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## THE AODA AND HUMAN RIGHTS CODE

Do you know the difference?

Anna S. P. Wong

As we approach the eighth anniversary of the *Accessibility for Ontarians with Disabilities Act, 2005* (AODA) and the fifth anniversary of our revamped human rights system, we reflect on the interplay between the AODA and the *Human Rights Code* (HRC).

Both pieces of legislation promote and protect the interests of the disability community, and they share the same broad definition of "disability", which includes both the visible and non-visible:

- a. any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
- b. a condition of mental impairment or a developmental disability,
- c. a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- d. a mental disorder, or
- e. an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*.

Jurisprudence under the Code establishes that "disability" as defined encompasses not just actual disabilities, but also perceived disabilities: see e.g., *Hinze v. Great Blue Heron Casino*, 2011 HRTO 93 at para. 14. Arguably, this applies to the AODA as well.

The AODA, which builds on the *Ontarians with Disabilities Act, 2001*, advances the interests of people with disabilities through the implementation and enforcement of accessibility standards in key areas of daily living: customer service, employment, information and communication, transportation, and built environment. The first four standards have been established and are being rolled out for compliance in phases between 2010 and 2021; the built environment standard is currently under development and will only apply to new construction and extensive renovation. These accessibility standards are designed to remove and prevent barriers faced by people with disabilities. The ultimate goal, as set out in section 1 of the AODA, is to make Ontario fully accessible by 2025.

The AODA is intended to address accessibility issues in a systematic fashion. In setting standards that apply to all public, private and non-profit organizations across the province with one or more employees, it increases accessibility for all. The standards are enforced through inspections, compliance orders, and monetary penalties ranging from \$200 to \$2,000 for individuals and unincorporated associations, and \$500 to \$15,000 for corporations. Appeals from orders and penalties go before the Licence Appeal Tribunal.

**It is sometimes mistakenly believed that an organization that complies with the AODA is also in fulfillment of its obligations under the HRC. While this may be the case, it is not necessarily so.**

The HRC, by contrast, is a compliant-based legislation with a focus on individualised accommodation. The Code protects people from discrimination based on an actual or perceived disability in the areas of employment, housing, facilities and services, contracts, and membership in unions, trade or professional associations. It does so by giving people with disabilities a right to be accommodated, and placing on employers, unions, service providers and landlords a corresponding duty to accommodate up to the point of undue hardship. There is no one-size-fits-all approach to accommodation. When an accommodation request is made, the person's unique needs must be considered, assessed, and accommodated individually in a way that most respects dignity.

The task of determining how to accommodate disability-related needs is a shared responsibility. As explained in the Human Rights Commission's Policy and Guidelines on Disability and the Duty to Accommodate, everyone involved, including the person with the disability, is expected to cooperate, exchange relevant information, and canvass possible accommodation solutions together. The duty to

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accommodate is enforced by a complaint procedure in which individuals can seek remedies for discrimination, harassment, and reprisal before the Ontario Human Rights Tribunal. The Tribunal is empowered to, among other things, devise and order remedies that most effectively address the problem. It will not, however, enforce the AODA, as is recently confirmed in *Bishop v. Hamilton Entertainment and Convention Facilities Inc.*, 2012 HRTO 708 at para. 19.

It is sometimes mistakenly believed that an organization that complies with the AODA is also in fulfillment of its obligations under the HRC. While this may be the case, it is not necessarily so. The AODA is meant to complement the HRC. As such, the standards enacted under AODA do not replace or curtail rights and responsibilities arising from the Code. If there is a conflict, the Code takes precedence (HRC, s. 47(2)) and the law providing the highest level of accessibility for people with disabilities prevails (AODA, s. 38). Imagine a company whose entranceway and washrooms are not wheelchair accessible. It may not be in contravention of the AODA, but it may nonetheless be found liable for failing to accommodate should a customer with a disability lodge a human rights complaint.

In summary, although the AODA and HRC may overlap, there are important differences between them. Chief among the differences are:

- The AODA aims to tackle access barriers systematically whereas the HRC requires accommodation on an individual basis;
- The AODA proactively sets standards for all organizations whereas the HRC reactively interpret and apply the Code to each case; and
- The HRC provides a comprehensive mechanism for seeking redress for discrimination whereas the AODA does not.



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