OSGOODE HALL LAW SCHOOL | YORK UNIVERSITÉ UNIVERSITY

Journal of Law and Social Policy

Volume 17 Article 7

2002

Case Commentary: Turnbull, et al. v. Famous Players

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CASE COMMENTARY

Turnbull, et al. v. *Famous Players*

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INTRODUCTION

Remember that case, decided over twenty years ago, regarding the right of persons who use wheelchairs to access movie theatres?[1] The owners and operators of many movie theatres in Ontario apparently do not. Persons who use wheelchairs are still facing exclusion and discriminatory treatment with respect to movie theatres, and still must challenge, one by one, each movie theatre to enforce their human right to access such public venues.

In the past two years, the Board of Inquiry (*Human Rights Code*)[2] in Ontario has decided two more cases regarding the right of persons who use wheelchairs to access movie theatres.[3] The most recent case, *Turnbull, et al.* v. *Famous Players*, involved five complainants[4] who alleged that Famous Players had discriminated against them with respect to three prominent theatres in the Toronto area.

Not only was Famous Players operating (as it continues to do) theatres which are inaccessible to persons who use wheelchairs, but it also, in 1995, outright banned persons who use wheelchairs from its inaccessible theatres. Prior to the ban, wheelchair users were at least permitted to watch movies after entering the theatres, often under significantly strained circumstances, with the assistance of friends, attendants and, sometimes, theatre staff. The Board of Inquiry in *Turnbull* heard shocking evidence of the circumstances in which some patrons with disabilities managed to

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1. *Huck* v. *Canadian Odeon Theatres* (1981), 2 C.H.R.R. D/521 (Sask. Bd. Inq.), rev'd (1982) 3 C.H.R.R. D/985 (Sask. Q.B.), aff'd (1985) 6 C.H.R.R. D/2682 (Sask. C.A.). It should be noted that an amendment made to the Ontario *Human Rights Code* in 1986 (S.O. 1986, c. 64, s. 18(9)) removed a defence that otherwise might have been available to theatre owners in Ontario facing a complaint regarding accessibility.

2. Hereinafter referred to as the Board of Inquiry or the Board.

3. The first case is *Brock* v. *Tarrant Film Factory* (2000), 37 C.H.R.R. D/305 (Ont. Bd. Inq.) (hereinafter *Brock*). The second case, *Turnbull, et al.* v. *Famous Players* (2001), 40 C.H.R.R. D/333 (Ont. Bd. Inq.) (hereinafter *Turnbull*) *is the subject of this commentary.*

4. The complainants were Barbara Turnbull, Marilyn Chapman, Domenic Fragale, Ing Wong-Ward, and Steven Macaulay.

access the theatres, including the case of a grandmother compelled to crawl up and down theatre stairs in order to take her five-year-old grandson to the movies.[5]

SUMMARY OF THE CASE

The five complaints in the *Turnbull* case concerned incidents of alleged discrimination at Famous Players theatres from 1993 through 1996. The complainants testified regarding their experiences of barriers when attempting to attend movies at the theatres. The complainants were either discouraged by theatre staff from using the theatres or refused admittance.[6] Some were required to use back door routes. Each of the complaints against Famous Players alleged discrimination with respect to "services" because of "handicap," contrary to sections 1 and 9 of the Ontario *Human Rights Code* (*Code*).[7] After a full hearing, the Board of Inquiry ruled that Famous Players had discriminated against the complainants by not providing services accessible to persons who use wheelchairs.

In typical disability discrimination cases, one important element of the legal inquiry will be a determination of whether the respondent party satisfied its obligation to accommodate the complainant short of undue hardship. The investigation into undue hardship entails a consideration of only three issues: cost, outside sources of funding, and health and safety requirements.[8] In preliminary proceedings in the *Turnbull* case, Famous Players admitted that it did not lack the resources to pay for renovations and so it undertook not to raise the issue of "cost" as a defence to the complaints. Rather than raising a "cost" defence, Famous Players made a novel argument that it called an "improvident use of resources" defence. Famous Players contended that making its theatres accessible to persons who use wheelchairs would constitute an improvident

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5. *Turnbull, supra* note 4 at D/343-344. Ms. Chapman testified that that she voluntarily crawled up and down the stairs because her grandson burst into tears when they were told, after having purchased tickets to view *The Lion King*, that they would be unable to see the movie because the theatre was inaccessible. Ms. Chapman was required to repeat the crawl in order to accompany her grandson to the washroom during the movie. Ms. Chapman testified that she was "shaken by the episode" and stayed in bed for "a couple of bad days" after with "very sore" knees.

6. Ms. Turnbull testified that she attended at a theatre to watch a specific movie. Although it was advertised to be accessible, the theatre turned out to be inaccessible. She was refused admittance, and staff suggested to her that she should simply go to see another movie. Ms. Chapman testified that she was admitted into an inaccessible theatre, but treated like "scum." For example, although she asked in advance for staff to help her get her wheelchair up some stairs after the movie, no employee showed up after the movie to offer assistance. Mr. Fragale testified that although he was admitted into an inaccessible theatre, a manager approached him before the movie began and told him to leave. Ms. Wong-Ward was admitted into an inaccessible theatre but was told after watching the movie "you're not allowed back." Mr. Macaulay was not permitted past the ticket booth of an inaccessible theatre.

7. R.S.O. 1990, c. H.19, as am. It should be noted that the *Code* was amended on 7 February 2002 and now all references to the term "handicap" have been removed and replaced with the word "disability." S.O. 2001, c. 32, s. 27(1).

8. Refer to s. 17 of the *Code*. These three criteria are the only statutorily-permitted undue hardship considerations in the *Code*.

use of its resources. The rationale was that Famous Players had, since 1994, been engaged in a billion-dollar expansion that included the construction of state-of-the-art, accessible, multiplexes.[9] Famous Players did not want to spend money, during the expansion, to make its non-multiplex theatres welcome to persons who use wheelchairs.

The Board considered the "improvident use of resources" argument and rejected it. The Board found that the defence was indistinguishable from a defence of undue hardship based on cost, which Famous Players had undertook not to raise since renovation costs were not an issue for it. The Board found that Famous Players was simply making a "throwing good money after bad" argument, which was not a legitimate cost consideration under an undue hardship analysis.[10] With respect to the imposition of the full scale ban of persons in wheelchairs in 1995, the Board held that doing so was unjustified because it was within the financial ability of Famous Players to have made the theatres in question accessible throughout the lifetime of the ban.

Famous Players was found to have discriminated against the complainants; therefore, it was ordered to pay general compensatory damages ranging in the amount of $8,000 to $10,000 *per* complainant. The Board ordered that Famous Players make one of the three theatres in question accessible within one year of the date of the decision, and the other two locations accessible within two years. Famous Players was also required to file an implementation plan with the Board within three months of the decision. Finally, the Board also directed Famous Players to consider whether it was safe to lift the ban during the renovation period and if so, under what conditions.[11]

ANALYSIS

In a country that prides itself on its human rights record, it is disappointing to learn that anachronistic exclusionary policies are still being employed by certain service-providers. The complainants in the *Turnbull* case repeatedly likened their experiences at Famous Players movie theatres to the experiences of African-Americans prior to the civil rights movement in the United States. When one considers that Famous Players did everything but post "No Persons in Wheelchairs" or "Persons in Wheelchairs Unwelcome" signs at the doors to their inaccessible theatres, it is easy to understand the comparison.[12]

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9. There is no consensus that the new multiplexes are accessible to all persons with disabilities; human rights complaints have been filed recently with the Ontario Human Rights Commission challenging the accessibility of the theatres.

10. *Turnbull, supra* note 4 at D/358.

11. For the full order of the Board, refer to *Turnbull, ibid.* at D/366.

12. It should be noted that one complainant testified that he was told by Famous Players staff that they "didn't allow wheelchairs;" refer to *Turnbull, supra* note 4 at D/337. Famous Players adopted, in 1995-96, a written policy prohibiting persons who use wheelchairs from its inaccessible theatres; refer to *Turnibull, ibid.* at D/345.

One might rightly wonder, in 2002, why inaccessible movie theatres still exist in Ontario and why some movie theatre operators feel entitled to ban, in a wholesale fashion, patrons who use wheelchairs from their inaccessible venues. Some answers may be found by considering the shortcomings of the legislation that exist to enforce accessible services for persons with disabilities, but some answers may also be found by considering the jurisprudence as represented by the decision in *Turnbull*.

(i) Accessibility Legislation

Currently, if a person in Ontario believes that a movie theatre is inaccessible and wishes to compel the owner of the theatre to make it accessible, the person must file a complaint, pursuant to the *Code*, with the Ontario Human Rights Commission (Commission). After an investigation (which is often completed only after years of inactivity have passed), the Commission may or may not decide to refer the complaint to be heard and decided by a Board of Inquiry. If the complaint is referred to a Board, then a full blown hearing (that sometimes takes years to complete) takes place, in which the complainant is required to testify regarding her experiences, describe the harm which has been visited upon her, and be subjected to vigorous cross-examination. After the hearing concludes, several months (and sometimes years) pass before a Board decision is rendered.

The human rights process can take a long time. For Barbara Turnbull, who filed one of her complaints with the Commission with respect to an incident that occurred in 1993, the human rights process – which is not yet finished[13] – has taken approximately a decade. If it takes a decade of legal expenses, hard and stressful work, emotional vigilance,[14] and perseverance through an adversarial and litigious hearing process to compel a *single* theatre-owner to cease its discriminatory practices, then one need not wonder any longer why there are so many theatres in Ontario that are still offering services that exclude persons who use wheelchairs. A complaint-driven system that places so much stress upon individual persons with disabilities to effect slow, incremental change asks too much from complainants and deters persons with disabilities from filing complaints in the first place. The one-at-a-time, individual complaint driven human rights process is also not an efficient way to address a systemic problem. If one courageous complainant decides to challenge one theatre at a time, with each complaint taking a decade to process, then she can expect to change only four theatres in her adult, working lifetime.

The government of Ontario had an opportunity recently to remedy the shortcomings of the existing system – the human rights process – that is used to compel accessibility. In December of 2001, the Government passed the *Ontarians with Disabilities Act, 2001* (*ODA*).[15] Persons within the disability community had hoped that the *ODA*

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13. The Board has remained seized with respect to various remedial issues.

14. The experience of one of the complainants was made the subject of a television phone-in show, in which callers stated, *inter alia*, that, when Famous Players banned the complainant from its inaccessible theatres, the complainant "got what [she] deserved." Refer to *Turnbull, supra* note 4 at D/341.

15. S.O. 2001, c. 32. At the time of writing, the *ODA* is only partially proclaimed.

would require service providers throughout the province, including theatre owners, to identify and remove barriers to accessibility without waiting for someone with a disability to file a human rights complaint. Although consideration was given to including private sector service providers (*e.g.*, theatre owners) within the ambit of the *ODA*, the legislation ultimately excluded such service-providers from any obligations to remove barriers. The human rights process is still, therefore, the only means by which to compel theatre owners to make their premises accessible.

Because the human rights process is long, labourious, and stressful, individual complainants are often loathe to get involved in the system. Who wants to engage in an arduous, expensive, decade-long fight, against corporations with deep pockets and teams of lawyers? In this context, in which complainants are deterred from getting involved in the human rights process, theatre-owners are left, in their view apparently, without any compelling reason to comply with the accessibility requirements of human rights legislation. Because of the deficiencies of the legislative scheme, Ontario still has inaccessible theatres two decades after the first human rights decision affirming the right of persons who use wheelchairs to enter movie theatres and enjoy movies like everyone else.

(ii) Jurisprudence Regarding Movie Theatres

Complainants must possess great emotional strength and extraordinary patience to wait a decade or longer for justice, all the while facing exclusion from the theatre(s) being complained against. Some complainants who have the strength to fight theatre owners, however, will decide not to do so if they have had occasion to study the jurisprudence associated with movie theatre complaints.

In the *Turnbull* decision, for example, it is by no means clear that the Board was sensitive to the experiences of the complainants. Rather than feeling vindicated by the *Turnbull* decision, it would be understandable if the complainants feel, upon reading the decision, disappointed and further demoralized. Consider that, when purchasing a ticket to enter one of the Famous Players theatres, Barbara Turnbull was asked by a box office employee if she could "get out of [that] thing," referring to her wheelchair. Upon replying in the negative, Ms. Turnbull was told that she would not be allowed in.[16] It is hard to imagine a more insensitive question to be posed to a person who uses a wheelchair. The incident was deeply upsetting to Ms. Turnbull and she felt the bitterness associated with being mocked and told that she does not belong. She felt, in her own words, like she was being told "you're a crip."[17]

In determining whether to award damages for mental anguish, the Board of Inquiry was required to undertake an assessment of whether a statutory precondition was met. The Board had to determine whether the impugned conduct – including the wholesale ban of persons who use wheelchairs – was "wilful or reckless."[18] Despite the fact that

16. *Turnbull, supra* note 4 at D/338.

17. *Ibid.*

18. Section 41(1)(b) of the *Code* has been interpreted to create two heads of general damages: (i)

the Board acknowledged that the concept of "reckless" included an "indifference to consequences," the Board concluded that the Famous Players employee (who did not testify at the hearing) may not have intended the remark, made to Ms. Turnbull, to be hurtful or insensitive. The Board noted that Ms. Turnbull was the only person involved in the interaction to give evidence and that she clearly perceived the exchange to be hurtful. Remarkably, though, the Board concluded that the employee was not acting "in a malicious, wanton, heedless, reckless or wilful manner."[19] The Board refused, on this basis, to award Ms. Turnbull damages for the mental anguish she suffered as a consequence of the incident.

Another complainant was denied access to a theatre by a "combative" manager because the complainant was viewed to constitute a "fire risk or hazard" who would end up "blocking the aisle." The dismissive incident deeply hurt the complainant, who lives with quadriplegia, and made him feel, in his words, "really, really, really disabled."[20] However, the Board found that the manager's comments and conduct were "reasonable" and accordingly the complainant was not compensated with damages for the mental anguish he suffered.[21]

Another complainant was told by a Famous Players manager that she would, in the future, be excluded from the theatre because her disability made her a "safety and fire hazard" who would just end up "blocking the aisle." The complainant was naturally distressed during the incident and understandably had a "heated angry argument" with the manager.[22] The Board again refused to award damages for mental anguish and went further to say that the conduct of the manager was "reasonable" both with respect to conveying the exclusionary policy and with respect to "dealing with a very irate patron."[23]

These complainants waited a very long time to have their "day in court." They suffered through painfully humiliating incidents, in public settings, in which they were characterized as mere obstacles for more worthy, able bodied patrons. The complainants bore prolonged periods of segregation from social gathering-places that are taken for

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compensation for loss of the intrinsic value of the right and (ii) compensation for mental anguish suffered in the circumstance of a respondent acting wilfully or recklessly. It is well-established in human rights jurisprudence that for a finding to be made that a respondent acted "wilfully," all that must be shown is that the respondent engaged intentionally in conduct that constitutes a discriminatory act (whether or not the respondent was aware that their conduct was unlawful). Refer to *Lampman* v. *Photflair* (1992), 18 C.H.R.R. D/196 (Ont. Bd. Inq.) at D/212. "Recklessly" in the *Code* means to pay no heed to the possibly injurious consequences of behaviour that constitutes a discriminatory act. Refer to *Cameron* v. *Nel-Gor Castle Nursing Home* (1984), 5 C.H.R.R. D/2170 (Ont. Bd. Inq.) at D/2198, appeal to the Divisional Court dismissed, leave to appeal to the Court of Appeal for Ontario refused (25 November 1985).

19. *Turnbull, supra* note 4 at D/363.
20. *Ibid.* at D/337.
21. *Ibid.* at D/364.
22. *Ibid.* at D/340.
23. *Ibid.* at D/363.

granted by able bodied participants in mainstream culture. To be dismissed as overly sensitive "irate patrons" by the Board of Inquiry after all that they had endured, and to be denied damages for the mental anguish they suffered, may make some of the complainants wonder if it was all worth it. Persons within the disability community who are considering filing new complaints as against presently inaccessible movie theatres may view their prospects as being considerably less appealing after reading the *Turnbull* decision.[24]

One explanation for the failure of the Board to order a remedy for the mental anguish suffered by the complainants may be discerned through an analysis of the Board's assessment of the complex nature of disability discrimination, evidence of which was led by the Commission. Through human rights and disability expert Catherine Frazee, it was established that exclusion from mainstream Canadian society has been the historic norm for persons with disabilities.[25]

Movie theatre inaccessibility is just one part of a long-standing, systemic, exclusionary problem faced by persons with disabilities. Insurmountable obstacles have been, and are being, erected at every turn and these, together with discriminatory attitudes, have the effect of preventing persons with disabilities from gaining admission into society. Persons with disabilities are forced to live to varying degrees segregated from the rest of society and they experience feelings of rejection and stigma consequently. Exclusion causes persons with disabilities to become social outcasts – members of what Ms. Frazee called an "underclass or untouchables of human society."

What permits our society to tolerate a situation in which persons with disabilities live as pariahs within it is a prevailing belief that any fault with respect to inaccessibility lies with persons with disabilities themselves. On this view, segregation exists because persons with disabilities, being defective, are unable because of their defects to participate in mainstream culture. This perspective is derived from a biological view of disability, which has come to be known as the "medical model" of disablement. In the medical model of disablement, blame for inaccessibility is placed on persons with disabilities for not being able-bodied enough and for requiring, consequently, accommodation. Ms. Frazee articulated for the Board in *Turnbull* an alternative and, most would agree, more enlightened view of disablement, known as the "social model" of

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24. It may also be the case that owners of inaccessible movie theatres will consider it unnecessary to provide sensitivity training to their staff because insensitive remarks will, in the end, be considered "reasonable" by a Board of Inquiry and insufficient to justify general damages awards to complainants to compensate for mental anguish visited upon them.

25. The evidence of Ms. Frazee is recounted in *Turnbull, supra* note 4, at D/335-D/336. For a discussion regarding disability discrimination, refer to M.D. Lepofsky, "A Report Card on the *Charter*'s Guarantee of Equality to Persons with Disabilities after 10 Years – What Progress? What Prospects?" (1996-97) 7 N.J.C.L. 263. Refer also to M.D. Lepofsky & J.E. Bickenbach, "Equality Rights and the Physically Handicapped," in A.F. Bayefsky & M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) at 323. That persons with disabilities face significant discrimination in Canadian society is reflected by the fact that disability continues to be one of the leading grounds of discrimination cited in human rights complaints at both the provincial and federal levels.

disablement.[26] Ms. Frazee explained that the social model of disablement has developed in response to the "tyranny of the medical model" and has been widely accepted in legal, policy, and academic spheres as the most appropriate paradigm to employ to understand disability disadvantage.[27] The social model conceptualizes "disability" not as a deviance from biological norms, but as a social condition caused by a societal failure to accommodate individual differences in ability. The social model posits that what accounts for disability disadvantage is society's failure to embrace such differences in ability.[28] Disability disadvantage results from the construction and perpetuation of environments in which the differing abilities of individuals are not given consideration.

Whereas the medical model of disablement blames persons with disabilities for not being able-bodied enough to gain access to society, the social model locates the fault for inaccessibility where it really belongs: in the mainstream – ableist – culture that assumes persons with disabilities do not exist when inaccessible buildings are erected in the first place. When applying this social model of disablement to a movie theatre case, fault for inaccessibility is found not with persons who use wheelchairs, but with a social context in which inaccessible movie theatres are permitted to be imagined, designed, approved, constructed, and maintained.

The competing theories of disablement may be applied to an analysis of the *Turnbull* case. The defence of Famous Players – that in the event of a fire, a patron who uses a wheelchair could endanger himself and other patrons – seems clearly to employ the medical model of disablement to an analysis of the safety issue. Consistent with the medical model, blame for the problem is placed squarely upon the shoulders of the patron who is considered to be not able bodied enough to save himself and get out of the way of others in the case of a fire. The social model, on the other hand, would blame the exclusive design of the building that presupposed that persons with disabilities would enjoy segregation and were uninterested in watching movies, with able-bodied persons, in theatres.

By banning persons who use wheelchairs from its inaccessible theatres rather than by banning inaccessible theatres from its operations, Famous Players was locating the

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26. This analysis of disablement is also articulated by J.E. Bickenbach in *Physical Disability and Social Policy* (Toronto: University of Toronto Press, 1993).

27. The social model, as opposed to the medical model, of disablement has been endorsed by the Supreme Court of Canada. Refer to *Granovsky* v. *Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 (hereinafter *Granovsky*) at 724 and *Québec (C.D.P.D.J.)* v. *Montréal (City)*, [2000] 1 S.C.R. 665 at 669. In *Granovsky* at 724, Binnie J. articulates the difference between the two models in the following excerpt: "It is therefore useful to keep distinct the component of disability that may be said to be located in an individual, namely the aspects of physical or mental impairment, and functional limitation, and on the other hand the other component, namely, the socially constructed handicap that is not located in the individual at all but in the society in which the individual is obliged to go about his or her everyday tasks."

28. In *Granovsky, ibid.* at 722, Binnie J. approved the following argument: "many of the difficulties confronting persons with disabilities in everyday life do not flow ineluctably from the individual's condition at all but are located in the problematic response of society to that condition."

problem of inaccessibility within persons who use wheelchairs themselves. Since persons who use wheelchairs were perceived to be a problem, Famous Players adopted a policy forbidding them to enter. The evidence of Ms. Frazee explained the theoretical basis upon which disability disadvantage is manifested in all movie theatre complaints including those in the *Turnbull* case. Ms. Frazee testified that the central problem continues to be the use, by theatres, of the antiquated medical model of disablement when considering accessibility issues.

Despite the clear articulation given by Ms. Frazee of the context in which movie theatre discrimination exists, the Board, when assessing her evidence, described it as being merely "very interesting." The Board went further to say that while her evidence gave context, it did not bear directly on the specific complaints before the Board.[29] It is disappointing that the Board apparently missed the point of Ms. Frazee's critical evidence: that when viewed through what she called a "different lens," the nature of the infringement of the rights of the complainants in the present case becomes clear. The rights violation experienced by the complainants had everything to do with the application of the inappropriate and demeaning medical model of disablement to them. Blaming, as those who use the medical model do, persons with disabilities for not being able bodied enough to access movie theatres is simple and hurtful victim blaming. Had the Board comprehended that the ban imposed by Famous Players was another case of victim blaming, the Board surely would not have failed to recognize the wilful (or at least reckless) element of the rights violation and refused to order compensation for mental anguish.

It is difficult, in any event, to imagine a more obvious example of a "wilful" violation of human rights than a wholesale ban – admitted to by Famous Players, and reduced to writing in a Famous Players policy document – forbidding persons who use wheelchairs from a service. To ban, though a written policy, persons who use wheelchairs from a service is indubitably the clearest form of intentional and purposeful action. Nevertheless, the Board found that "the ban does not meet the test of wilfulness."[30]

The remedy ultimately ordered by the Board of Inquiry compelled Famous Players to renovate and make accessible three of its theatres within two years of the decision, which was rendered on September 10, 2001.[31] By fighting against the complainants

29. *Turnbull, supra* note 4 at D/335-D/336. Ms. Frazee also testified as an expert witness in another case, regarding movie theatre accessibility, before the same Board. In *Brock*, supra note 4 at D/310, the Board remarked as follows: "While Ms. Frazee's evidence was informative and interesting, its use in assisting me in my deliberations is of a more limited nature."

30. *Ibid.* at D/362.

31. Disappointingly, during the interim period in which the theatres will remain inaccessible, the Board did not, at least, order that movies being shown within the theatres simultaneously be shown in alternative, accessible theatres. Remarkably, the Board ordered instead that Famous Players need only make such movies available "upon request," at a place agreeable to Famous Players. Providing a 'remedy' that imposes such a considerable burden upon persons with disabilities is alarming. If one of the complainants wants to view a movie being shown in one of the inaccessible theatres, they must now contact someone at Famous Players (who may know nothing about the Board order), work

– beginning in 1993 – and resisting human rights legislation that clearly mandates accessibility, Famous Players was thus able to avoid making its theatres accessible until September of 2003.

There is a new twist to the Famous Players case, however, which has developed after the September 2001 decision of the Board. As part of its remedial order, the Board required Famous Players to file an implementation plan setting out a timetable for renovations to the theatres to make them wheelchair-accessible. Exactly three months from the date of the Board's decision, Famous Players announced its intention to close the inaccessible theatres prior to the dates upon which the Board ordered that they be made accessible.[32] At the end of the day, and after so much work by the complainants, the theatres will not be made accessible. What was certainly accomplished, however, is that Famous Players has shown other theatre owners how to avoid their obligations under the *Human Rights Code* and how to avoid compliance with orders made by the Board of Inquiry.

After Famous Players announced its decision to close down the theatres ordered by the Board to be made accessible – and it bears repeating that at the hearing, Famous Players indicated that the cost of making the theatres accessible was not an issue for it – the complainants were subjected to a vitriolic backlash in the media. In one letter to the editor of a newspaper, an angry writer argued that because persons with disabilities had made accessibility complaints, "those of us who are not disabled will now be shut out of landmark movie halls."[33]

Famous Players was ordered to address, as part of its implementation plan, the issue of the whether the ban must be maintained during the renovation period. Consequently, the Board remains seized with respect to the lawfulness of Famous Players' policy that forbids wheelchair users from entering its inaccessible theatres. The Board stated that it requires further evidence regarding what it considers to be "compelling safety issues." The Board stated that, in case of a fire, persons using wheelchairs would block the aisles and "heighten the risk to safety to patrons escaping a fire." The Board wrote that, in a fire, "there would be no means of exit for persons in wheelchairs except for

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their way through a bureaucracy until they reach someone who has the knowledge and authority to help them, ask for the movie to be shown in an accessible venue, and then *negotiate* regarding the location of the venue. With the amount of time and energy required, and considering that a viewing at the alternative venue might not be arranged for months anyway, the 'remedy' amounts to a planned exercise in futility. It would be understandable for the complainants to simply wait for the movie to come out in a rental format, try to ignore the multitude of conversations in which friends and family talk about the plot of the movie, and then watch the movie alone, like the outcasts they were prior to complaining about the violation of their human rights. The 'remedy' ordered by the Board does not improve their situation much, if at all.

32. On December 11, 2001, *The Toronto Star* reported: "The company that runs the oldest movie theatres in the city plans to shut them down in the wake of an Ontario Human Rights Commission order to make them accessible to wheelchairs."

33. A.J. Quinn, Letter to the Editor *Toronto Star* (13 December 2001) A33. Refer also to K. Selick, "A View from a Businessman's Wheelchair" *Canadian Lawyer* (March 2002).

them to be carried out." The topic of fire safety was an ongoing issue in the case despite no evidence having been led, apparently, of any problems ever occurring in a fire.

Famous Players' representatives repeatedly indicated during the hearing that they permitted persons, who conceivably might have difficulty in a fire but who do not use wheelchairs, to make their own risk assessments when deciding whether to enter an inaccessible theatre. Persons who use crutches, who use canes, who use braces, who use walkers, who wear prosthetics, who have poor balance, who walk very slowly, who are blind, who are older, who are pregnant, who have certain cognitive disabilities, who are allergic to smoke, who have asthma, who cannot hear alarms, who panic in stressful situations, who risk heart failure in a crisis, who have infant children, and many other persons all might have difficulty in a fiery and desperate "scramble for their lives," to use an expression of the Board. But all such people are permitted by Famous Players to make their own risk assessments when entering the theatre. It is only persons who use wheelchairs who are considered incompetent to make such an assessment. While no evidence was led to support the premise that persons who use wheelchairs are more incompetent or less capable as compared to other citizens when making risk assessments regarding safety issues, the question of fire safety for persons who use wheelchairs nevertheless managed to capture the fascination of the Board.

The Board's comment that persons in wheelchairs "need to be carried out" in a fire seemingly ignored the evidence led at the hearing that one complainant was able to crawl up and down stairs at an inaccessible theatre operated by Famous Players. Of more concern, however, is the possibility that the Board is actually considering, albeit on an interim basis, sanctioning the outright ban of persons who use wheelchairs from inaccessible buildings due to fire concerns. There are hundreds of thousands of persons with disabilities in Ontario who work and live in buildings that become inaccessible in fire situations (*i.e.*, the elevators cease to operate, thus making the buildings inaccessible).[34] It is deeply alarming to consider that the Board of Inquiry is seriously contemplating the merits of banning persons who use wheelchairs from such buildings. The implications of such a judicially-approved ban would be devastating to persons who use wheelchairs.

CONCLUSION

In many respects the *Turnbull* decision is disappointing. What was otherwise a straightforward case about accessibility has turned into one in which the Board is considering whether it will endorse segregation in Ontario. The Board found that creating policies that explicitly ban persons with wheelchairs from services and that perpetuate their plight as social pariahs does not constitute "wilful or reckless" behaviour.

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34. Although some buildings have "areas of refuge" in which persons with disabilities may wait during a fire, these buildings are nevertheless inaccessible in actual fire situations. In the event of a fire, with no elevators in operation, persons with severe mobility impairments waiting in areas of refuge would require assistance to get out.

The complainants, in the end, were not able, using the only legal mechanism available, to compel Famous Players to turn their inaccessible theatres into accessible theatres. Despite all of the pain they endured, most of the complainants were ultimately denied compensation for mental anguish. And for all of their hard work and dedication to advancing the cause of human rights, the complainants were belittled by the Board's characterization of them as "irate patrons," and they were subsequently vilified in the media. Twenty years have passed since the first human rights case regarding the right of persons who use wheelchairs to access movie theatres. It is not unreasonable to believe, with the current legislative scheme and the current state of human rights jurisprudence on the subject, that it will take at least twenty more before persons who use wheelchairs will truly win the right to view movies like everyone else. And after considering the *Turnbull* decision, it is certainly not surprising that inaccessible theatres still exist in Ontario in 2002.