Fall 2004, Vol. 3, No. 9 ACE is a Legal Clinic Serving Low Income Seniors

ACE
Celebrating 20 Years of Service to Seniors

ELDER ABUSE AWARENESS AND RESPONSE-The ACE Experience

The Advocacy Centre for the Elderly has been at the forefront on the issue of elder abuse for the last 20 years. Every year ACE represents and advises older clients on elder abuse matters, including financial abuse, physical and emotional abuse, and neglect. As a direct result of this experience with clients, ACE has initiated many public legal education, community development, and law reform projects with respect to elder abuse.

Client Advice and Representation

Financial abuse is the most common type of abuse problem that ACE has assisted clients with, including misuse of a power of attorney. However, ACE has also assisted clients who are the victims of physical and emotional abuse, as well as neglect. Often ACE is able to help clients without initiating legal proceedings; however, ACE has represented abuse victims in the courts. This direct experience with clients is the driving force for other elder abuse projects at ACE. Direct contact with clients provides a meaningful reality check.

Public Legal Education and Community Development

Publications

The booklet "Elder Abuse the Hidden Crime" is a very popular educational handout. It has been in circulation since 1986 and thousands of copies have been distributed. The booklet was written by ACE and produced by Community Legal Education Ontario (CLEO), and is regularly updated to keep it current and relevant.

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Developing community networks

With funding from the Trillium Foundation, ACE and the Haldimand-Norfolk Committee on Abuse Against Older Adults brought the Community Networking model of elder abuse response to Ontario. This model was developed in British Columbia and adapted for use in the Ontario context with the permission of the B.C. Ministry of Health.

The initial project in Haldimand-Norfolk was expanded into a second 3-year project in which ACE worked with 18 communities across Ontario in developing community networks. These 18 communities included both urban and rural communities as well as three First Nations communities.

In this work, ACE collaborated with local legal clinics including Kenora and Manitoulin Island Community Legal Services. Staff from other clinics also participated in workshops held in their own communities. The workshops involved extensive collaboration with seniors groups and services from all those communities who made a commitment to raising awareness and improving local response to seniors experiencing elder abuse. These services and groups should be acknowledged for their work, often done with limited or no additional funding or resources. These organizations continue to do their work with limited funding and resources.

Working with police services

As ACE is a legal clinic, it was natural to look at how the legal systems, both criminal and civil, were responding to the problem of elder abuse. In 1987, ACE began working with various police services, looking at how the police services were interacting with older adults who were victims of elder abuse crimes. ACE developed a training manual for police services in the late 1980's that was distributed to police services across Ontario and used as a training module at the Ontario Police College. These materials were later used by other groups in developing their own resource materials for police.

Through the years ACE was involved in many workshops for police personnel. Last year ACE did several workshops as part of programmes organized by the Ministry of the Attorney General Victim Services for police and social services in Kingston, Peterborough, Peel, and Chatham. Some of these workshops were organized in collaboration with other groups such as the Ontario Network for the Prevention of Elder Abuse as part of the Provincial Elder Abuse Strategy.

In October of 2004, ACE organized and presented a 3-day training programme for police services on Elder Abuse Awareness and Response at the Ontario Police College in Aylmer. This programme was done in collaboration with representatives from the Ministry of the Attorney-General Victim Services, the Ontario Police College, the Ontario Provincial Police, and several local police services including Halton, London, and Niagara.

More than 75 participants, all police officers from various regions and services in Ontario, participated in this training. The course was intended to go beyond "Elder Abuse 101". The course focused on matters that police need to be aware of to provide improved services to older adults

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provide improved services to older adults that are victims of crimes. It is hoped that this successful programme will develop into a course to be incorporated into the core police training at the Police College.

ACE is now working in collaboration with the Ontario Provincial Police to do workshops in Perth, Simcoe, Orillia, Thunder Bay, and Elliot Lake on Elder Abuse Awareness and Response. These workshops are primarily directed at the police services in the regions in and around those cities, although the workshops will include participants from local social services and local community legal clinics.

Speaking engagements and future projects

ACE has agreed to provide education on the legal issues related to elder abuse in a project organized by Education Wife Assault and the Family Service Association on Elder Abuse Response. This programme is directed at social and community services in Toronto that are working with older adults and need to understand abuse issues to better respond to their older clients.

ACE will also continue to do community outreach by speaking to seniors groups and service providers about elder abuse.

Law Reform

ACE is participating as a stakeholder providing advice to the Ministry of Health and Long-Term Care (MOHLTC) on revisions to standards that apply to long-term care facilities in Ontario. This is an on-going process, but the first major phase has just been completed. One of these standards is directly on abuse prevention. The revised policy on abuse has not yet been finalized however the draft prepared by the MOHLTC is a major step forward. The policy includes requirements for education of staff not only on the issue of abuse but also on dementia care and appropriate use of restraints. The policy is based on a zero-tolerance model and includes requirements for education of staff and residents, their families, volunteers, and other persons interacting with residents at the facilities. The hope is to ensure that everyone knows what to do if abuse occurs, as well as to prevent abuse from occurring in the first place.

Toward an end to elder abuse

In 20 years of operation, the issue of elder abuse has always been a priority area of work for the Advocacy Centre for the Elderly. We look forward to the day that this issue is no longer a priority as elder abuse has been eliminated. In the meantime, we together with our partners must continue to raise community awareness of the issue and work towards meaningful responses to abuse.

The **Advocacy Centre for the Elderly (ACE)** is a legal clinic for low income seniors 60 years of age and over, funded by Legal Aid Ontario. ACE is incorporated as a non-profit corporation under the name "Holly Street Advocacy Centre for the Elderly Inc.".

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THE NEW LIMITATIONS ACT: LITIGANTS BEWARE!

By Graham Webb, Barrister & Solicitor

After more than 30 years of study, the Ontario Legislature passed a new *Limitations Act* in December of 2002, which came into force on January 1, 2004. This Act attempts to rationalize very old rules about how long individuals have to start legal proceedings (known as "limitation of actions"). While the new rules are in general simpler and easier to understand, there are important exceptions and a transition period for existing claims.

The new rules will in some cases seriously affect the ability of older adults to enforce their legal rights in a civil court. Defaults on loans made to friends or family members, and cases of financial elder abuse are examples where the new rules could have a negative impact. This article will describe the general rules in the new Act, and will alert readers to situations where they must be very careful and seek legal advice.

Why are there limitations at all?

The *Limitations Act* only applies to civil proceedings. Unlike the United States, Canada does not have any codified statute of limitations for *Criminal Code* offences. However, most civil claims can only be initiated within fixed periods of time (or "limitation periods") that are set by various statutes, some with very archaic origins.

There are many reasons to set limits on how long a person should have to start legal proceedings. Concerns about evidence is one of the main reasons for setting limits. The quality of oral and physical evidence usually deteriorates, and important pieces of evidence can be lost entirely. The need to preserve evidence can create undue business costs, and litigation brought well beyond its "best due date" can result in a deterioration in the quality of justice.

The murky waters of the limitation of actions became even murkier in 1984 and 1986 when the Supreme Court of Canada decided cases that laid down the "discoverability rule". This rule says that in certain cases the limitations clock starts ticking, not from the time that an act or omission occurred, but rather when it was discovered.

Those who developed the new *Limitations Act* tried to follow some guiding principles that reflect the major concerns about limits. These reasons include: (1) ensure fair and effective access to justice; (2) help the public to better understand the limitation of actions; (3) have fewer limitation periods, with fewer exceptions; (4) make it more certain as to when legal liability ends; and (5) treat the Government the same as any other litigant.

The new *Limitations Act* applies to most civil proceedings that do not include claims to real estate. The old *Limitations Act* has not been repealed, but it has been amended under the new name of the "*Real Property Limitations Act*". Under this Act, as amended, time limits on claims for an interest in real property remain, for the most part, unchanged.

The two main rules about limitations

The new *Limitations Act* gives two important rules for most other civil claims

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(and there are some exceptions): (1) there is a two-year "basic limitation" period from the time a claim is discovered; and (2) there is an "ultimate limitation period" of 15 years from the date the act or omission took place, no matter when it was discovered.

The two-year basic limitation period is a far-reaching and important change in the law. Previously, most civil claims had a 6-year limitation period. Also, a smaller number of short limitation periods will be lengthened. Under the new two-year basic limitation period, the clock will normally start ticking when a claimant knew or ought to have known that injury, loss or damage had occurred, and who caused it. If action is brought more than two years after the event, the claimant will likely have to prove that he or she did not discover the claim, and ought not to have known about it, more than two years before legal action was started.

The 15-year ultimate limitation period is also a substantial change in the law because it is an entirely new concept. Under the old law, most claims can be started within a specified period of time after discovery, regardless of when discovery was made. The 15-year ultimate limitation period would prevent legal action for claims based on events that are more than 15 years old, no matter when they were discovered, and even if the claimant's loss or damage was not known throughout the whole 15-year period.

Some exceptions to the main rules

As with any law, there are important exceptions to the two-year basic limitation period, and the 15-year ultimate limitation period. In addition to most real estate claims, some family law claims, defamation claims, trust claims and *Insurance Act* claims are exempted from the Act and will continue to have their own special

limitation periods. With respect to claims brought by or on behalf of a minor or an mentally incapable person, the clock stops ticking on both the two-year basic limitation and the 15-year ultimate limitation period during that person's minority or incapacity,

unless a litigation guardian is appointed. Similarly, in claims based on assault or sexual assault, the clock stops ticking for both the two-year basic limitation period and the 15-year ultimate limitation period for any time in which the claimant is not capable of commencing proceedings because of a physical, mental or psychological condition. Further, where an assault or sexual assault claimant had an intimate relationship with or was dependent upon a defendant, the claimant is presumed to have been incapable of commencing proceedings unless the defendant proves otherwise.

Finally, under the new *Limitations Act*, there are some claims that now have no limitation period at all. Claims based on sexual assault where the claimant was under the charge of or dependent upon the defendant, or where the defendant held a position of trust or authority towards the claimant at the time of question, have no limitation period. Also, legal proceedings to enforce a court order or to obtain support under the *Family Law Act* have no limitation period.

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Transition rules

There is a great difference between the old six-year limitation period that applied to most claims, and the new two-year basic limitation and 15-year ultimate limitation periods. Fortunately, there are transitional rules that are easy to understand and usually work to the benefit of a claimant. If a claim were discovered on or before December 31, 2003, the old limitation period will apply (and this will normally be the longer six-year limitation period that could last much longer than the new two-year basic limitation period). If a claim is discovered on January 1, 2004 or later, the new limitation period will apply. However, any claims that were already too old to litigate as of January 1, 2004, will continue to be out of time, even though a 15-year ultimate limitation period might not have expired.

Some implications for older persons

As of January 1, 2004, most people will have a much shorter time to pursue legal claims, even against family members. Previously, most claimants would have up to six years to start legal proceedings. Now, that time has been shortened to two years or less, even against a family member.

An important example of how this shortened period operates is in the area of the recovery of debts from family members. Frequently, an older adult will lend money to a son or daughter, or other family members, with minimal documentation. If the loan called for monthly payments, and payments were made, then legal action could have been brought within six-years of the time that a default in payment occurred. However, if the loan did not call for any monthly payments, and was a "demand" loan, then legal action could only be brought within six-years of the time that the loan was made. Sometimes, neither the lender nor the borrower expected that the loan would be repaid in six years, and no one thought of any legal action until the borrower refused to pay, perhaps many years later. Even under the old law, the six-year limitation period on demand loans could be harsh by preventing legal action by the lender more than six-years after a demand loan was made.

The new *Limitations Act* will tighten the screws on lenders to bring legal action against family members within two-years of the time that a demand loan was made, or that default occurred under a loan with regular payments on a fixed maturity date. This will increase the pressure for older adults who are lending money to family members to obtain legal advice at the time the loan was made to ensure the longest possible limitation period, and to take steps to ensure recovery while legal action is still possible. Older adults should therefore be aware of the new *Limitations Act*, and should take it into account in ordering their financial affairs.

WILL ONTARIO EVER RETIRE "Mandatory Retirement"?

By George T. Monticone, Barrister & Solicitor

The practice of forcing older workers to retire at a specified age (usually age 65) appears to be on the way out in Ontario. In August of this year the Ministry of Labour

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announced a September consultation prior to introducing legislation to end mandatory retirement. However, a note of caution must be sounded. The previous government in Ontario also announced an end to mandatory retirement, but the provincial election resulted in a change of government before this was accomplished.

The Ontario Human Rights Code prohibits discrimination in employment, including age discrimination. However, the Code is silent on the subject of discrimination in employment over the age of 65. While the Code does not say that persons must retire at age 65, the silence of the Code on discrimination in employment for persons 65 and over permits employers to continue the practice of forcing employees to retire at age 65. They may do so regardless of the employees ability to do the job.

Forced retirement is traumatic for some older workers. It also sends the message that society does not value older people. MR causes great financial harm to those who do not have pensions or savings sufficient to allow them a decent quality of life. Women who stayed out of the workplace to raise children, recent immigrants not eligible for public pensions, and persons who because of injury or illness were not able to work for a significant part of their working lives, are among those so affected. Older persons who still have dependents are also adversely affected. They may have started a family late in life, or may have to care for older children who have disabilities.

Studies suggest that the percentage of older workers who will want to continue to work past the normal retirement age is low (about 1 to 2 percent). However, for those individuals the issue is extremely important, profoundly affecting their quality of life.

The United States effectively abolished mandatory retirement ("MR") in 1986. It is noteworthy that in the United States the percentage of older workers (55+) in the workplace has been very stable since 1985 at between 31% and 35%. It is also noteworthy that this percentage is well below the figure for 1950 (43%). The trend towards early retirement continues and the evidence from the U.S. experience suggests that abolishing MR will not reverse this trend.

While some provinces such as Manitoba and Quebec have long since abolished MR, as has the federal government, Canadian courts, particularly the Supreme Court of Canada, have waylaid the abolition of MR, allowing Ontario to lag behind on this issue.

The *McKinney* group of decisions

In 1990 the Supreme Court of Canada decided in *McKinney v. University of Guelph* that the Charter of Rights does not apply to the hiring/firing of university professors as the university context is not "government". The Charter only applies to government. However, the Supreme Court also said that while forcing university professors to retire at a fixed age is clearly age discrimination, the practice is reasonable and justifiable with the result that *if the Charter applied*, the practice must be allowed to continue. The Supreme Court did not say that employers must force employees to retire, but that they are permitted to do so.

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This decision did not decide the issue of MR forever for all workplaces in Canada. It can be seen as a very narrow decision about one unique kind of workplace (tenured college or university faculty). The Supreme Court reached similar decisions in the *Harrison* and *Stoffman* cases, decided at the same time as *McKinney*. While *Harrison* dealt with universities in B.C. and McKinney with universities in Ontario, the cases were otherwise identical. In the *Stoffman* decision, the Supreme Court said that the hospitals may take away privileges from doctors at age 65, despite this practice being a form of age discrimination.

In the *McKinney* group of decisions the Supreme Court found that the Charter of Rights did not apply to the context as the employer was not properly seen as "government". Despite this finding, the Court went on to render a decision as though the Charter did apply. This makes the Court's decisions "obiter", meaning that the remarks are not directly on the issue before the Court and as a result are not binding precedents on the question of MR. As a result, the minority decisions delivered by two justices are of special importance as both found that MR is age discrimination, and it is not reasonable and justifiable in this context. Despite the fact that the *McKinney* group of decisions do not settle the question of the legality of MR, they had a very dampening effect on the process of abolishing MR.

More recent court cases

The 1991 decision of the Supreme Court of Canada in *Tetreault-Gadoury v. Canada* struck down provisions of the *Unemployment Insurance Act* that denied benefits to persons 65 and older. The Supreme Court said that the denial of these benefits is a form of age discrimination that could not be upheld as reasonable and justifiable under the Charter of Rights. In commenting on why age discrimination was justifiable in the *McKinney* case whereas it is not in this case, the Court appeared to seriously limit the impact of the *McKinney* decision. The Supreme Court cited specific features of the university context, describing it as a "closed environment", referring to the tenure system and academic freedom that justified age discrimination in that context.

More recent court decisions such as the 2001 British Columbia Court of Appeal decision in *Greater Vancouver Regional District Employees Union* (GVRDEU) have noted the limited scope of the *McKinney* group of Supreme Court of Canada decisions. In a persuasive decision by Madame Justice Prowse for the majority, the Court of Appeal found that *McKinney* does not stand for the view that an MR policy is acceptable simply because it is not contrary to provincial human rights legislation. In addition, Madame Justice Prowse cited a number of reasons why it is now time for the courts to completely re-examine the issue of MR, referring to the passage of time, developments in other jurisdictions, and changes in the demographics of the workplace.

This opens the way for Canadian courts to examine MR policies under the Charter in other workplace contexts, and possibly even to re-examine the issue in the university/college/hospital contexts. However, it is time consuming and

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expensive for a litigant to see a case such as this through several levels of our court system. Time works against an older litigant who wants to continue working. As a result, it is not surprising that there have been few court challenges to MR, although the door to doing so remains very much open.

Beyond court challenges

Rather than force individuals to resort to a time consuming and expensive court process to challenge MR, it is far better to abolish MR in the provincial human rights code. The Ontario Human Rights Code covers all workplaces in the province, so that the abolition of MR in the Code has a very broad impact.

The experience of the United States, Australia, and other Canadian provinces illustrate that there are no profound negative effects of abolishing MR. Readers are urged to visit the website of the American Association of Retired Persons (AARP) for extensive materials on the impact of eliminating MR in the United States (see www.aarp.org). Tired arguments about the need to provide opportunities for younger workers and skyrocketing costs of benefits for older workers do not hold up in light of the evidence from other jurisdictions. For a good survey of the evidence against these arguments, readers are urged to consult the June 2003 report of the U.K. Department of Trade and Industry written by P. Meadows entitled "Retirement Ages in the UK: A Review of the Literature in Employment Relations", Research Series No.18.

In response to the Ontario government's consultation, the Advocacy Centre for the Elderly along with many others, urged the government to end the practice of MR as soon as possible. Leaving MR in place only serves to enforce negative stereotypes about older persons. Retiring the practice of MR sends a strong symbolic message that age discrimination should not be tolerated.

MINISTRY SETS NEW STANDARDS LIMITING USE OF RESTRAINTS

By George T. Monticone, Barrister & Solicitor

The Ministry of Health and Long-Term Care (MOHLTC) has released a set of new standards and policies governing long-term care. The new standards and policies are the result of a consultation with stakeholders and the general public over the past several months. They relate to the use of restraints, abuse, reporting of "critical incidents", skin care and wound care management, nutrition and hydration, and continence care. In this article we will look at the policies and standards relating to the use of restraints.

The Ministry plans to review and revise all existing standards and policies relating to long-term care in the near future. This first set of standards and policies is only the beginning of a much longer process.

The trauma brought on by the use of restraints is captured in the comments of a 72 year old hospital patient: "*I felt like a*

dog and cried all night. It hurt me to have

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to be tied up. I felt like I was a nobody; that I was dirt. It makes me cry to talk about it."[1] As this quote reveals, the psychological impact on the person being restrained can be profound. And there are physical risks as well that suggest that overall, restraints are a bad idea.[2]

ACE congratulates the MOHLTC for introducing new standards and policies that seriously limit the use of restraints in nursing homes and homes for the aged. It is hoped theses standards and policies will soon be finalized.

The new restraints policy authorizes the use of restraints in only **two** situations: in emergencies and where there is consent to use a supportive device that may restrict movement in some way (known as a "personal-assistance service device" or "PASD"- see below).

A restraint may be used "for the protection of the resident and/or others in situations where there is an imminent risk of harm to a resident or other person(s)". In other words, in emergency situations where there is an immediate risk of harm to the resident or another, restraints may be used, provided that procedures outlined in the new policy are followed. If a resident is physically attacking a staff person or another resident, the resident may be restrained. When the emergency has passed the use of the restraint must be discontinued.

The second situation in which restraint use is recognized by the new policy is the use of a PASD. A PASD is a device used to "support or stabilize the resident so that his or her participation in activities of daily living (eating, walking, recreation, etc.) and quality of life are improved and which, as a by-product, restrict the resident's freedom of movement in some manner". For example, a resident may not be able to sit up straight in a chair well enough to eat in the dining room. If there is a device that assists the resident to sit up and enables the resident to take his or her meals at the dining room table, then it may be used even if it in some ways restricts the resident's movements. A PASD may not be used unless there is consent to its use and other procedures outlined in the new policy are followed. Not all PASDs act as restraints (for example, a wheelchair), but some do restrict movement as our example illustrates.

Other than in emergencies and as PASDs, there is no authorization in the new standards and policies to use restraints. Any other use of restraints would not only be a violation of the MOHLTC policy and standards, it could be either criminal behaviour or a civil tort. If it is criminal behaviour, the person or persons who applied the restraint may be charged with an offence under the Criminal Code of Canada (assault). If a tort, the person or persons who applied the restraint may be sued by the resident in an Ontario civil court for assault, battery, false imprisonment, or possibly negligence.

The new restraints policy is intended to govern all nursing homes and homes for the aged in Ontario. All policies adopted by a long-term care facility "shall be consistent

with this policy in its entirety". Facilities are not able to devise their own policies regarding restraints if there is any conflict

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between the facility policy and that of the MOHLTC.

The manner in which restraints may be used is carefully governed by the new Ministry policy and standards. One of the most important provisos is that "when a resident is restrained in accordance with this policy, the LTC Home Operator shall always use the least-restrictive measures assessed as required". If a measure is available that does not restrict at all, then it is to be used. If a restrictive measure must be used, it shall be the least restrictive out of a range of possibilities.

In addition, there are other safeguards regarding the use of restraints. For example, a physician cannot leave a standing order to use a restraint as needed ("*pro re nata*"). Moreover, where there is a risk of imminent harm and a restraint is used the following restrictions apply:

(1) the restraint must be the least restrictive alternative available;
(2) a physician or nurse-practitioner has ordered the use of the restraint or has confirmed its use within 12 hours of it being applied;
(3) the physician's or nurse's order must be documented in the resident's health record;
(4) the restraint shall be removed as soon as there is no longer an imminent risk of harm;
(5) the resident shall be monitored hourly or more often as required, and shall be repositioned hourly or more often as required;
(6) a member of the registered nursing staff shall closely monitor those restrained by chemicals in a number of ways set out in the policy.

Facilities are required to report on their use of restraints to the MOHLTC. In particular, they must report annually on (1) the number of residents that have been restrained, (2) the change from the previous report in the number and percentage of residents to whom restraints have been applied, (3) injuries or alterations in skin conditions relating to the use of restraints, and (4) the number of residents using a security system such as bracelets, wander-guards, or tagging devices.

The prohibited use of a restraint is regarded as a form of abuse that must be reported to the Director of the Long-Term Care Branch of the MOHLTC. Facilities must take other steps as well in such cases, as outlined in the new abuse policy.

Facilities are directed by the new restraints policy to intervene in order to discourage and prevent situations where there is an imminent risk of harm. There is no question that this represents a challenge to facility caregivers to be creative and thoughtful in providing care to residents. To assist caregivers in meeting this challenge, facilities must ensure that staff are properly educated to help them cope with difficult residents. Facilities must also foster an environment wherein staff are encouraged to openly discuss these issues and work towards creative solutions that enhance the quality of life of residents in a restraint-free environment.

[1] Quoted in L. Evans and N. Strumpf, "Myths about Elder Restraint" (1990), 22(2) Image: Journal of Nursing Scholarship 124 at 126.
[2] See for example Bower, F.L., and McCullough, C.S. (2000), "Restraint use in acute care settings", JONA 30(12), 592-598 citing a U.S. Food & Drug Administration study estimating that 100 deaths per year in the U.S. result from the improper use of restraints.

DISABILITY ACCESSIBILITY ACT INTRODUCED

The Ontario government has introduced Bill 118, the *Accessibility for Ontarians with Disabilities Act, 2004* to replace the *Ontarians with Disabilities Act, 2001*. The proposed legislation provides for developing, implementing, and enforcing accessibility standards. The new standards will effectively remove all barriers for persons with disabilities with respect to goods, services, facilities, occupancy of accommodation, employment, buildings, structures and premises before or by January 1, 2025. The Act ensures that persons with disabilities play an integral part in the development of these new standards. For more information, the text of Bill 118 may be found on the Ontario government website at **www.e-laws.gov.on.ca**. You may learn more about the new legislation by visiting the Ontarians with Disabilities Act Committee website at **www.odacommittee.net**. The Committee has lobbied many years for more effective accessibility legislation.

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