

*All Aboard! (Except You): The Illusory Guarantee of Access to Transportation for Persons
with Disabilities and their Service Animals*

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Abstract

Through the passage of the Human Rights Code and the Accessibility for Ontarians with Disabilities Act (AODA), the Ontario legislature enacted a set of legal guarantees to increase the participation of Persons with Disabilities in society. This includes the guarantee of access to public transportation. But a deeper analysis of the statutes, the existing jurisprudence, and legal theory suggests that there are gaps in the legal protections for persons with disabilities who rely on service animals and use public transit. Consequently, we suggest that the relevant provisions of the AODA should be amended to permit persons with disabilities who rely on certified service dogs access to any services, places, or facilities which are open to the public. Additionally we suggest that the Ontario government increase its efforts to enforce the provisions of the AODA.

Introduction

The use of dogs to assist the persons with visual impairments is commonplace, and enjoys a long history which is traceable to 79 AD¹. Today, the visually impaired are not the only persons with disabilities who benefit from guide or service dogs: service dogs now provide a wide range of assistive and therapeutic benefits to persons with physical and mental disabilities². Additionally, dogs are not the only animals who assist disabled persons: miniature horses also assist the visually impaired; service monkeys help persons with limited dexterity to retrieve

¹ Canadian National Institute for the Blind, "A History of Guide Dogs", online: < <http://www.cnib.ca/en/living/safe-travel/Pages/history-dogs-0807.aspx>>.

² For instance, service dogs in Ontario are trained to help persons with post-traumatic stress disorder, and autism, in addition to being companions for developmental disorders. See National Service Dogs, "2014 Annual Report", online: < <http://www.nsd.on.ca/wp-content/uploads/2015/07/2014-Annual-Report.pdf>>.

objects; and parrots can also help persons with mental disorders³. However, while the use of guide dogs for the blind and/or visually impaired is commonplace and receives the full protection of the law, the increasing use of service animals for a wide variety of disabilities has posed a challenge for lawmakers. Additionally, although blind persons who rely on guide dogs are guaranteed access to transit with their guide dogs, there are numerous news reports indicating both blind persons with guide dogs and PWDs with service animals are regularly denied taxi service because of their service animals⁴.

The following paper seeks to analyze the current state of the law surrounding the transportation needs of persons with disabilities (hereafter "PWDs") who rely on service animals in Ontario. In particular, the analysis examines and compares the bodies of law which govern this area: the *Human Rights Code*⁵, and the *Accessibility for Ontarians with Disabilities Act, 2005*⁶. The analysis reveals that under-inclusive provisions in the *AODA* may create a potential shortfall of legal protections for PWDs who rely on service animals and use public transit. Our discussion will demonstrate that this shortfall is contrary to the purpose of both protective regimes. We conclude our discussion by arguing that greater clarity and uniformity in the statutory instruments governing the use of service animals together with better enforcement of the *AODA* can help to repair this legal void.

³ Avril Rinn, "Service Animals 101: What You Need to Know About these Special Helpers", *Abilities*, Spring: 2011. See also Sarah Blakemore, "What Kinds of Animals Can Be Trained as Service Animals?" (11 January, 2011), Petful.com, online: <<http://www.petful.com/service-animal/trained-service-animals-guide-horses-helper-monkeys/>>.

⁴ Gilbert Ngabo, "Cabs turning away guide dogs a rampant problem in Toronto: Advocate", *Metro News* (20 October, 2015) online: <<http://www.metronews.ca/news/toronto/2015/10/20/cabs-turning-away-guide-dogs-rampant-in-toronto-.html>>; Steve Goetz, "Guide dog handler refused service by Toronto taxis, UberX", *Metro News* (18 October, 2015) online: <<http://www.metronews.ca/news/toronto/2015/10/18/guide-dog-handler-refused-service-by-toronto-taxis.html>>; Steve Mertl, "No dogs allowed: many Calgary, Ottawa businesses rejecting service animals (2 December, 2014) online: <<https://ca.news.yahoo.com/blogs/dailybrew/no-dogs-allowed-many-calgary-ottawa-businesses-233106288.html>>.

⁵ RSO 1990, c H19 [*HRC*].

⁶ SO 2005, c 11 [*AODA*].

In support of our position, the following paper is divided into the following sets of discussions: 1) a brief explanation of our approach; 2) an overview of disability in Canada and the history of the disability rights movement, 3) the current statutory regime governing service animals; 4) relevant human rights jurisprudence; and 4) our conclusion and suggestions for future areas of study.

1. Methodology Undertaken

To address the above mentioned area of concern, we undertake an overview of the statutes governing the use of service animals in Ontario. Our examination focuses primarily on the Regulations under the *AODA* which set standards and guidelines for access to transportation, and the *Human Rights Code* (“*HRC*”). Relevant jurisprudence is also be analyzed to illustrate how individual complaints of PWD relying on service animals have been dealt with by the Ontario Human Rights Tribunal (“*HRTO*”) in comparison to the human rights tribunals of other jurisdictions. However, before proceeding, we first offer some background information on disability in Canada and the theoretical foundations upon which the current legal regime has been built.

2. An Overview of Disability in Canada

PWDs are a historically disadvantaged group. In the past, the disadvantages of PWDs were attributed solely to their disabilities and as a result, PWDs were marginalized from mainstream society and forced to depend on the charity of others⁷. Over the years, PWDs have slowly but steadily gained greater equality as well as accessibility to and participatory rights in

⁷ See Susan M. Schweik “All About Ugly Laws (for ten cents)” in Susan M. Schweik ed., *The Ugly Laws: Disability in Public* (New York: New York University Press, 2009) 23-39.

mainstream society as a result of law reforms and attitudinal changes. Additionally, the use of aids such as service animals and assistive devices have enabled many PWDs to participate more fully in society. However, while PWDs today benefit from aids such as service animals, increased legal protections and better social programs, they remain disadvantaged vis-à-vis their non-disabled counterparts. A 2012 study by Statistics Canada revealed that approximately one in seven Canadians 15 years of age or older have a disability⁸. In Ontario, approximately 15.4% of the population is composed of persons with disabilities⁹. The study also found that persons with disabilities generally attain lower levels of education, have a lower participation in the workforce, and earn less income than non-disabled persons¹⁰. While it is easy to characterize these issues as ones that pertain to the “disability community”, this is a myopic error. The reality is that through a myriad of ways anyone can become disabled. The study by Statistics Canada revealed that prevalence of disability rises with age: only 4% of 15- to 24-year-olds are disabled compared to 43% for persons aged 75 years or older¹¹. Given Canada’s aging population¹², the prevalence of disability among Canadians is therefore expected to rise¹³.

Consequently, it is important to identify and eliminate or at the very least substantially reduce the socially constructed barriers that hinder the participation of PWDs in society¹⁴. Thankfully, there has been a convergence in the theory and law over time, where legislative schemes and court decisions have come to recognize the need to increase the participation of PWDs in mainstream society in order to level the playing field between PWDs and their non-

⁸ Canada, Statistics Canada, *Canadian Survey on Disability 2012: A profile of persons with disabilities among Canadians aged 15 years or older, 2012*, Catalogue No. 89-654-X (Ottawa: Statistics Canada, 13 March 2015).

⁹ *Ibid* at Table 1.

¹⁰ *Ibid*.

¹¹ *Ibid*.

¹² *Ibid*

¹³ *Ibid*.

¹⁴ Mark Priestley, Lisa Waddington, and Carlotta Bessozi, “Towards and agenda for disability research in Europe: learning from disabled people’s organisations” (2010) 25:6 *Disability & Society* 731 at 733.

disabled counterparts. In examining public policies targeted to this end, the ideas of two prominent schools of thought are readily apparent: the medical and social models of disability.

The Medical Model

The medical model emphasizes the individual as the base unit of analysis and focuses on an individual's disability as the source of social disenfranchisement and condition¹⁵. Therefore, it expects that a medical resolution or cure of disability as the route to social freedom.¹⁶

However, the relatively narrow conception of disability as strictly emanating from one's medical condition excludes the social context within which all members of society live – not least of which include PWDs. Applied to the topic discussed here, the medical model views the state of impairment – and therefore the need for accommodating one's physical condition – as causing one's inability to exercise certain rights. Cast in this light, disease creates a condition that requires greater accommodation, which remains so long as one's condition persists. This model effectively prevents the recognition of the social and legal rights to which each person is entitled by recasting disenfranchisement as disease rather exploring socially constructed barriers¹⁷.

The Social Model

By contrast, the second theoretical approach most relevant to our discussion is the social model¹⁸. The social model emphasizes the lived experiences of PWDs where the impact of a

¹⁵ For further reading, please refer to Donna R. Falvo, *Medical and Psychosocial Aspects of Chronic Illness and Disability*, (Burlington, MA: Jones & Bartlett Learning, 2014).

¹⁶ Thomas, *supra* note 2; Steven Edwards, "Disability as Medical and as Social Category" in Thomas Schramme and Steven Edwards eds, *Handbook of the Philosophy of Medicine* (Netherlands: Springer, 2016) 1-10.

¹⁷ See Paul Harpur, "Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities" (2012) 27:1 *Disability & Society* 1.

¹⁸ For further reading, please see Tom Shakespeare, "The Social Model of Disability" in Lennard J. David ed, *The Disability Studies Reader* (New York: Routledge, 2013) 214-221.

society built around the needs of the able bodied society excludes their participation in society and perpetuates their disadvantage¹⁹. Thus, disability is treated as “a political problem calling for corrective action”²⁰. As a result, this model creates a dialogue of rights where a distinction is drawn between oppression, discrimination, and dignity of persons suffering adverse treatment²¹.

Applied to the topic of discussion here, we see a shift in the dialogue toward a more inclusive dialogue. The social model challenges the notion of *(dis)ablism* and *impairment* and substitutes the discussion with the idea of different sets of rights²². And it is within the gaps of difference found between different groups of society that a more equitable construction of policy and law can be had. Thus, the discussion shifts away from the correction of medical malady toward a more inclusive discussion about how different lifestyles can fit together in a mutually supportive society.

The Growing Influence of the Social Model

Over the last few decades, it has become clear that the social model has increasingly gained traction among lawmakers; legislative schemes and court decisions have increasingly recognized the need to reduce the substantive barriers imposed on PWDs to boost their participation in society. The Ontario legislature has recognized that to promote equality, socially constructed barriers and discrimination must be eliminated in order to increase all citizens' participation in society. For example, consider the wording of the *HRC*'s preamble:

“It is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination... and

¹⁹ Anita Silvers, “An Essay on Modelling: The Social Model of Disability” in Christopher D. Ralston and Justin Ho eds, *Philosophical Reflections on Disability* (New York: Springer, 2010), 19-36 [Silvers].

²⁰ *Ibid* at 21.

²¹ *Ibid*.

²² Carol Thomas, “Disability Theory: Key Ideas, Issues and Thinkers” in Colin Barnes, Mike Oliver and Len Barton, eds, *Disability Studies Today* (Malden MA: Polity Press, 2002) 38-57 [Thomas].

having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person..."²³

Contraventions of the *HRC*'s provisions can result in the ordering of corrective measures by the Human Rights Tribunal of Ontario (HRTO) and/or a fine of up to \$25,000 in addition to monetary compensation to the complainant for any loss he/she sustains as a result of the denial of goods or services on a prohibited ground, including compensation for any injury to dignity, feelings and self-respect²⁴.

However, the *HRC* is that only serves a corrective function *after* an infringement has already taken place and only does so on a case by case basis. Moreover, the complaint process can be slow and persons who lodge a complaint may face a disadvantage at proceedings if they represent themselves and respondent businesses or individuals are represented by lawyers. When discussing a possible amendment to the *Blind Persons' Rights Act* ("BPRA") that would extend its protections to certified service dogs for PWD, MPP Laurie Scott noted the following:

"I know we have some protections built into the Ontario Human Rights Code that people can turn to, but redress under the Human Rights Code is slow and indirect. If there is an alleged infringement of that code that would lead to an investigation and the Ontario Human Rights Commission would attempt to negotiate a change of behaviour and perhaps compensation on the part of the party infringing on the right, I think what the member from Cambridge is proposing is a solution that cuts through the convoluted process and puts protection for people who rely on service dogs into a piece of proven

²³ *HRC supra* note 5 preamble.

²⁴ *Ibid* at s. 45.2(1).

legislation that does a good job of protecting the rights of the blind, and would extend the rights of protection to all persons with disabilities who need the services of a guide dog.”²⁵

In sum, the focus of the *HRC* revolves around individual accommodation.

In one sense, the providing for and accommodation of particular needs is part of what drives equalization forward²⁶. However, as noted by the Supreme Court of Canada (“SCC”) in the case of *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*²⁷, accommodation without the reduction of barriers resulting from a society built around the needs of the able-bodied, does not challenge the standards that maintain the existing imbalance of power and perpetuate the disadvantages of PWD:

Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply “accommodate” those who do not quite fit. We make some concessions to those who are “different”, rather than abandoning the idea of “normal” and working for genuine inclusiveness...

²⁵ Legislative Assembly of Ontario, 38th Parl, 1st Sess, No 153 (2 June 2005) at 1110 (Bruce Crozier), online <http://www.ontla.on.ca/house-proceedings/transcripts/files_html/2005-06-02_L153A.htm#PARA120>.

²⁶ *Silvers supra* note 19.

²⁷ [1999] 3 SCR 3 at para 41, 176 DLR (4th) 1, [*Meiorin*].

Accommodation, conceived of in this way does not challenge deep-seated beliefs about the intrinsic superiority of such characteristics as mobility and sightedness.”²⁸

Consequently, reducing socially constructed barriers requires broad and sweeping changes. It is for this reason that the Ontario legislature passed the *AODA* which seeks to make the province more accessible for PWD through the creation of inclusive standards. This appears to be the underlying purpose of the *AODA* as set out in section 1:

“Recognizing the history of discrimination against persons with disabilities in Ontario, the purpose of this Act is to benefit all Ontarians by,

- (a) developing, implementing and enforcing accessibility standards in order to achieve accessibility for Ontarians with disabilities with respect to goods, **services**, facilities, accommodation, employment, buildings, structures and premises...”²⁹

In addition to the above wording, the remarks of the MPP who introduced the *AODA* with then Premier Dalton McGuinty reveal its social model underpinnings:

“To make truly comprehensive progress...we need legislation that will deliver fundamental changes -- real change -- to the way we think and act as a society... The creation of an accessible Ontario is a vision and a job for all of us.”³⁰

During the introduction of the *AODA*, the government proudly stated that its provisions were “crafted and fine-tuned by what we have heard from the disability community and those in

²⁸ Shelagh Day and Gwen Brodsky, “The Duty to Accommodate: Who Will Benefit?” (1996), 75 *Can Bar Rev* 433 at 462 as cited in *ibid Meiorin* at para 41.

²⁹ *AODA supra* note 6, s1.

³⁰ Ontario, Legislative Assembly, Statements by the Ministry and Responses Ontarians with Disabilities Legislation, *Hansard*, 38th Parl, 1st Sess, No 70 (12 October 2004) at 1420, 1430 (Hon Marie Bountrogianni).

other sectors”³¹. The public was also told that the *AODA* would contain enforceable standards that would address the barriers faced by PWD in their day-to-day lives:

“I’m talking about standards in areas that affect people in their day-to-day lives; standards that would *address barriers* related to physical and mental health, sensory -- the full range of developmental and learning disabilities, visible and invisible; standards that would be given the force of law through regulation and *enforcement* and that would require affected persons and organizations to comply with tough penalties for violators.”³²

Prior to the passage of the *AODA*, the government’s Standing Committee on Social Policy heard submissions from many persons in the disability community who raised the issue of ensuring that the standards developed under the *AODA* guaranteed access to transit for PWD relying on service animals³³.

Why Accessible Transit is Essential for the Increased Participation by PWD in Society

A key aspect of promoting the increased participation of PWDs in society is ensuring that accessible transportation systems are available³⁴. It is estimated that approximately 20% of PWD use public transit systems, such as buses and subways, while approximately 8% rely on specialized transit service, such as the special buses or vans of a subsidized accessible taxi service³⁵. As noted by the SCC in the 2007 case of *VIA Rail Canada Inc. v. Canadian Transportation Agency*:

³¹ *Ibid* at 1420.

³² *Ibid*.

³³ *Ibid*.

³⁴ Consider the *AODA Integrated Accessibility Standards* enumerating the standard of access to be guaranteed to all PWDs with respect to transportation.

³⁵ *Supra* note 1.

“The objective of accessible transportation to persons with disabilities is an issue of human rights. It is critical to enabling persons with disabilities to gain employment, pursue educational opportunities, enjoy recreation, and live independently in the community.”³⁶

Consequently, it seems uncontroversial that PWDs who rely on service animals and have mutually dependent relationships with them³⁷ should be able to travel with them as do PWD who rely on assistive devices. However, as noted earlier there have been instances where PWD face discrimination and barriers when accessing public transit.

Service Animals and The Law

Presently, the use of service animals are governed by the *HRC*, and the *AODA*. The *Blind Persons' Rights Act*³⁸ governs the use of certified guide dogs for blind individuals. At first glance, it appears that these three statutes mandate that public transportation must be entirely accessible to disabled persons who rely on service animals or guide dogs.

Pursuant to ss 2 and 6 of the *BRPA* it is an offence for providers of goods and services to deny services to blind persons with certified guide dogs. Additionally, the *HRC*³⁹ prohibits the denial of goods and services on the basis of disability and includes in its definition of disability “*physical* reliance on a guide dog *or other animal*”⁴⁰. In recognition of the expanded use of service animals, the *Accessibility Standards for Customer Service*⁴¹ enacted under the *AODA*

³⁶ 2007 SCC 15 at para 289, [2007] 1 SCR 650, [2007] SCJ No 15 [*Via Rail*].

³⁷ Caroline LaFrance, Linda J Garcia and Julianne Labreche, “The effect of a therapy dog on the communication skills of an adult with aphasia”, *J of Comm Disorders* (2007) 40:3, 214-244.

³⁸ RSO 1990, c B-7 [*BRPA*].

³⁹ *HRC supra* note 4.

⁴⁰ *Ibid* at ss 1, 10(1)(a).

⁴¹ O Reg 429/07, R4(8) [*ASCS*].

also prohibits the denial of goods or services to PWDs who rely on guide dogs as defined by the *BPRA* as well as to PWDs who rely on service animals.

But upon closer examination of the statutes, it becomes clear that only blind persons with guide dogs are guaranteed access to transit, while PWD with service animals do not enjoy a similar guarantee for the following reasons:

(1) the *Integrated Accessibility Standards Regulations*⁴², which sets out standards for accessible transportation, is silent on the issue of service animals;

(2) it appears that the *ASCS*⁴³, which does define service animals, limits their guarantee of access to services delivered on “premises”; and

(3) it is unclear whether the *ASCS* even applies to the *IASR* given the wording in sections 6(5) and (9) of the *AODA*.

The IASR is Silent on Service Animals

The entire *IASR* is silent on the issue of service animals. Part IV of the *IASR* addresses transportation and sets out very detailed technical requirements for transportation service providers. Section 38 even guarantees that support persons accompanying a disabled person are not be charged a fare. Section 74 provides that specialized transportation providers⁴⁴ “shall”

⁴² Please see O Reg 191/11 [*IASR*].

⁴³ *Supra* note 41.

⁴⁴ Please see *AODA supra* note 6:

Pursuant to regulation 33 of *Accessibility Standard*, “specialized transportation service provider” means public passenger transportation services that,

allow “companions” and “dependants” of a disabled person to travel with him or her. The term “companions” is not defined, but it can be inferred that such term cannot be construed to mean service animal given that “service animal” is clearly defined in the *ASCS*.

ASCS

Section 1 of the *ASCS* states that it:

“applies to every designated public sector organization and to every other person or organization that provides goods or services to members of the public or other third parties and that has at least one employee in Ontario

The definition of “service animal” in the *ASCS* is very broad and reasonably covers a wide range of PWDs assisted by service animals. Sections 4(8) and (9) define guide dog and service animal as:

(8) In this section,

“guide dog” means a guide dog as defined in section 1 of the *Blind Persons' Rights Act*;

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- (a) operate solely within the Province of Ontario,
 - (b) are provided by a designated public sector transportation organization as described in paragraph 5 of Schedule 1, and
 - (c) are designed to transport persons with disabilities.

Paragraph 5 of Schedule 1 states:

Every public transportation organization in Ontario, including any municipally operated transportation services for persons with disabilities, that provides services for which a fare is charged for transporting the public by vehicles that are operated,

- i. by, for or on behalf of the Government of Ontario, a municipality, a local board of a municipality or a transit or transportation commission or authority,
- ii. under an agreement between the Government of Ontario and a person, firm, corporation, or transit or transportation commission or authority, or
- iii. under an agreement between a municipality and a person, firm, corporation or transit or transportation commission or authority.

“service animal” means an animal described in subsection (9);

...

(9) For the purposes of this section, an animal is a service animal for a person with a disability,

(a) if it is readily apparent that the animal is used by the person for reasons relating to his or her disability; or

(b) if the person provides a letter from a physician or nurse confirming that the person requires the animal for reasons relating to the disability.

However, section 4 of the *ASCS*, which specifically addresses service animals, appears to limit the guarantee of access to services for persons with disabilities to those services delivered at “premises”:

4(1) This section **applies if goods or services are provided** to members of the public or other third parties **at premises** owned or operated by the provider of the goods or services **and if the public or third parties have access to the premises.**

(2) If a person with a disability is accompanied by a guide dog or other service animal, the provider of goods or services shall ensure that the person is permitted **to enter the premises** with the animal and to keep the animal with him or her unless the animal is otherwise excluded by law from the premises.

(3) If a service animal is excluded by law **from the premises**, the provider of goods or services shall ensure that other measures are available to enable the person with a disability to obtain, use or benefit from the provider's goods or services.

To gain a greater appreciation of why the *AODA*'s provisions on service animals may be problematic, it is useful to bear in mind the language used in the *BPRA* which clearly and unequivocally prohibits the denial of services to "blind persons" with "guide dogs" in "any place to which the public is customarily admitted". By virtue of section 3 of the *AODA*, the protections of both *BPRA* and the *HRC* remain intact. However, this provision makes it clear that "blind persons" with "guide dogs" have a greater guarantee of access to transit by virtue of the *BPRA* than do PWDs with service animals pursuant to the *AODA*.

Lack of Clarity Surrounding the Applicability of the ASCS to the IASR

Finally, the fact that the *IASR* and *ASCS* are separate create additional confusion because it is not entirely clear whether organizations are subject to both regulations. Section 1(2) of the *IASR* states that:

(2) The requirements in the standards set out in this Regulation are not a replacement or a substitution for the requirements established under the *Human Rights Code* nor do the standards limit any obligations owed to persons with disabilities under any other legislation.

However, sections 6(5) and (9) of the *AODA* stipulate that that organizations "may" be subject to one or more standards together with the wording in section 6(9) which stipulates that

standards “may” be limited to places. When all of these provisions are read together, it appears that disabled persons who rely on service animals may not be guaranteed access to public transit, unless they are blind and have a certified “guide dog”. Although service providers are obliged to accommodate PWDs with service dogs pursuant to the *HRC*, obtaining such accommodations may require that a complaint be filed. As discussed above, seeking changes through the *HRC* is “slow”, cumbersome, and involves individual accommodation which seems contrary to the purpose of the *AODA*.

The Legislature's Attempts to Remedy the Problems Identified

Over the past decade, the lack of protections for PWDs who travel with service animals has attracted the attention of the legislature and in response two significant proposals have been made. The first proposal involves making changes to the present regulations of the *AODA*. The second proposal was a bill to amend the *BPRA* to extend its protections of blind persons and guide dogs to all PWDs that rely on certified service dogs for assistance.

Proposed Changes to AODA Regulations

Since the *AODA* was passed in 2005, it has undergone two separate independent reviews. The first review was conducted by Charles Beer in 2010 and the second review was conducted by Mayo Moran in 2014. One of the recommendations set out in the first review was a harmonization of the service standards⁴⁵. Presently, the Ontario government has proposed to pass a new regulation that will, among other things:

⁴⁵ Charles Beer, “Charting a Path Forward: Report of the Independent Review of the Accessibility for Ontarians with Disabilities Act (2010) online: <<https://www.ontario.ca/page/charting-path-forward-report-independent-review-accessibility-ontarians-disabilities-act>>

1. Incorporate the *Customer Service Standard* into the *Accessibility Standard*;
2. Include “facilities” wherever “goods and services” are presently referred to; and
3. Change the definition of “service animal” to allow PWDs to present a certificate of the training completed by the service animal to assist with disabilities and to allow PWDs to show “documentation from a regulated health professional” confirming their need for service animals related to disability⁴⁶.

Regrettably, while the above proposals are positive steps, they do not address the problems faced by PWDs who travel on public transit with service animals and are not protected by the *BPRA*. The government has invited the public to submit feedback on the proposed regulation. If the above regulation is passed, it will come into force on January 1, 2016.

Proposed Amendments to BPRA

Prior to the passage of the *AODA*, the lack of protections for PWDs with service animals was brought to the attention of the legislature. In 2004, Conservative MPP, Gerry Martiniuk introduced a private member's bill to amend the *BPRA* to extend its protections of blind persons and guide dogs to all PWDs that relied on service dogs for assistance⁴⁷. When the bill advanced to its second reading, it was debated and received praise and support from all parties. The members who debated the bill recounted the benefits of service dogs to autistic and deaf persons as well as those who suffer from seizures. NDP MPP Kim Craiton recounted to the legislature that one of his constituents, a 9-year-old boy, had been denied access to the Niagara Falls transit

⁴⁶ Ontario, Regulatory Registry, Ministry of Economic Development, Employment and Infrastructure, Proposed Changes to Accessibility Regulations, 15-MEDEI006 (9 November 2015) online: www.ontariocanada.com/registry/view.do?postingId=20303 >

⁴⁷ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 1st Sess, No 18 (17 June 2004) at 1400 (Bruce Crozier).

system because of his service dog. Mr. Craitor expressed dismay that the *BPRA*'s protections were limited to only blind persons with guide dogs. The bill was then referred to the Standing Committee on General Government, but was never passed. Mr. Martiniuk re-introduced the bill⁴⁸ in 2008, but it was never debated again in the legislature.

Although an amendment to the *BPRA* appears to provide a possible solution to the current problem, such a proposal may exclude emotional support animals and may entail significant certification costs for PWDs. The imposition of such requirements would therefore impose additional barriers on PWDs and help to perpetuate economic and social disadvantage among PWDs who rely on service animals. It would also be a step back from the broader and more inclusive definition of service animals found in the *AODA*.

Having examined the statutes that presently govern service animals, we will now turn to a discussion of the jurisprudence which outlines how human rights tribunals have dealt with cases involving service animals.

3. The Relevant Jurisprudence

In *Via Rail*, the SCC stated that “where a statutory provision is open to more than one interpretation, it must be interpreted consistently with human rights principles”⁴⁹. Consequently, it would appear that the provisions in the *AODA* which are unclear as to whether or not PWDs with service animals are guaranteed access to transit should be interpreted in accordance with the *HRC*⁵⁰, which ensures equal treatment with respect to transportation services, section 2 which

⁴⁸ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 39th Parl, 1st Sess, No 70 (7 May 2008) at 1510 (Steve Peters).

⁴⁹ *Ibid* at para 115.

⁵⁰ *HRC* at *supra* note 5. We considered the HRC as a whole by accounting for section 1, which ensures equal treatment with respect to transportation services, section 2(1) which ensures accommodation without

ensures accommodation without discrimination, and section 17(2) which recognizes what the standard for PWD accommodation must be

Regrettably, there are no reported cases of the HRTO dealing with service animals and transportation other than interim decisions on collateral issues arising from complaints by PWD who alleged that they had been denied transportation services due to the presence of their service animals⁵¹. A high volume of HRTO cases are settled between the parties

However, despite the limited number of dispositive holdings about how these laws work together, courts and tribunals have nevertheless provided insight. There are a series of cases involving service animals that highlight: (1) the difficulties in seeking individual accommodation through the HRC on grounds already covered by the *AODA*; (2) the differential treatment that is given to guide dogs as defined by *BRPA* vis-à-vis service animals as defined by the *AODA*; and (3) the challenges posed due to the lack of awareness of the expanded use of service animals.

The case of *Merner v Greater Essex County School Board*⁵², reveals some of the hurdles that persons seeking to enforce the rights set out *AODA* regulations must undergo when they seek accommodation pursuant to the *HRC*. In *Merner*, the applicant suffered from a psychological disorder and sought to have her service dog accompany her to and from school on a school bus and remain with her during her classes. The applicant had produced neuropsychological reports detailing her condition as well as a letter from her doctor indicating that in her opinion the applicant required the presence of her service dog. The matter had been set for mediation but the applicant requested an interim order which would allow her to be accompanied by her service dog on the school bus and remain with her at school before the

discrimination, and sections 10(3) and 11(1) which casts a wide net by identifying PWDs or individuals who may be perceived as PWDs to be ensured equal treatment.

⁵¹ *McIndless v AAA Best Choice Taxi*, 2009 HRTO 1548 (CanLII); *Farokshadfar v Regional Municipality of Peel*, 2014 HRTO 1409 (CanLII); *Guillemette v Beck Taxi*, 2015 HRTO 192 (CanLII).

⁵² 2010 HRTO 194 (CanLII) [*Merner*].

matter was disposed of. The decision concentrated only on the issue of whether or not the applicant met the burden of an interim order and the HRTO denied her request.

It is notable that pursuant to the wording of both the *AODA* and *HRC*, the respondent school board was subject to the *Customer Service Standard*⁵³. Therefore, given the fact that at least part of the applicant's claim involved "premises" and that she had a "letter from a physician confirming" that she required "the animal for reasons relating to the disability" one would expect that it should have been uncontroversial for the school board to have accommodated the applicant from the outset.

However, the HRTO held that the Applicant had not met the "significant onus" to justify an interim remedy because the HRTO needed to consider whether or not accommodating the applicant's request would amount to undue hardship for the respondent⁵⁴. Because the parties likely reached a settlement, we do not know how this case would have been decided by the HRTO.

It is likely that when deciding whether or not allowing the Applicant's service dog to travel with her on the school bus and stay with her in school, the HRTO would have considered the *Customer Service Standard* in its assessment of undue hardship pursuant to ss17(2) and (3) of the *HRC*⁵⁵. While s 4 of the *Customer Service Standard* may have served to protect the Applicant's right to have her service dog with her at the school, it is unclear whether a similar

⁵³ *Supra* note 30 at section 1(2) and Schedule 2.

⁵⁴ *Supra* note 44 at paras 23 to 25.

⁵⁵ These sections deal with undue hardship and read as follows:

17. (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.

(2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

(3) In determining for the purposes of subsection (2) whether there would be undue hardship, a tribunal or court shall consider any standards prescribed by the regulations.

conclusion would have been reached regarding her request to have her service dog with her while riding the school bus to and from school since s 4 only extends protection to services at “premises”. Furthermore, in 2009 when this complaint was filed, the *Accessibility Standard* had not yet been passed.

Based on this, we expect that if a case with similar facts were to be decided today, the HRTO would likely consider s 75 of the *Accessibility Standard* which requires that school boards create an accommodation plan for students with disabilities. However, given the *Accessibility Standard's* silence on the issue of service animals it is unclear whether such an accommodation plan would permit service animals. Consequently, students seeking to travel to and from school with their service dogs may have to resort to filing a human rights complaint if the transportation provider or school board refuses their request.

The case of *Sprague v RioCan Empress Walk Inc*⁵⁶ reflects the differential treatment under the law between PWD relying on service dogs and blind persons with guide dogs. In this case, Mr. Sprague a lawyer who relies on a certified service dog to assist him with Post-Traumatic Stress Disorder (PTSD), was treated rudely by a mall security guard who advised him and his pregnant wife that they could not enter the mall with the dog. Mr. Sprague advised the guard that his dog was a certified service dog and offered to show him the documentation but the guard refused and left Mr. Sprague and his wife waiting outside for approximately four to six minutes.

After Mr. Sprague's wife, who was 37 weeks pregnant, became uncomfortable as a result of standing, Mr. Sprague went inside and spoke to the guard's supervisor who let them enter the

⁵⁶ 2015 HRTO 942 (CanLII) [*Sprague*].

premises. The HRTO found that Mr. Sprague's rights under the *HRC* were infringed and he was awarded the sum of \$1,000 pursuant to section 45.2(1) of the *HRC* as compensation for the "injury to dignity, feelings and self-respect" that the encounter caused to Mr. Sprague.

Mr. Sprague subsequently asked the HRTO to reconsider its decision because in his submission the HRTO had decided several cases where higher monetary awards were awarded to blind persons with guide dogs that were denied goods or services in comparison to PWD with service dogs who had experienced similar denials of goods and services⁵⁷. The HRTO refused Mr. Sprague's request for reconsideration.

While Mr. Sprague's cases received some unfavourable media coverage⁵⁸, his cases highlight the differential treatment in the law between service animals and guide dogs and these along with the other cases cited in *Sprague* illustrate the challenges that have arisen due to the public's lack of awareness of the expanded use of service animals. One such case, *Sweet v 1790907 Ontario Inc. o/a Kanda Sushi*⁵⁹ involved a young autistic girl who was denied entry into a sushi restaurant because the waiter was unaware that service dogs in addition to guide dogs for the blind were permitted to enter restaurants. Interestingly, in *Sweet*, the health regulations that the respondent restaurant was subject to, and had an exemption that allowed "service dogs" to be on the premises⁶⁰. The HRTO awarded the Applicant the sum of \$2,500 for the "injury to dignity, feelings and self-respect" she experienced as a result of the incident. When considering the sum awarded, the HRTO opined among other things that:

⁵⁷ 2015 HRTO 1385 (CanLII) [*Sprague Reconsideration*].

⁵⁸ Michelle Mandel, "PTSD Sufferer Wants \$10Gs For Being Forced To Wait At A Mall", *Toronto Sun*, (29 July 2015) online: < <http://www.torontosun.com/2015/07/29/ptsd-sufferer-wants-10gs-for-being-forced-to-wait-at-a-mall>>

⁵⁹ 2015 HRTO 433 (CanLII) [*Sweet*].

⁶⁰ *Ibid* at para 61.

“It also seems to me that there may be some difference between the denial of access to a restaurant because of a service dog as compared to a guide dog. The fact that a blind person may be accompanied by a guide dog is well known and accepted. It is also known and generally accepted that a blind person is entitled to service at a restaurant because guide dogs are known to be an exception to the general rule that animals are not allowed in restaurants. Given this, denial of service at a restaurant to a blind person because of a guide dog would be relatively unexpected.

A person with a disability other than blindness who requires a service dog is also legally entitled to service at a restaurant. However, this legal right is not as well-known and accepted. As the applicant in this case has learned, it is prudent to understand this and be prepared for it. For example, it is important to carry a letter confirming the medical need for the service dog and to offer it to the service provider.⁶¹

Although *Sweet* does not deal directly with the issue of transportation, it illustrates why further clarity is needed in the *AODA* regarding the use of service animals and transportation. In *Sweet*, the complainant was denied access to the restaurant with her service dog, something that is clearly prohibited under section 4 of the *AODA*. Given the fact that section 4 only guarantees PWD with service animals access to good and services delivered on premises, it is possible that the differential treatment of service animals and guide dogs may be a factor that can adversely affect complainants who bring claims to the ORHT relating to the denial of service animals in public transit. Moreover, the above quote from *Sweet* reflects the limited effect that individual HRTO rulings can have on broader social policies; in this case, the HRTO had to consider the lack of awareness of the server as a mitigating factor to ensure fairness to all parties in that proceeding. However, the apparent passiveness of the HRTO at the notion that the legal right to access premises with service dogs is not “accepted” is troubling.

Challenges of the Expanded Use of Service Animals and How the Issue is Dealt with in Other Provinces

The analysis above has focused on the statutory regime and jurisprudence from Ontario. But as previously noted, the high number of settlements means that we have few judgments to

⁶¹ *Ibid* at paras 77 - 78.

learn about how this issue would be treated by the HRTO. Consequently, we have briefly examined the law on service animals in other provinces. Presently, British Columbia and Alberta have legislation which entitles PWD with service animals to access public places with provisions similar to those in the *BPRA*⁶². Nova Scotia is also in the process of tabling similar legislation⁶³.

In Manitoba, the legislature amended its *Human Rights Code*⁶⁴ to replace “guide dog” with “service animal” in 2012. Following the amendment, the Manitoba Human Rights Commission (MHRC) became concerned that the amendment generated a significant amount of confusion among stakeholders. In response, the MHRC initiated a public consultation to better understand the concerns and difficulties faced by all stakeholders. Its report was published in February 2015⁶⁵. One of the main concerns expressed by business owners, employers, and other stakeholders was how they were to balance the competing rights and interests of others who share spaces with PWD with service animals. One of the main concerns expressed was how employers, service providers and others were to balance the competing rights and interests of others who share spaces with PWD with service animals. For example, some expressed concerns about to how to manage allergies and fear of dogs and ascertaining the degree of control that the person seeking access has over the animal. Another concern raised was how to verify that an animal is in fact a service animal given that that identification harnesses and vests are available

⁶² See *Guide Animal Act*, RSBC 1996, c- 177 and *Service Dogs Act*, SA 2007, c S-7.5.

⁶³ “Service dog standardized legislation being drafted by Nova Scotia”, *CBC News*, (26 June 2015), online: < www.cbc.ca/news/canada/nova-scotia/service-dog-standardized-legislation-being-drafted-by-nova-scotia-1.3115218 >

⁶⁴ Continuing Consolidation of the Statutes of Manitoba, The Human Rights Code, c H175.

⁶⁵ The Manitoba Human Rights Commission, “Service Animal Public Consultation Report” (Manitoba: 2015) online: <http://www.manitobahumanrights.ca/publications/reportsandsubmissions/service_animal_consultation_report.pdf>.

for purchase online⁶⁶. The report recommended a review of the current legislation in the province to ensure consistency on the definition of service animals and well as the dissemination of information that would provide greater clarity for the public as to their respective obligations in connection with service animals⁶⁷.

In British Columbia, the question of balancing competing rights has been dealt with in with in connection with service dogs and dog allergies. In *McCreath v Victoria Taxi*⁶⁸ the BC Human Rights Tribunal began its analysis by stating that the issue raised involved “balancing the rights of a service provider, the needs of its physically disabled employees, and its physically disabled customers”⁶⁹. Here, the British Columbia Human Rights Tribunal considered an application from a blind man who was denied taxi service while travelling with his guide dog. The applicant Mr. McCreath was denied taxi service because the taxi driver claimed an allergy to dogs in general. However, another taxi was arranged for Mr. McCreath and it arrived shortly thereafter. The applicant’s claim against the taxi company was dismissed because the cab driver had filed medical proof that he had dog allergies and the taxi company had promptly sent another cab to serve Mr. McCreath.

4. Closing Discussion

As previously discussed, it is clear that through its enactment of *BPRA*, *HRC* and the *AODA*, the Ontario government has made earnest attempts to reduce socially constructed barriers for PWD. However, although it appears that both are meant to complement each other, their intersection in connection with the use of service animals in transit remains a area of potential conflict. Since the recognition of equality among PWDs and their respective communities begin

⁶⁶ *Ibid* at 10-11.

⁶⁷ *Ibid* at 16

⁶⁸ 2015 BCHRT 153 [*McCreath*].

⁶⁹ *Ibid* at para 22.

to come to the fore in the law and in policy, it is paramount that the legal instruments we enact reflect that sense of justice. It would be unacceptable in any other circumstance for transportation rights to be curtailed in any way by someone's lifestyle as noted in the Manitoba Consultation Report on Service Animals, PWD and their service animals are one unit and denying entry to the service animal is discrimination against a PWD⁷⁰. The *AODA* and *HRC* have managed to address other hurdles, including the need for changes in infrastructure and improved training programs among service personnel. But PWDs cannot be expected to fully participate in society as equals without the law considering the journey as much as the destination. Transportation itself is a fundamental activity, and any limits on access to transportation raises yet another barrier for PWD communities. Without clearly articulate statutes governing this matter, the courts can scarcely be expected to function as mediators for equality. Consequently, we suggest that the proposed changes to the *AODA*'s regulations include an amendment that allows PWD to enter any place where the public is customarily admitted together with their service animals.

However, as noted by Michael Lynk, "The nobility of a law is ultimately measured not by the elegance of its proclamation but by the gritty amelioration of the human condition that it has been enacted to change."⁷¹ As noted earlier, despite the fact that blind persons with guide dogs are entitled to access public transit, there are many reports of instances where they are denied taxi rides.

As suggested in *Sweet*, the general lack of awareness on the expanded use of service animals is one explanation for this ongoing problem. Another explanation is found in the fact

⁷⁰ *Ibid* at front page.

⁷¹ Michael Lynk, "Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in Canada" (2007): *UWO L Rev* 189 at 194.

that to date the *AODA* has been poorly enforced. This lack of enforcement has been heavily criticized by disability rights advocates such as the Accessibility for Ontarians with Disabilities Act Alliance, a consumer disability advocacy organization:

“The recurring problem repeatedly reported in the media, and about which we too often hear, involves restaurants and taxis that still simply bar service animals, regardless of the animal’s documentation. When a taxi driver simply drives away at the sight of a service animal, the problem would not be solved by having a letter in hand from a doctor or other health professional saying the animal is legitimately needed. This problem of ongoing failure of accessible Customer Service persists in 2015 due to the well-known lack of the Government’s promised effective *AODA* enforcement.”⁷²

The purpose of the *AODA* was for “developing, implementing and enforcing accessibility standards...for Ontarians with Disabilities...on or before January 1, 2025”⁷³. Unfortunately, ten years after it was passed, lack of enforcement remains a major flaw in the *AODA*. This problem was also highlighted in the second legislative review of the *AODA* conducted by Mayo Moran in 2014. One of the recommendations set out in her report was that greater steps be taken to enforce compliance with the *AODA*⁷⁴.

Consequently, we suggest that increased public awareness about service animals together with increased enforcement of the *AODA* provisions can contribute to greater accessibility for PWD travelling with their service animals.

⁷² Accessibility for Ontarians Act Alliance, “Draft Response to the Wynne Government’s November 9, 2015 Summary of Its Proposed Amendments to the 2007 Customer Service Accessibility Standard” (20 November 2015), online: <www.aodaalliance.org/strong-effective-aoda/default.asp>

⁷³ *ADOA supra* note 6 at s1(a).

⁷⁴ Mayo Moran, “Second Legislative Review of the Accessibility for Ontarians with Disabilities Act” (2015) at 59 online: <<http://www.ontario.ca/document/legislative-review-accessibility-ontarians-disabilities-act>>.

Whereas the law and public policy has shown tremendous growth and evolution with the *AODA*, there are areas for improvement and critique. The possibility for conflict among different statutory instruments is one problem highlighted here. The example set in Manitoba may allow Ontario to address this area and put to rest the possible concerns raised here.

Fortunately, as it stands, the situation in Ontario seems stable. But the potential for lawful discrimination is ever present. The policy aims of the law are not reached without first settling the areas of ambiguity. Thus, we may do well to have the fullest grasp of how the ambiguities present in Ontario are dealt with in neighbouring jurisdictions – if at all – to remain poised to resolve it in Ontario courts when the time comes.

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