of the *Building Code*. However, it should be noted that in a number of respects the *Building Code* provisions related to accessibility fall substantially short of the comparable provisions in the *Americans with Disabilities Act*, or in the Canadian Standards Association barrier-free guidelines.⁴³

Significantly, the Government is permitted to exempt some buildings, structures, and premises from the guidelines entirely, or to provide for different time frames to meet the guidelines.⁴⁴ There are no doubt some specialized Government facilities which legitimately could be exempted (*e.g.*, a forest fire lookout), as is done in the *Building Code*. It is difficult to understand, however, why the proposed legislation allows for the possibility of exempting places offering required public services.

The *ODA* provides that Government funded building and renovation projects must comply with the *Building Code* in order to receive capital funding from the Government.⁴⁵ Such projects would have to comply with *Building Code* requirements in any event, but this provides a role for the provincial Government in ensuring compliance. The Government is furthermore authorized to add accessibility requirements to capital funding for building or renovation projects where accessibility is not required by the *Building Code*.⁴⁶ Since this provision is permissive instead of mandatory, there may nevertheless still be capital funding provided to inaccessible projects. It is significant that the *ODA* contemplates adding accessibility requirements to Government funded capital programs, but is silent with respect to other Government funded programs. Since most Government funding is for programs or operations rather than capital projects, it would appear that the *ODA* permits the Government to avoid adding accessibility requirements to the majority of projects that it funds. This will mean, for example, that accommodation requirements need not be imposed on program or operational funding allocations where accommodations other than to building structures may be essential.

The *ODA* requires that every Ministry of the Ontario government produce an annual "accessibility plan."⁴⁷ The scope of the accessibility plan is quite comprehensive, including the legislation administered by each Ministry as well as its policies, programs, practices, and services. However, there is no obligation for accessibility plans

lease" is unknown and may be set out in the regulations (although we do not know when such regulations will be written). Refer to s. 23(1)(e).

42. S.O. 1992, c. 23, as amended (hereinafter *Building Code*).

43. Canadian Standards Association, "Barrier-Free Design," CAN/CSA-B651-95 (R2001).

44. *ODA* at s. 4(3).

45. *Ibid.* at s. 9(1).

46. *Ibid.* at s. 9(2).

47. *Ibid.* at s. 10.

to provide time frames for the achievement of full accessibility. This seems to be a significant lacuna where accessibility plans are concerned. What is the point of planning if there are no time frames by which the goals of planning are to be achieved?

While the legislative requirements of annual accessibility plans are very general, there is still an opportunity for the community of persons with disabilities to be involved in presenting recommendations to Ministries for accessibility plans, and to monitor these plans once adopted. This will provide an opportunity to move accessibility issues forward. Although there is no enforcement mechanism in the *ODA*, a failure on the part of a Ministry to address these issues could be the subject of a complaint to the Office of the Ombudsman, or the topic of a public information campaign.

(ii) Duties of Municipalities

The concept of "municipality" in the *ODA* is defined to include regional municipalities, district municipalities, and counties as well as local municipalities.⁴⁸ Municipal governments are required, like Government ministries, to prepare annual accessibility plans that will be made available to the public.⁴⁹ The scope of the plans is reasonably comprehensive, including municipal by-laws, policies, programs, practices, and services. Once again, however, there is no obligation for a plan to indicate the date by which full accessibility is to be achieved.

Municipalities are required to have Accessibility Advisory Committees (AACs).⁵⁰ The structure and functions of the AACs are not fully fleshed out, but detailed requirements could be added in the future through regulations. The majority of persons on ACCs must have disabilities.⁵¹ There are no other provisions regarding membership or the appointment process. The duties of AACs include advising municipal councils about accessibility planning. AACs also play a role in reviewing site plans and drawings selected pursuant to s. 41 of the *Planning Act*.⁵²

48. *Ibid.* at s. 2(1). For reasons unclear to the authors the County of Oxford is also listed separately.

49. *Ibid.* at s. 11. In the First Reading version of Bill 125, municipalities with populations under 10,000 were exempted from the requirement to prepare an accessibility plan, but this exemption was removed in the legislative committee.

50. *Ibid.* at s. 12.

51. *Ibid.* at s. 12(3). The requirement of majority participation by persons with disabilities was added by the legislative committee. The First Reading version of Bill 125 only required that persons with disabilities be "included."

52. *Ibid.* at ss. 12(2) to 12(6). Section 41 of the *Planning Act* deals with approval of "developments," which are defined in subsection 41(1) to mean as follows: "the construction, erection or placing of one or more buildings or structures on land or the making of an addition or alteration to a building or structure that has the effect of substantially increasing the size or usability thereof, or the laying out and establishment of a commercial parking lot or of sites for the location of three or more trailers as defined in clause (a) of paragraph 101 of section 210 of the *Municipal Act* or of sites for the location of three or more mobile homes as defined in subsection 46(1) of this Act or of sites for the construction, erection or location of three or more land lease community homes as defined in subsection 46 (1) of this Act." R.S.O. 1990, c. P.13, s. 41 (1); 1994, c. 4, s. 14.

The AACs will potentially be an important focal point for the participation of the community of persons with disabilities. At the local level, there may be a significant opportunity to make progress through consultation, especially in smaller communities, as there will be reviews of specific projects and proposals. Advocates on local AACs will be greatly assisted if disability organizations are able to establish an information-sharing network across the province, so that AAC representatives in one community can learn from the successes (and failures) of those in other communities.

(iii) Duties of Other Organizations, Agencies, and Persons

The basic requirement to develop an accessibility plan is imposed on two classes of organizations in addition to the Provincial and municipal governments: “public transportation organizations” and “scheduled organizations.” A third kind of entity, “agencies,” is also covered, but as will be seen, “agencies” are only required to develop *internal accessibility policies*, not *public accessibility plans*.

Each type of organization will be discussed in turn. It can be noted at the outset, however, that almost all private-sector (for-profit) organizations are exempted entirely from any requirement to develop accessibility plans or policies. The only private sector businesses not exempted are certain “public transportation organizations” (and even these could be exempted by regulation). This is an evident and major weakness of the *ODA*; it sends a signal to the business community that it is *not* required to participate in accessibility planning at all.

The term “public transportation organization” is defined to include transportation organizations which are either directly operated by the Provincial or a municipal government, or are operated under contract with, or licensed by, the Provincial or a municipal government.⁵³ It does not include transportation organizations that are regulated by the Federal government, such as airlines and trains, nor does it include transportation organizations that are purely in the private sector. However, as has been mentioned, the *Act* permits the development of regulations that can exempt some public transportation organizations from any specified provision of the *Act* or the regulations.

The description of an “accessibility plan” for a public transportation organization is similar to that for governments and is reasonably comprehensive, although lacking any required time frames for barrier removal. The accessibility plan must be made public; there is no reference to an advisory committee. However, through an amendment made by the legislative committee, public transportation organizations are required to consult with “persons with disabilities and others” in developing their plans.⁵⁴

“Scheduled organizations,” as listed in the Schedule at the end of the *Act*, are school boards, colleges and universities, and hospitals. The obligations of scheduled organizations are the same as those of provincial transportation agencies. They must prepare

53. *Ibid.* at s. 2(1).

54. *Ibid.* at s. 14(1). The First Reading version of Bill 125 just required public transportation organizations to prepare an annual accessibility plan, with no reference to consultation.

an annual accessibility plan to be made public, but there is no requirement for time frames or an advisory committee.⁵⁵ There is a general requirement to consult “persons with disabilities and others.”⁵⁶ By regulation, scheduled organizations can be exempted from any otherwise specified obligations under the *Act*.⁵⁷

What is, and what is not, an “agency” for purposes of the *Act* is left to be determined by regulation.⁵⁸ However, the *ODA* excludes any “organization in the private sector” from being designated an “agency” under the *Act*.⁵⁹ This raises an interesting question as to whether for-profit organizations that receive all or most of their business through government contracts are truly “in the private sector.”

But this issue is mostly of academic interest, since *even if* an organization is an “agency” under the proposed legislation, the only requirement is to develop an internal accessibility policy.⁶⁰ The policy need not be a plan and there is no requirement that it be made public. The policy development process need not involve an advisory committee or any other consultation mechanism with the community of persons with disabilities. This is a very weak requirement placed on government-funded service-delivery organizations that should be publicly accountable.

Nevertheless, even in organizations required only to have internal accessibility policies, there are still advocacy opportunities. Organizations can be challenged to demonstrate that an accessibility plan is in place, and that their policies and practices are consistent with the plan. As in other *ODA* contexts, the community is essentially left to depend on persuasion and moral pressure to achieve accessibility.

The *ODA* also contains an “offences” section,⁶¹ which was added by the legislative committee, providing for a maximum fine of \$50,000 for Ministries, municipalities, and organizations that fail to prepare or make public their annual accessibility plan or policy. This is a largely ineffective provision, as the entity in question could presumably avoid the penalty by producing a very basic plan or policy, or by developing the plan or policy before a potential prosecution could go forward. It was presumably added to make the *ODA* appear more effective.

Much of the content of the *ODA* is left to regulations, under wide-reaching powers. This means that a wide range of implementation approaches are still to be decided upon, at the discretion of the Provincial cabinet. Notably, many of the regulatory powers granted in the statute relate to granting exceptions and weakening requirements, rather than strengthening them.

55. *Ibid.* at s. 15.

56. As with public transportation organizations, the consultation requirement was added by the legislative committee.

57. *ODA* at s. 23(1)(b).

58. *Ibid.* at s. 2(1).

59. *Ibid.* at s. 23(3)(b).

60. *Ibid.* at s. 16(1).

61. *Ibid.* at s. 21.

An interesting provision of the *ODA* concerns the “adoption of codes.”⁶² The Accessibility Directorate is required to consult with persons (whom the Minister directs) regarding an accessibility “code, code of conduct, formula, standard, guideline, protocol or procedure.” Following consultation, the Provincial cabinet, may enact an enforceable accessibility regulation. This formalizes a consultation process for the development of regulations under the proposed legislation. However, the Government has full authority to enact regulations, whether or not a consultation takes place. It is difficult to assess the potential impact of this provision. The community can be pro-active in developing proposals for accessibility codes and regulations, but ultimately all authority rests with the Government itself.

VI. PROCLAMATION AND IMPLEMENTATION OF THE *ODA*

On February 7, 2002, the sections of the *ODA* came into force⁶³ that permit the Accessibility Advisory Council to be appointed and the Accessibility Directorate to be established. None of the sections imposing duties to develop accessibility plans and policies has been proclaimed in force as of the time of writing, nor is there a public timeline for their proclamation. It is also not known when the regulations under the *ODA* will be developed.

The Government’s promotion of the *ODA* thus far is entirely consistent with the voluntaristic and low-pressure nature of the *Act* itself. According to the Ministry of Citizenship’s website, besides passing the legislation and working towards establishing the Advisory Council and Directorate, the Ministry has:

- Published a Vision Statement entitled “Independence and Opportunity: Ontario’s Vision for Persons with Disabilities”
- Established an \$800,000 Partnership Incentive Fund to encourage business and the broader public sector (including non-profit organizations) to work together to improve access
- Established a Community AccessAbility Fund for local access projects as part of the Partnership Incentive Fund
- Established a web site, “Gateways to Diversity,” to provide accessibility information⁶⁴

These are clearly very small-scale responses to a major problem.

62. *Ibid.* at s. 23(7).

63. The proclamation was dated February 6, 2002. O.C. 576/2002. The sections proclaimed were the Preamble, 1-3 (Purpose, Definitions, and Interpretation), 8(1), 8(2), 8(5), 8(6) (Accessibility and Government Employees), 19 (Accessibility Advisory Council of Ontario), 20 (Accessibility Directorate of Ontario), 27, 33, 34, and the Schedule. The Bill 125 amendment to the *Human Rights Code* definition of “disability” (discussed above) was also proclaimed in force, but none of the other complementary amendments.

64. <www.equalopportunity.on.ca>.

Bill 125, as passed by the legislature, also enacts complementary amendments to other Provincial legislation, with the intent of improving accessibility. However, *none* of these complementary amendments have been proclaimed in force as of the date of writing, with the exception of a *Human Rights Code (Code)*⁶⁵ amendment to the definition of “disability.”⁶⁶

VII. INTERPRETING AND LITIGATING THE *ODA*

From the legal advocate’s standpoint, the *ODA* is undoubtedly an unusual statute. It is not the first Ontario statute to set out a regime of proactive measures to address widespread inequality and discrimination, but it is the first to do so without any enforcement or review mechanism.⁶⁷ Its self-congratulatory political language, as discussed above, is unprecedented in Ontario legislation.

The *ODA* may be said to represent simply the codification, in a free-standing statute, of some of the accessibility-planning obligations already imposed on the Government under the *Human Rights Code*. While the *ODA* requires certain other public-sector entities to engage in accessibility planning and establishes the Accessibility Advisory Council and the Accessibility Directorate, it is nevertheless very limited in scope and derivative of the *Code*.

Considering its derivative nature, its limited scope, and the failure to establish expanded rights or an enforcement mechanism, it cannot be said that the *ODA* lives up to its billing as “ground-breaking legislation.”⁶⁸ The *ODA* amounts merely to a

65. R.S.O. 1990, c. H.19, as am.

66. For the amendment to the definition of “disability,” refer *infra* to note 68. The other, as yet unproclaimed, complementary amendments will include the following measures: (i) the Chief Election Officer will be required to report on accessibility arrangements for elections; (ii) the *Election Finances Act* will be amended to provide that a candidate’s disability-related expenses of campaigning are *not* included in the candidate’s spending limit; (iii) the *Highway Traffic Act* will be amended to prohibit fraudulent dealing in disabled parking permits and to impose a maximum fine for this type of offence to \$5,000; (iv) the *Municipal Act* will be amended to provide a minimum \$300 fine for persons parking illegally in a disabled parking space, and to provide that this fine may be imposed on the owner of the car even if he or she is not driving where permission has been given to use the vehicle; (v) preparation of an accessibility plan for the Ontario Legislative Building will be required of the Speaker of the Legislature every year; (vi) municipalities will be given explicit authority under the *Municipal Act* to require that the premises of licensed businesses be accessible as a condition of granting a license (this provision potentially could be utilized to address physical accessibility in the private sector); (vii) the *Municipal Elections Act* will be amended so that the municipal clerk “shall have regard to the needs of electors with disabilities” when choosing polling stations; (viii) the *Planning Act* will be amended to include accessibility as a “provincial planning interest,” which has the potential for being an effective tool to advance accessibility in Ontario municipalities (where there is a provincial planning interest, the Government may issue policy statements in that area, and require municipalities to amend their official plans to conform to them); and (ix) the *Social Housing Reform Act, 2000* will be amended to authorize regulations which will provide more specifically than at present for a process to ensure a required percentage of accessible units.

67. This is in stark contrast to such statutes as the *Employment Equity Act* (now repealed; refer *supra* to note 16) and the *Pay Equity Act*, R.S.O. 1990, c. P.7.

68. Refer to the News Release of the Ministry of Citizenship, “Ontario Tables Canada’s Broadest

statement of direction for Government policy and action. The same obligations set out in the *ODA* could have been set out in Cabinet directives to all Ministries. The Government could easily have made it clear that each Ministry was required to use accessible buildings, review their statutes, guidelines, and policies with an accessibility lens, and be aware of a broad range of barriers, not just those relating to mobility. The Government could have set up an accommodation fund for employees in its ordinary budgetary processes and required accessibility with respect to all third-party procurement contracts.

To the extent that the *ODA* is a statutory statement of policy and planning, derived from the *Human Rights Code*, questions remain regarding its legal impact. We will presently examine some ways in which the *ODA* may become the subject of litigation.

(i) Interplay with the *Human Rights Code*

The *ODA* neither establishes new rights nor does it enhance existing rights. The right of individuals to be free from discrimination because of disability is still addressed under the *Human Rights Code*. The language of the *ODA* does not purport to affect the interpretation of the *Human Rights Code*. The *ODA* should, therefore, have no negative effect on the rights of persons with disabilities as set out in the *Code*. There is, nevertheless, a concern that attempts may be made to introduce the *ODA* into human rights litigation in an effort to water-down the rights set out in the *Code*. Conceivably, respondents in human rights litigation might argue that the *ODA* should be used as an interpretive tool for the *Code*, one that would justify discriminatory conduct or place limitations upon the remedial measures that otherwise would be authorized by the *Code*.

Once raised, a Board of Inquiry will have to deal with the overlap between the *ODA* and the *Code*.⁶⁹ Two key aspects to each law are quite congruent. First, they both contain the same definition of “disability.”⁷⁰ Second, the purpose of the *ODA* is at least consistent with the goals of the *Code*. The purpose of the *ODA* is as follows:

The purpose of this Act is to improve opportunities for persons with disabilities and to provide for their involvement in the identification, removal and prevention of barriers to their full participation in the life of the province.⁷¹

Disabilities Legislation” (5 November 2001).

69. Boards of Inquiry are mandated by the *Human Rights Code* to hear and decide human rights complaints (refer to s. 39 of the *Code*).

70. It should be noted that Bill 125 amended the *Code* to refer to “disability” where it had otherwise referred to “handicap.” Also, a reference to “mental retardation” was changed to “developmentally disability.” The only substantive change to the definition of “disability” is the explicit inclusion of brain injuries, which were arguably included implicitly in the definition prior to the amendment. Prior to being amended by Bill 125, the *Code* definition of “because of handicap” contained a reference to *perceived* handicap (disability), but Bill 125 moved this protection to a new section—10(3)—of the *Code*, which reads: “Past and presumed disabilities” (“The right to equal treatment without discrimination because of disability includes the right to equal treatment without discrimination because a person has or has had a disability or is believed to have or to have had a disability.” S.O. 2001, c. 32, s. 27(4)).

71. *ODA* at s. 1.

The *Code* guarantees to persons with disabilities freedom from discrimination, and to this end the *Code* compels the removal of barriers (called “accommodation” in the *Code*) in certain areas of social interaction⁷² unless to do so would cause undue hardship.⁷³ Each statute is, therefore, concerned with the equality of persons with disabilities and the removal of barriers.⁷⁴

We expect that sooner or later, a Board of Inquiry will have to come to terms with the inconsistencies between the two statutes. Some examples include:

- According to the *ODA*, the Government must accommodate the needs of its employees “in accordance with the *Human Rights Code*”⁷⁵ only “to the extent that the needs relate to employment.”⁷⁶ The *Code* does not similarly provide such a restriction on the duty to accommodate with respect to employment.
- According to the *ODA*, the Government is required to “develop barrier-free design guidelines to promote accessibility.”⁷⁷ The Government is also required to “specify guidelines for the preparation of accessibility plans” applicable to various entities.⁷⁸ The Government is furthermore directed to make regulations

72. The *Code* guarantees, at ss. 1-6, freedom from discrimination for persons with disabilities with respect to the following social areas: (i) goods, services, and facilities; (ii) housing (“occupancy of accommodation”); (iii) contracts; (iv) employment; and (v) vocational associations.

73. Section 17 of the *Code* provides for a duty to accommodate up to the point of undue hardship. The criteria for assessing when the point of undue hardship has been reached are threefold, and are as follows: cost, outside sources of funding, and health and safety requirements.

74. The definition of “barrier” in the *ODA* is set out, in s. 2, as follows: “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; (“obstacle”). The definition is significantly strengthened as compared to the First Reading version of Bill 125. In that version, “barrier” was defined to mean “an obstacle to access for persons with disabilities that is not an obstacle to access for other persons and, in addition to a physical barrier, includes an attitudinal barrier, method of communication, policy or practice.” Aided by community input during the legislative committee hearings, the Government improved this key definition in a number of ways. The phrase “that is not an obstacle to access for other persons,” which potentially could have led to a narrow interpretation of what constitutes a “barrier,” was replaced by the much more inclusive reference to “anything that prevents a person with a disability from fully participating in all aspects of society.” The list of barriers was changed from one that seemed to give prominence to physical barriers to a list that gives equal prominence to less tangible barriers. “Architectural barrier” was added and “method of communication” was replaced by “an information or communications barrier.” All of these changes serve to make the definition of “barrier” under the *ODA* more inclusive.

75. It is not clear why, in this instance, the *ODA* specifically refers to the *Code*, when in other provisions where the *Code* would apply, there is no similar reference.

76. *ODA* at s. 8(1).

77. *Ibid.* at s. 4(1). Of concern is the fact that these guidelines, according to s. 4(2), may simply require compliance with the *Building Code*. The *Human Rights Code* compels accommodation up to the point of undue hardship, which often compels going far beyond the requirements of the *Building Code*.

78. *Ibid.* at s. 18(1).

“governing the preparation and contents of accessibility plans or policies.”⁷⁹ The Accessibility Directorate of Ontario is directed to “develop codes, codes of conduct, formulae, standards, guidelines, protocols and procedures related to the subject-matter of this Act.”⁸⁰ From the foregoing it is apparent that the *ODA* imposes obligations upon the Government and the Accessibility Directorate to develop “guidelines” regarding accessibility. However, the Ontario Human Rights Commission has already published such “guidelines”⁸¹ and it is uncertain how inconsistencies between such guidelines will be resolved.

- Accessibility plans under the *ODA* do not have to set out time frames by which barriers to accessibility must be removed, whereas the *Code* has been interpreted to imply that such time frames must be set out in circumstances where a “phased-in” approach to accommodation is being used.⁸²
- Under the *ODA*, the Government can avoid making its publications and internet sites accessible to persons with disabilities if doing so is not “technically feasible.”⁸³ A Board of Inquiry might be asked, in human rights litigation, if the “technically feasible” standard for accommodation is weaker than the “undue hardship” standard in the *Code*.
- There are several instances in the *ODA* where it is provided that the Government can exempt itself and other organizations from the application of the *Act*. Some of the exemptions have been discussed and relate to planning obligations. Other examples include exempting Government buildings and publications from accessibility requirements.⁸⁴ The *ODA* also contains exceptions. For instance, existing Government buildings that are not under renovation are not required to conform to the barrier-free guidelines.⁸⁵ Similarly, the Government is not obligated to make accessible materials that are of a “scientific, technical, reference, research, or scholarly nature.”⁸⁶ The right guaranteed by the *Code*, however, for persons

79. *Ibid.* at s. 23(1)(f).

80. *Ibid.* at s. 20(2)(f).

81. Refer to the Commission’s *Policy and Guidelines on Disability and the Duty to Accommodate* (2000). The *Policy and Guidelines* stem from the Commission’s interpretation of the *Human Rights Code*.

82. *Ibid.* at s. 4.4.9. It must be presupposed that, when phasing-in accommodation, the time frame for the phasing is known. The time frame is assessed for reasonableness when considering whether an accommodation plan meets the undue hardship standard in human rights litigation. Refer, for example, to *Brock v. Tarrant Film Factory* (2000), 37 C.H.R.R. D/305 (Ont. Bd. Inq.) at D/315, where a phased-in approach to accommodation was ordered and a three-year period was imposed in which to implement the order.

83. *ODA* at ss. 6, 7. With respect to publications, it may be noted that the *ODA* provides that the Government has a duty to make them accessible upon “receiving a request.” The *Code*, on the other hand, provides that the right to be accommodated with accessible publications is not similarly contingent upon making onerous requests with respect to each particular publication.

84. *Ibid.* at ss. 2(1), 4(3).

85. *Ibid.* at s. 4(1).

86. *Ibid.* at s. 2(1).

with disabilities to be accommodated up to the point of undue hardship is not subject to similar exemptions or exceptions.⁸⁷

Should a Board of Inquiry be presented with arguments relying on these or other inconsistencies, consideration will have to be given to the “recognition of existing legal obligations” section of the *ODA*, which provides as follows:

Nothing in this Act, the regulations or the standards or guidelines made under this Act diminishes in any way the existing legal obligations of the Government of Ontario or any person or organization with respect to persons with disabilities.⁸⁸

The wording in this provision was strengthened significantly from the First Reading version of Bill 125.⁸⁹ It is very clear now that no interpretation may be given to the *ODA* that would have the effect of diminishing the existing legal rights of persons with disabilities under the *Human Rights Code*.

However, being familiar with the ingenuity of counsel for respondents in human rights litigation, we do expect that Boards of Inquiry will be presented with contrary arguments regarding the impact of the *ODA* upon the *Human Rights Code*. Counsel for private-sector respondents will argue that because the *ODA* is silent with respect to planning obligations in that sector, private-sector entities are therefore exempt from any legal obligations to plan for accessibility. Counsel for public-sector entities will argue that the recently enacted *ODA*, to the extent of any inconsistencies with the older *Human Rights Code*, supercedes the *Code* by virtue of an implied repeal. Boards of Inquiry will be invited, in essence, to conclude that the *ODA* was introduced by the government of Ontario for the purpose of singling out persons with disabilities, among all other persons protected by the *Code*, and watering down their rights therein.

These arguments clearly run afoul of the express purpose of the *ODA* and the aforementioned section confirming that the Government recognizes its existing obligations toward persons with disabilities (*i.e.*, under the *Human Rights Code*). Most importantly, the *Code* provides explicitly that it prevails over other provincial legislation (including the *ODA*).⁹⁰ Even though the Government made several amendments to the *Code* through the Bill that enacted the *ODA*, the section that confirms the

87. Another concern regarding the *ODA* is the use of the expression “have regard to accessibility,” at ss. 4(5), 5, 13, to describe the obligation to accommodate. The *Human Rights Code* requires, of course, accommodation up to the point of undue hardship.

88. *ODA* at s. 3.

89. Refer to *ARCH ALERT*, published on 20 November 2001, in which ARCH criticized, at 5-6, the weak language contained in the First Reading version of this section. The First Reading version had two parts: “(1) The existing legal obligations of the Government of Ontario with respect to the provision of access for persons with disabilities are hereby recognized and affirmed;” and “(2) Nothing in this Act limits the operation of the *Human Rights Code*.” The final version is considerably more comprehensive. The affirmation of existing rights is extended to *all* persons and organizations, not just the Government, and the affirmation is made to clearly rule out any implied diminution of rights.

90. Refer to s. 47(2) of the *Code*, where it is provided that the *Code* prevails over other Acts unless other Acts expressly provide that they are to apply despite the paramountcy provision.

primacy of the *Code* was left unchanged. From this it must be concluded that the Government did not intend for the *ODA* to supercede the *Code* to the extent of any inconsistencies. Finally, it must be stressed that the rules of statutory interpretation provide that human rights legislation must be given primacy to the extent of any inconsistency with other legislation.⁹¹ In a series of cases rendered by the Supreme Court of Canada, this paramountcy principle has been affirmed.⁹² Accordingly, the *ODA* cannot be interpreted as adversely affecting the rights of persons with disabilities as set out in the *Code*.

(ii) *Code* Complaints regarding *ODA* Accessibility Plans

Although there is no enforcement mechanism in the *ODA*, the *Human Rights Code* can be used to challenge the adequacy of accessibility plans drafted pursuant to the *ODA*. Accessibility complaints made pursuant to the *Code* could allege that the accessibility plans of public-sector entities do not represent measures that meet the undue hardship test under the *Code* and therefore discriminate against persons with disabilities. Complaints can be made, for example, alleging that that accessibility plans do not remove barriers with sufficient expedition, that they do not commit sufficient resources to the removal of barriers, or that they do not provide for accommodation most respectful of the dignity of persons with disabilities. Similarly, a failure on the part of an entity to act upon an accessibility plan could itself be the subject of a human rights complaint.

The adequacy of accessibility plans have been the subject of human rights litigation prior to the enactment of the *ODA*.⁹³ The fact that an accessibility plan was drafted pursuant to the *ODA* (and not out of consideration of the duty to accommodate under the *Code*) would not make a difference in human rights litigation. Accessibility plans drafted pursuant to the *ODA* may be challenged under a complaint made pursuant to the *Human Rights Code* despite the fact that there is no mechanism for complaining about such plans under the *ODA* itself.

(iii) Judicial Review

In Ontario, applications for judicial review may be brought to the Divisional Court to compel compliance with statutory requirements and to prohibit actions that are either not authorized by statute or contravene certain administrative law principles.⁹⁴ It is

91. Refer to R. Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) at 184-85.

92. Refer to the following cases decided by the Court: *Insurance Corporation of British Columbia v. Heerspink* (1982), 137 D.L.R. (3^d) 219; *O'Malley v. Simpsons-Sears* (1985), 23 D.L.R. (4th) 321; and *Robichaud v. The Queen* (1987), 40 D.L.R. (4th) 577.

93. Refer, for example, to *Brock v. Tarrant Film Factory*, *supra* note 82, and *Howard v. University of British Columbia* (1993), 18 C.H.R.R. D/353 (B.C. Coun. Hum. Rts.). In the latter case, the accessibility "plan" of the respondent was analyzed and found to be "not sufficient." Many cases have required boards to adjudicate regarding the actual costs of an accommodation plan and consider whether a respondent is able, financially, to implement it; refer to *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 (Ont. Bd. Inq.).

94. *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

expected that there will be circumstances in which judicial review proceedings will be taken with respect to the *ODA*.

For example, should the Government fail to develop barrier-free design guidelines, despite being directed to do so by the *ODA*,⁹⁵ an application for judicial review could be brought to the court to obtain an order compelling the Government to comply with its statutory obligation. Alternatively, were the Government to develop barrier-free guidelines that impose lesser requirements for accessibility among different classes of buildings for an arguably irrelevant reason, such an exercise of statutory power would be vulnerable on judicial review.

Because the making of regulations also constitutes the exercise of a statutory power, regulations under the *Act* could be challenged on judicial review.⁹⁶ For instance, if a regulation was made that purported to authorize the diminishment of the rights of persons with disabilities as otherwise set out in the *Human Rights Code*, then a judicial review application could be brought to the court to challenge the regulation. An order could be sought to quash the regulation, or prohibit the Government from making such a regulation, because the Government has no authority to pass a regulation that diminishes the existing legal obligations of the Government toward persons with disabilities.⁹⁷

Wherever the *ODA* sets out statutory obligations and powers, courts will be able to supervise – through judicial review applications – the carrying out of such obligations and the exercise of such powers.

(iv) *Canadian Charter of Rights and Freedoms*

In accordance with the principles of constitutional supremacy,⁹⁸ the government of Ontario is required to act in conformity with the *Charter* and pass laws that conform to the *Charter*.⁹⁹ Should the Government act upon an interpretation of the *ODA* that promotes the inequality of persons with disabilities, or make regulations that adversely affect persons with disabilities, then the Government may be challenged through an action or application brought, in Ontario, to the Superior Court of Justice.

The *Charter* challenge would claim that the interpretation given to the *ODA* or the impugned regulations have the effect of discriminating against persons with disabilities, contrary to the equality rights section of the *Charter*.¹⁰⁰

95. *ODA* at s. 4(1).

96. The Government may only pass regulations under the *ODA* through the operation of s. 23(1).

97. *ODA* at s. 3.

98. Section 52(1) of the *Constitution Act, 1982* provides that “The Constitution of Canada is the supreme law of Canada.” Section 52(2) of the same *Act* confirms that it (including the *Charter*) is part of the Constitution of Canada.

99. Section 32(1) of the *Charter* provides for the application of the *Charter* to the “legislature and government of each province.”

100. Refer *supra* note 11.

For example, if the Government were to exempt, by regulation, public transportation organizations from becoming accessible to persons with disabilities, then such a regulation could be challenged. In an application brought under the *Charter*, an order could be sought striking down the regulation on the basis that it is unconstitutional, because the effect would be discriminatory to persons with disabilities. Similarly, that section of the *ODA* which purports to permit the Government to refuse to make its scientific, technical, reference, research, or scholarly material accessible to persons with visual impairments¹⁰¹ could be declared unconstitutional and of no force or effect on a *Charter* challenge. If the Government were to imagine that the *ODA*, by implication, does not require it to provide accommodation to persons with disabilities short of undue hardship, then on a *Charter* challenge the “undue hardship” standard could be read into the *ODA*, in order to ensure equality for persons with disabilities.¹⁰²

In any circumstance in which the Government were to take actions, or interpret the *ODA* contrary to *Charter* principles, then the Government may be challenged for doing so in court.

VIII. CONCLUSION

The *ODA* is not the legislation that was expected by those who have been pushing, for over a decade, for an *Ontarians with Disabilities Act*. The *ODA*, in its present form, may do more in terms of congratulating the Government than it does for persons with disabilities. Some within the community of persons with disabilities will understandably feel insulted by the political commentary contained within a statute that does little to improve the lot of Ontarians with disabilities.

Disappointingly, the *ODA* may not, in the end, compel the dismantling of a single barrier in the province. The *ODA* may not improve the circumstances of persons with disabilities in Ontario and there is a danger that it could be interpreted as diminishing the rights of persons with disabilities. Although it is expected that such questions will ultimately be answered negatively, it is at least ironic that the disability rights community may have to use limited resources to litigate against a negative interpretation of legislation which purports to expand accessibility. The effectiveness of the *ODA* will also depend upon regulations made pursuant to the *Act*, which are as yet unwritten.

The *ODA*, in its present form, does not operate to change substantially the legal landscape for persons with disabilities. It is nevertheless hoped that the *ODA* will have a positive non-legal effect for persons with disabilities because, at least within the public sector, accessibility planning will have to be engaged in and persons with disabilities will have to be consulted. Getting persons in the public sector to speak to persons with disabilities will hopefully result in consciousness raising within the

101. *ODA* at s. 2(1).

102. The Supreme Court of Canada has ruled that the undue hardship standard for accommodating persons with disabilities enters into a *Charter* equality-rights analysis at the stage at which s. 1 of the *Charter* is considered. Refer to *Eldridge v. British Columbia (A.G.)* (1997), 151 D.L.R. (4th) 577 at 624.

public sector. The more that people listen to persons with disabilities and talk about the barriers that prevent persons with disabilities from gaining access to society, the more likely it is that issues of inequality will be addressed. The community of persons with disabilities will have to rely upon this hope until a real *ODA* can be achieved.