

# **Using Law and Advocacy to Win Accommodations and Promote Reform in a Wireless World**

**Impacts of Wireless Technology on Health:  
A symposium for Ontario's medical community  
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# Acknowledgements

- I gratefully acknowledge the work of Dr. Meg Sears in preparing this presentation
- My past and current clients
- Canadian medical researchers
- EMF researchers and engineers
- Citizens groups and leaders

# Presentation

- Two parts:
- 1. General introduction to Legal System and Tort Law
- 2. Case Studies of Accommodation
- strategies for achieving individual accommodation and winning in the courts
- Advocating for the necessary laws and policies in line with science

# Key goals of my talk

- One goal of my talk is to shed light on strong undercurrents of skepticism about EHS and environmental sensitivities, esp. amongst male lawyers and judges
- We also may encounter a related problem we have in the legal system which is called “Male Answer Syndrome” or MAS.

# Context: Conventional Wisdom

- wireless internet access has changed from novelty to necessity. In homes, universities, businesses, hotel rooms, trains, buses, coffee shops, airports and even on the street, anyone with a mobile device can surf the web, check their e-mail, update their Facebook Timeline, stream music and television, upload photos to the cloud and much more.

# Context: how did we survive before wireless devices?

- Hard to believe that we ever survived back in the 1960s and 1970s without Youtube videos of cute cats, instant access all day long to TV shows about dragons torching cities
- Today humans watch approx. one billion hours of YouTube videos a day and you can imagine how many those are watched thru wireless tech

# Electromagnetic Phenomena

- Cannot see or smell electromagnetic fields or radiation
- Biological effects are measured at radiation levels thousands of times below standards
- Electromagnetic “smog” levels increasing rapidly (orders of magnitude more coming with 5G technology)
- Technological “fixes” can be simple and effective
- Professional electromagnetic survey includes, for example:
  - Lower frequencies - Power lines, mis-wired circuits (e.g. with ground return), fluorescent lights
  - Higher frequencies – Computers, “internet of things”

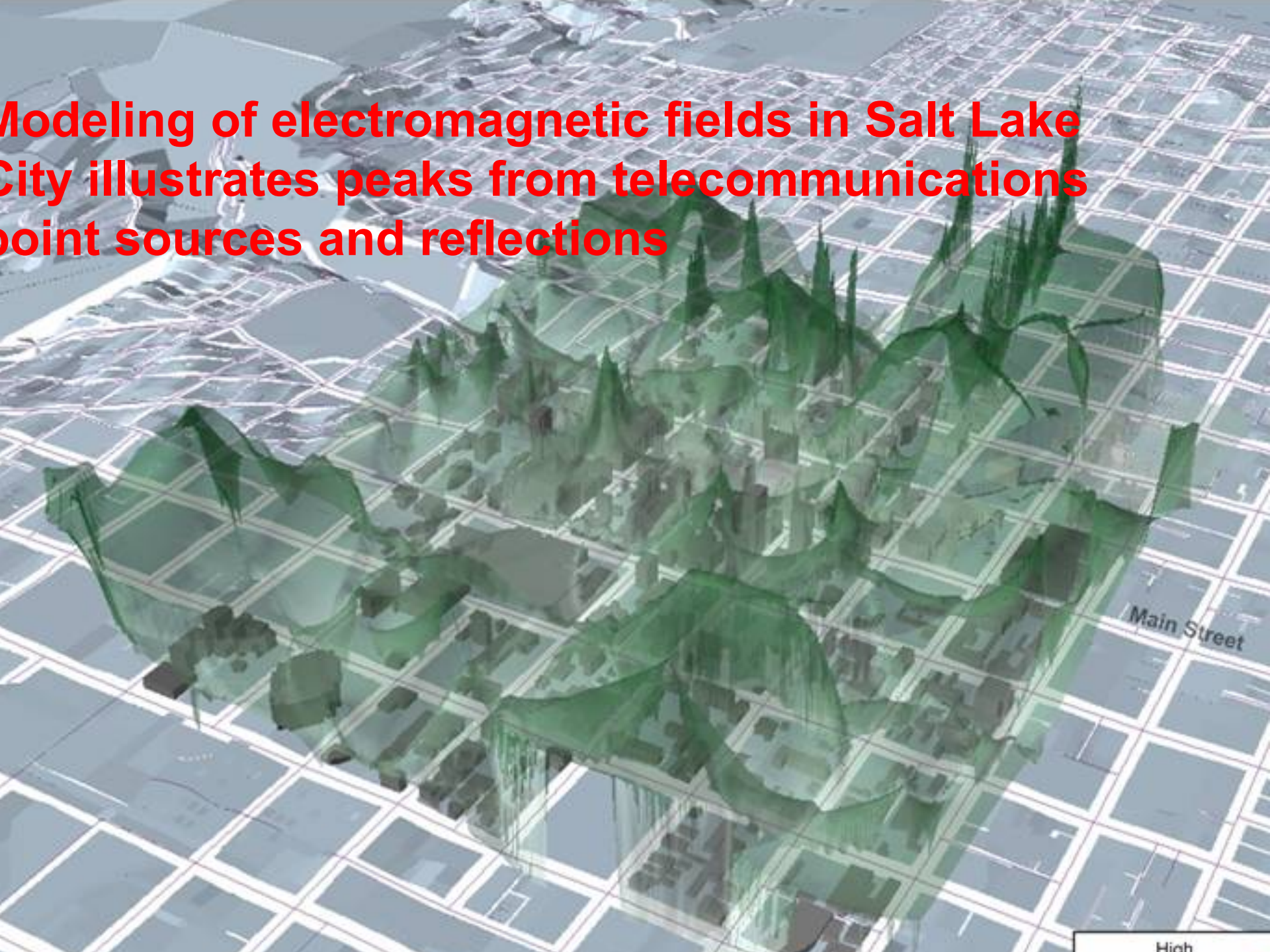
# ELECTRO-HYPER-SENSITIVITY

- ELECTRO-HYPER-SENSITIVITY:
- A growing population is adversely affected by these electromagnetic frequencies. The illness is referred to as “electro-hyper-sensitivity” (EHS) and now is explicitly recognized as a disability in many nations including Italy, France, Sweden, etc. as outlined by Frank Clegg at this symposium today

# EHS Clients are seeking solutions

- Clients are suffering from EHS
- They come to lawyers with evidence of harms they are suffering from
- they allege employers or service providers have failed to accommodate their disabilities by reducing the electromagnetic fields (“EMF”) they are exposed to and seek remedies and solutions

**Modeling of electromagnetic fields in Salt Lake City illustrates peaks from telecommunications point sources and reflections**



# Sources of electromagnetic radiation, currents and fields

- EMR sources are numerous but typically are cell towers, wireless equipment and personal devices such as cell phones, tablets, laptops, etc.
- Ground currents are related to inadequate return in electricity supplies
- Patients and litigants also maintain that wind turbines cause electromagnetic hypersensitivity

# LAW AND SCIENCE

## COMMON FEATURES

- Both claim authority over evidence and conclusions;
- Both claim a monopoly over what counts as “rational”;
- Both claim what counts as a credible witness;
- Rules sometimes shift – new court rulings e.g. Glyphosate vs. new scientific findings;

# LAW AND SCIENCE

## COMMON FEATURES

- Both activities are subject to the influence of values and biases despite varying claims of degrees of objectivity by their practitioners
- “Normal” science and law are decentralized and silent.
- Legal rules and science both take into account uncertainty and conflicting evidence but use different methods;

# LAW AND SCIENCE: DIFFERENCES

- Law strives for closure; science advances through hypothesis testing (see Karl Popper);
- Fact-finding in law designed to persuade in short-term; not so in science;
- Litigation and law reform often based on narratives created by lawyers and PR experts
- Science advances through paradigm shifts (see Kuhn, Structure of Scientific Revolutions, 1962)

# LAW AND SCIENCE: DIFFERENCES

- Precedent seeks to provide investors with reassurance about the stability of rules in decisions on property, contracts and torts
- Law is loyal to the concept of justice in ways that can seem counterfactual.

# Lawyers advocate – WRSC press conference, April 2011



# Govt.-made Law and Policy

- Governments also craft laws and these always are based on “meta-policies” [more later]
- New laws usually are accompanied by regulations, policies and programs
- Policies and programs may include education, renovation of infrastructure and often are constrained by available funding

# Meta-policy governing health care

- Current meta-policy governing health care emphasizes expenditures on treatment at the expense of investments in preventative care and education.
- Prevention and lifestyle change must become the meta-policy for health care in the long run because treatment is extremely expensive

# Lalonde report, 1974

- In 1973, the federal govt. tasked a former Deputy Minister to draft an overarching policy on health care for Canada which stressed the importance of prevention
- The final paper, *A New Perspective on the Health of Canadians: a Working Document* (“the Lalonde report”) was presented in the House of Commons on April 1, 1974.

# What is the current EMF/EHS metapolicy?

- Post-industrial capitalism, supercharged by Developing Nations (China, India, etc.) desire to sell us new devices and 5G tech
- Growing levels of electromagnetic phenomena
- Strong interest in expanding wireless tech into public spaces to promote economic development and tourism

# Health Canada on EHS

- Health Canada, 2011 ; effectively Cdn. metapolicy
- “The causes of these symptoms are unclear. There are suggestions that they might arise from environmental factors unrelated to EMFs (e.g. "flicker" from fluorescent lights or glare and other visual problems with computer monitors).

# Health Canada on EHS

- “Other possible factors include poor indoor air quality, stress in the workplace or living environment, or pre-existing medical conditions.
- In summary, *there is no scientific evidence that the symptoms attributed to EHS are actually caused by exposure to EMFs.*” [emphasis added]
- *Evidence of regulatory capture?*

# Role of Public Law

- Public and Administrative law often are intended to address problems in the private law system such as the expense of litigation
- They often provide remedies through tribunals, which are supposed to be more accessible and cheaper
- Modern laws also are based on concepts such as natural justice and fairness

# Status of Policies

- Regular Policies, which also are based on an overarching “meta-policies” are not binding on courts, tribunals or other decision makers unless the policy is “incorporated by reference”
- e.g. an ISO standard on equipment or procedures may be referenced in a regulation
- CHRC Policies are legal policies as recognized in the Canadian Human Rights Act

# ROLES OF COURTS, TRIBUNALS, AND ADJUDICATORS

- Deconstruct expert authority

*litigation exposes assumptions*

- Civic education

*how effective?*

- Redress wrongs

*how effective? – difficult and complex cases result  
in bad court precedents*

*“hard cases make bad law”*

# Types of Adjudicators, 1

- Courts
- Ontario Tribunals:
  - Human Rights Tribunal of Ontario (HRTO),
  - Workers Safety and Insurance Board (WSIB),
  - Ontario Landlord and Tenant Board (OLTB),
  - Environmental Review Tribunal (ERT),
  - Ontario Ministry of Labour – OHSA, ESA, etc

# Types of Adjudicators, 2

- Federal and Other Tribunals:
  - Cdn. Human Rights Commission,
  - Workers Compensation agencies,
  - Landlord and Tenant Board,
  - Employment, Federal Dept. of Labour Arbitrators, mediators,
  - Special commissioners or appointees

# Quebec v Boisbriand (City)

## [2000], SCC

- Is a perceived disability an adequate ground to lead to a human rights claim?
- Yes; the government is accepting the broadening concept of disability.
- Once a disability claim is accepted, the onus shifts, and the defendants try to show undue hardship.

# Perception of Disability gets you in the door

- Rule: Perceived disabilities are protected under Canadian Human Rights legislation because perception is an implied part of "disability".
- Explains why most tribunals do not dismiss EHS complaints out of hand

# Court v. Tribunal decisions

- Unlike courts, tribunals decisions are not binding upon subsequent adjudicators
- However, often there is strong persuasive value if previous case addresses a similar set of facts and its conclusions are based upon a review of the *submitted* current medical and scientific literature.

# What are Torts?

- Law of accidents and personal injury
- Encode moral dilemmas
- Have become more collective over time e.g. use of class actions to address mass torts arising tobacco litigation, chemical pollution to community water supplies (e.g. Erin Brockovich movie scenario)

# Policy Goals of Tort Litigation

- Lawyers believe that tort litigation provides a valuable mechanism of social integration and control
- Used to deter risky activities
- Used to spread out costs of risk
- Perception of tort litigation varies to plaintiffs, defendants, judges, lawyers, insurers, public

# Policy Goals of Tort Litigation

- in the 1980s tort law was replete with examples of large tort awards against doctors for alleged negligence in surgery
- Encouraged doctors and hospitals to adopt better practices such as checklists to ensure surgical instruments and sponges were removed before patients were sown up

# Toxic Torts

- high stakes for victims
- huge liability for defendants
- Toxic tort actions are a poor way to address health impacts caused by new tech
- how can we better regulate risks associated with the technologies we develop and prevent future health problems related to new wireless tech such as 5G?

# Challenges with Tort litigation

- Alleged injury caused by toxic substances
- Pathways can be hard to identify
- Dosage can be hard to calibrate
- Long latency periods
- Where a contractual relationship exists such as employment or service provision, there is a duty on plaintiffs to mitigate

# Challenges with Tort litigation

- Must prove harm on balance of probabilities
- Must show there was a duty of care or that some expected standard of behaviour or a duty to warn was not provided
- Duty to warn – not many Cdns. know that cell phone manufacturers such as Apple advise users to not hold their phones within a couple of centimetres of their ears

# Cost and Access to Justice



# Mass Toxic Torts and Class Actions

- Class actions also provide a means of access to justice
- Agent Orange case was first mass toxic tort allowed to proceed as a class action
- Consolidates separate (individual) cases
- Network of firms involved

# Agent Orange Redux

- 600 actions
- 1500 law firms
- 15,000 named individuals
- 2.4 million vets, wives, children affected
- 7 large defendants, including U.S government
- Very different from some current class actions

# Popular media on tort actions

- Excellent non-fiction book on one of most famous toxic tort cases in the US: A Civil Action (1995) By Jonathan Harr
- In 1998, it was made into a movie of the same name starring John Travolta
- Besides the fact that the lawyer Jan Schlichtmann loses his Porsche Carrera and his law firm, what do we learn from the story?

# Causation

- Most courts have understood that causation testimony without a dose assessment is scientifically questionable and inadmissible.
- Others judges, however, have struggled with the debate between the plaintiff and defense experts, and the difficulty of determining how much exposure is **too much**.

# Low-dose Causation Testimony

- Corporate tort lawyers argue that low-dose cases should presumably face a major hurdle since scientific evidence usually doesn't link minimal exposures to disease or injury.
- In the 1980s lawyers and experts for Asbestos plaintiffs addressed this by adopting a unique and controversial form of causation testimony—most widely known as either the “every exposure” or any exposure theory

# Backlash developing on low dose causation cases in US

- There is a backlash developing on low dose causation cases
- In Nov 2018 New York's highest court issued a decision in an asbestos case that has significant impact beyond asbestos litigation.
- In the Juni case, The NY Court of Appeals affirmed a 2017 decision tossing out a \$11M Asbestos Verdict

# Claim on behalf of a deceased auto mechanic

- Claim on behalf of a deceased auto mechanic alleging that his mesothelioma was caused by asbestos found in Ford Motor Company's brakes, clutches and gaskets. Mrs. Juni, the auto mechanic's widow, obtained an \$11 million jury verdict against Ford.
- Expert opinions were deemed insufficient under reliability standards established in prior rulings.

# Exposure to asbestos was “not enough”

- Exposure to asbestos was “not enough for a determination of liability against” Ford; a causation expert must still establish that the plaintiff was exposed to sufficient levels of the toxin ... to have caused his disease.” Even if it is not possible to quantify a plaintiff’s exposure, “causation from exposure to toxins in a defendant’s product must be established through some scientific method ... .”

# Importance of Experts

- Experts are absolutely key to the success
- In a 2014 summary hearing before the HRT0 on EHS and stray voltage, the complainant advised the tribunal he did not intend to call any experts and wished to rely on reports he had located on the internet and a four year old expert letter from a WCH doctor
- Perhaps unsurprisingly, he lost.

# Lawyers and Experts

- In 2014 Law Society of Ontario's Rules of Professional Conduct were amended to incorporate the Federation of Law Societies of Canada's Model Code of Professional Conduct and came into force in October 2014. The competent lawyer rule, now Rule 3.1-2, relating to experts was modified to mirror the Federation of Law Societies of Canada's Model Code

# Rule on Professional Conduct

- “The lawyer should also recognize that competence for a particular task *may require seeking advice from or collaborating with experts in scientific, accounting, or other non-legal fields*, and, in such a situation, when it is appropriate, the lawyer should not hesitate to seek the client’s instructions to consult experts. [emphasis added]

# Expert's Duty to the Court

- All experts have a duty of loyalty to the court. Rule 4.1.01 states: (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules:
  - (a) to provide opinion evidence that is fair, objective and non-partisan

# Expert's Duty to the Court

- (b) to provide opinion evidence related only to matters within the expert's area of expertise, and (c) to provide additional assistance as the court may reasonably require
- 2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

# Court-appointed Experts

- The Rules also allow for the court to appoint an expert for the proceeding.
- Under Rule 50.06, the presiding pre-trial judge or master will consider the advisability of having the court appoint an expert.

# Securing expertise

- Cost is high
- Experts must be viewed as credible
- Who has the experts?
- Hint: it isn't lawyers representing EHS and other clients with environmental sensitivities
- Query: how many of the presenters here today would be accepted as experts by courts?

# Keller and Hackman law firm

- US-based Keller and Heckman's litigators “work with over 25 in-house scientists, almost all of whom have Ph.D.s or graduate level degrees.”
- expertise in relevant areas such as chemistry, toxicology, risk assessment, and the fate and transport of chemicals in the environment.

<https://www.khlaw.com/Environmental-and-Toxic-Tort-Litigation>

# Educating Judges about Science

- Improve the use of science in judicial policy
- Educate the judiciary
- Promote “science literacy” among jurors
- Address problems re: culture of expert witnesses
- Contrary view: Judiciary should not be making policy and do not have jurisdiction; Set policy in legislative process

# Educating Judges about Science

- NATIONAL JUDICIAL INSTITUTE
  - Science Manual for Canadian Judges (2013)
- <https://www.nji-inm.ca/index.cfm/publications/science-manual-for-canadian-judges/>

# Tort Litigation on EHS

- Courts and tribunals are struggling with medical evidence on EHS and other sensitivities
- E.g. courts regularly award damage for mould in real estate cases
- However, they struggle with the idea that moulds cause depression

# Where are most EHS Tort cases?

- Many are addressed through insurance programs if this is available to the EHS sufferer
- This is difficult because the insurance companies will badger the doctors of the patient (a good lawyer can be a shield)
- Some cases also at the WSIB although the WSIB is notorious for refusing to recognize claims

# Medical Controversy and claims

- Medical controversy about EHS, MCS, and ES can undermine a claimant's attempts to prove she is disabled (e.g., *MacDonald v. Sunlife Assurance Co. Of Canada*, [2005] P.E.I.J. No. 60)
- onus is on the claimant to prove on a balance of probabilities that she is disabled
- not required to have medical consensus on her diagnosis.

# Competing Rights

- There also are issues of competing rights – desire of device users to watch YouTube vs. respect for EHS sufferers
- the courts have not set a clear formula or analytical approach for competing rights
- they have provided some guidance. Where rights appear to be in conflict, *Charter* principles require decision-makers to try to “reconcile” both sets of rights.

# Competing Rights (2)

- no “bright-line rules” for dealing with competing rights claims,
- legal decisions provide direction in how to deal with these types of scenarios, as well as what to avoid.
- The courts have recognized that the specific facts will often determine the outcome of the case.

# Competing Rights (3)

- No rights are absolute
- There is no hierarchy of rights
- Rights may not extend as far as claimed
- The full context, facts and constitutional values at stake must be considered
- Must look at extent of interference (only *actual* burdens on rights trigger conflicts)

# Competing Rights (4)

- The core of a right is more protected than its periphery; Aim to respect the importance of both sets of rights
- Statutory defences may restrict rights of one group and give rights to another.
- Organizations must consider these legal principles when they deal with competing rights situations.

# Achieving Accommodations

- Ontario Human Rights Code (OHRC)
- ODA, 2001
- AODA, 2005
- CHRC Policy
- Using the courts
- Advocacy and negotiations (threat of legal action)

# Ontario Human Rights Code

- Section 10(1) of the Code defines the term “disability” as follows: “disability” means, (a) any degree of physical disability, infirmity, malformation or disfigurement
- I only located one reported case on EHS which refers to two disputes filed with the HRTO by Michael Thompson in 2012 and 2015

# Ontario Human Rights Code

- In Thompson case, the HRTO left open the possibility that the applicant would be able to establish at a hearing that he is a person with a disability as a result of EHS condition
- Language of decision is convoluted because the case was a summary hearing.
- See discussion further at approx. slides 124-127

# Ontarians with Disabilities Act, 2001 (ODA)

- Under the ODA all public institutions such as govt. offices, hospitals and universities have a legal obligation to prepare annual accessibility plans. The ODA specifies that public organizations such as universities must consult persons with disabilities in preparation of the plan.

# AODA, 2005

- The *Accessibility for Ontarians with Disabilities Act, 2005* (2005) received Royal Assent on June 13, 2005
- the provisions of the *Ontarians with Disabilities Act* remain in force until the act is repealed. This means that public sector organizations are still legally required to prepare annual accessibility plans and to make these plans available to the public.

# Accessibility for Ontarians with Disabilities Act, 2005 (AODA)

- In June 2005, the Ontario government passed a new law called the *Accessibility for Ontarians with Disabilities Act, 2005 (AODA)*. The AODA provides for the development, implementation, and enforcement of accessibility standards with a vision of a fully accessible Ontario by 2025.

# Relationship between AODA and OHRC

- *AODA, Section 3: Nothing in this Act or in the regulations diminishes in any way the legal obligations of the Government of Ontario or of any person or organization with respect to persons with disabilities that are imposed under any other Act or otherwise imposed by law. 2005, c. 11, s. 3.*

# Requirements of the *AODA*

- the organizational requirements of the *AODA* and its Regulations do not replace or change our legal obligations towards persons with disabilities under the *Ontario Human Rights Code, 1990* (e.g., a request to accommodate an individual student or employee with a disability) or any other Act such as the *Ontario Building Code Act, 1992*.

# Requirements of the *AODA*

- Accordingly, compliance with the requirements of the *AODA* and/or the *Building Code* is not enough
- may be vulnerable to a human rights complaint to the extent that their premises and practices continue to fall short of the requirements of the *Human Rights Code*.

# AODA is “standards-driven”

- The AODA is “standards-driven” (not complaints driven) and covers the public/private/not-for-profit sectors.
- HRTO and CHRC are complaints driven
- Compliance based on preparation of plans; large organizations tend to post them on their web sites

# Specific accessibility requirements

- AODA has numerous specific accessibility requirements in five areas:
- Customer Service
- Information and Communications
- Employment
- Transportation
- Built Environment

# Customer Service Regulation

- Ontario's first set of accessibility standards for customer service came into force January 1, 2008. The standards outline what organizations must do to provide their goods and services in ways that are accessible to persons with disabilities. The public sector compliance was January 1, 2010; private and Not-For-Profit sector deadline was January 1, 2012.

# Integrated Accessibility Standards Regulation

- This Regulation covers three accessibility standards: Information & Communications, Employment, and Transportation. It became law on June 3, 2011 and the requirements have begun to come into effect as of July 1, 2011, and will continue until 2021.

# Integrated Accessibility Standards Regulation

- The information and communications standards sets out how organizations will be required to create, provide, and receive information and communications that are accessible for persons with disabilities. The employment standards set out specific requirements for the recruitment, retention, and accommodation of paid employees with disabilities.

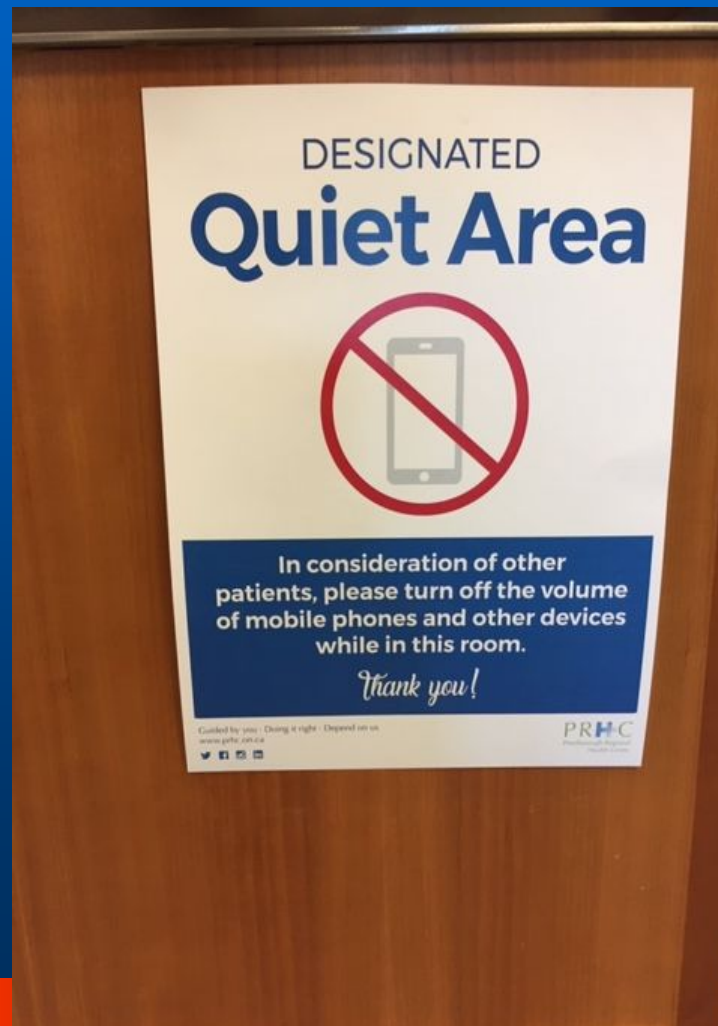
# Types of Accommodations

- White zones
- Cell Phone Free Quiet areas
- Other EMR restricted zones
- PDO (Personal Devices Off) signs
- Analogue utility meters rather than smart meters
- Community warnings

# White Zones

- White zones – a white zone is a designated area intended to be free of the electromagnetic radiation released by communications antennas and other wireless devices. To achieve a true white zone for those people who are EHS, emphasis must be placed on use of fibre optic technologies and other means.

# Quiet Areas at Hospital



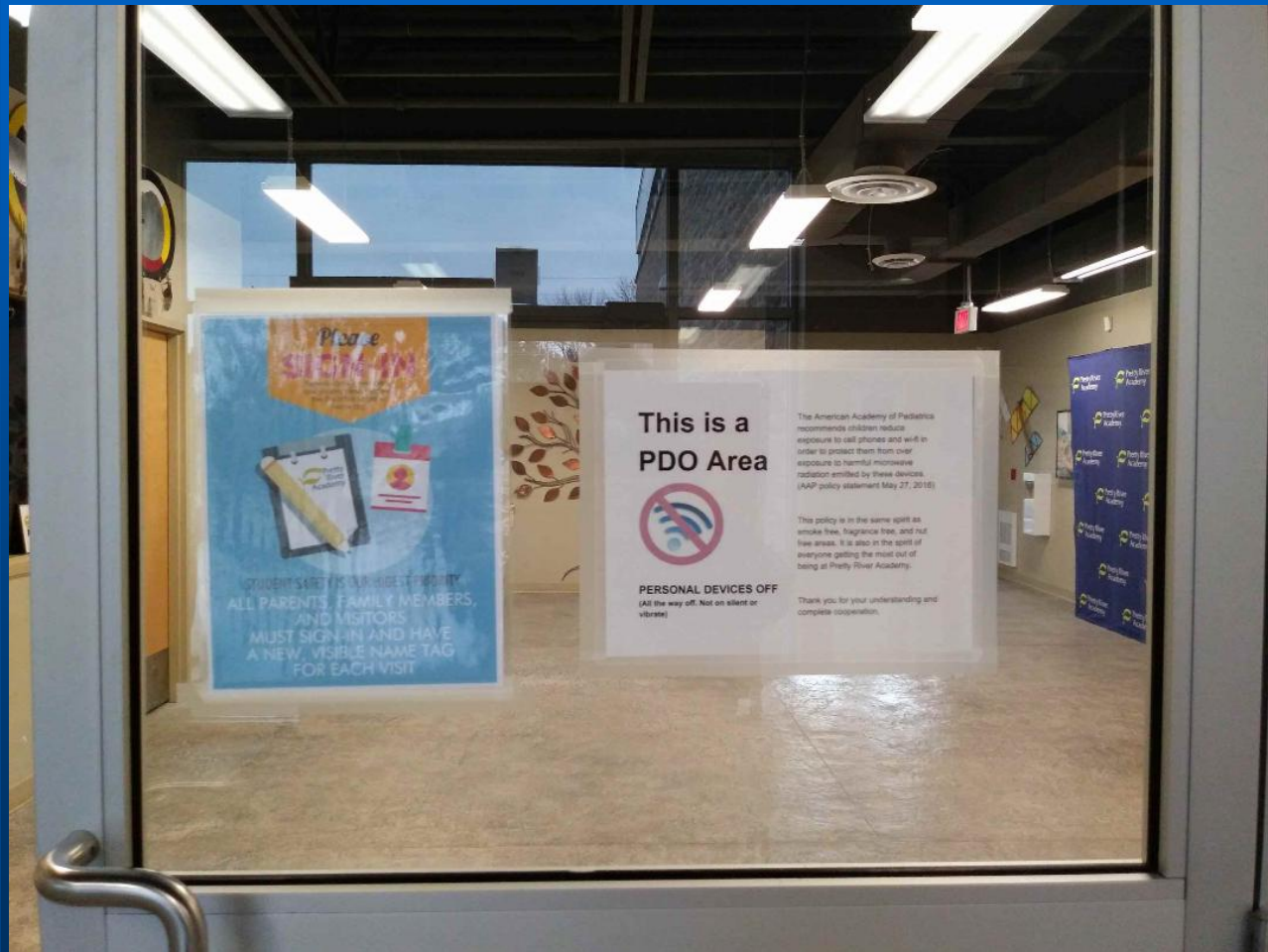
# Personal Device Off (PDO) signs

- Personal Device Off (PDO) signs offer another means for establishing white zones

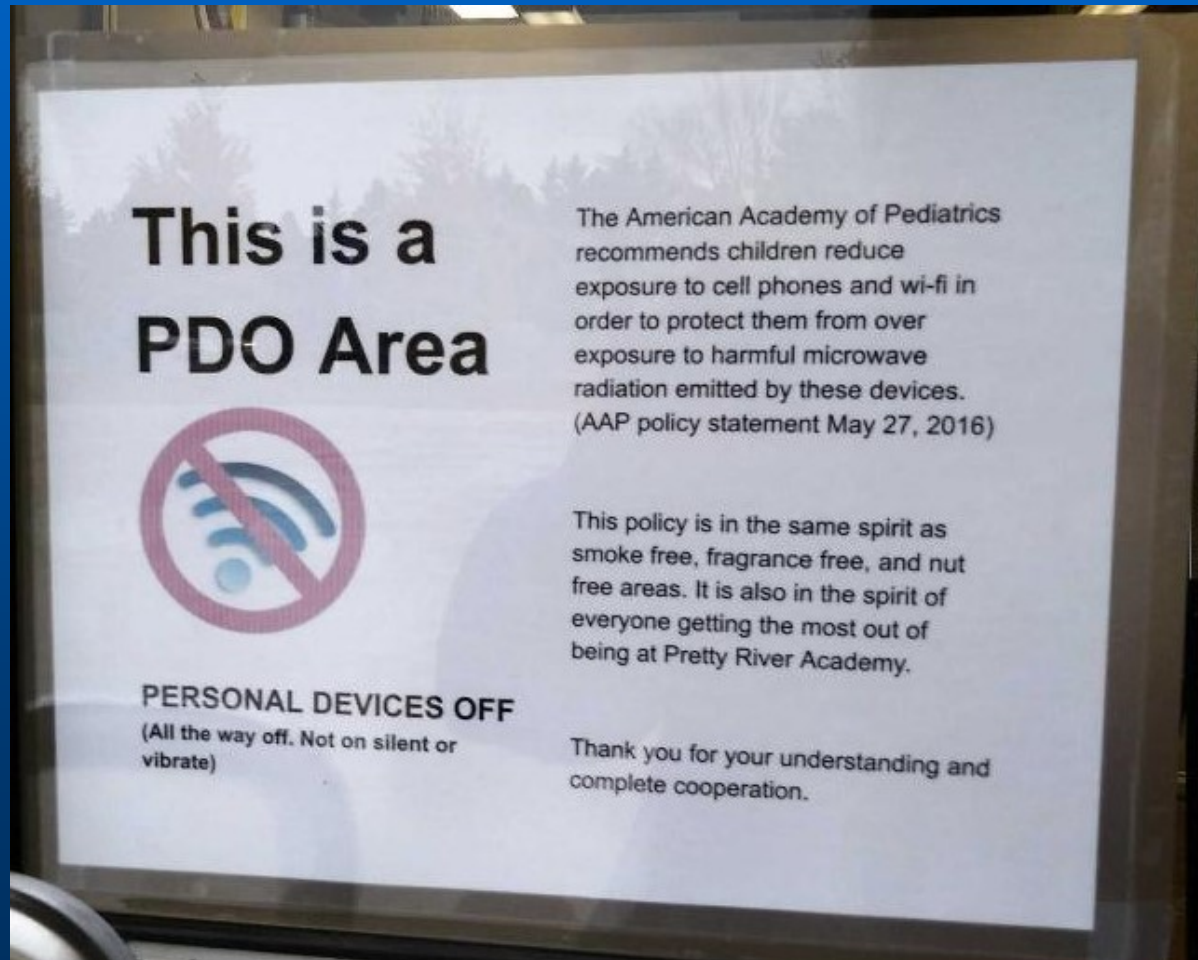
# PDO signs – Kingston area Library



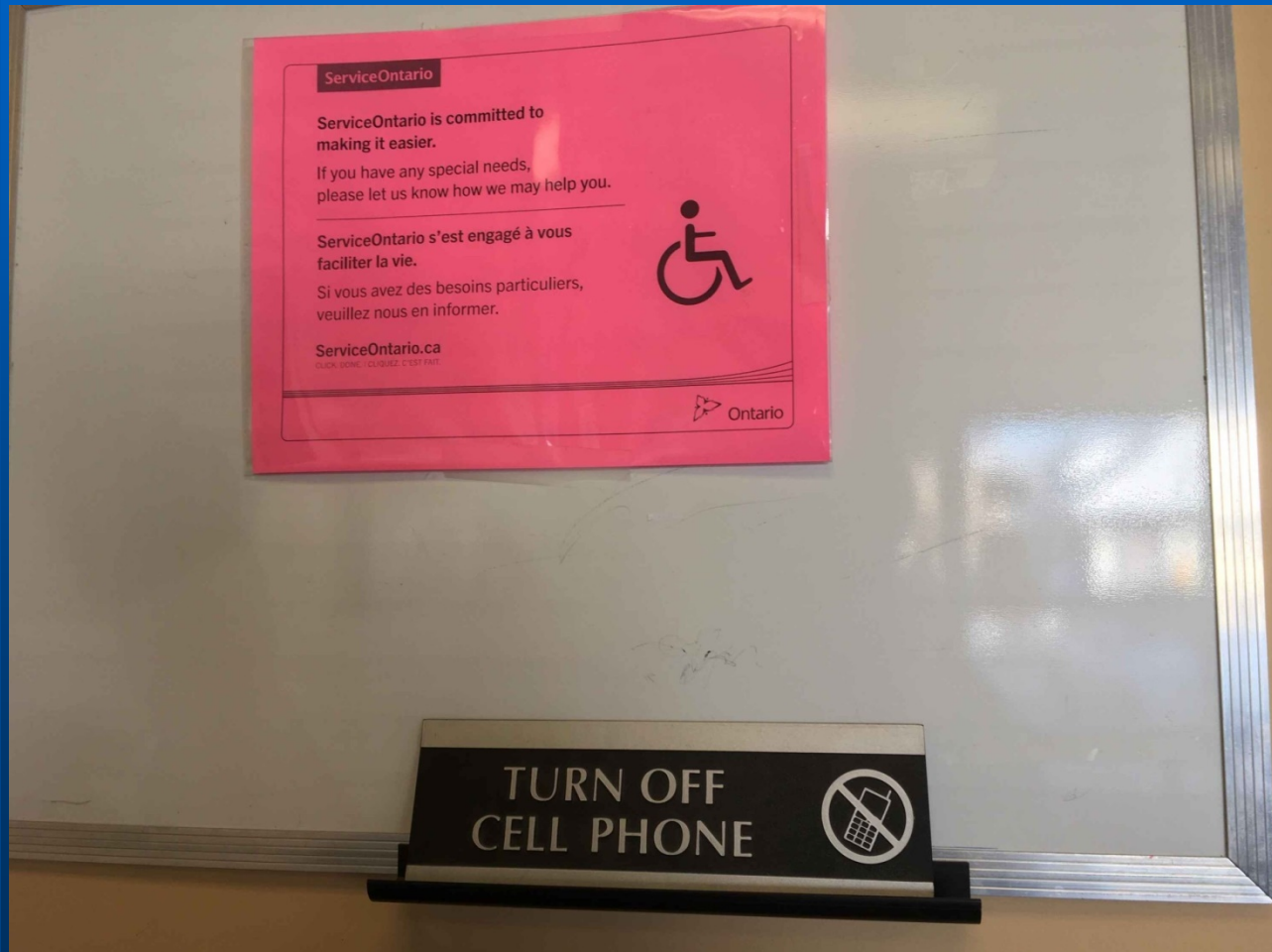
# PDO sign – Collingwood school



# PDO sign 2 - Collingwood school



# Govt – Stittsville Service Ontario (Driver's Licences, etc.)



# PDO off areas for HRTTO and OLTB mediations and hearings

- EHS sufferers can request that the Human Rights Tribunal of Ontario, Landlord Tenant Board (OLTb) or other tribunals and boards arrange meetings and hearings in PDO off or wireless spaces
- Possibly threatened by efforts to clear up backlog by Ford govt.

# Community warning – 5G test tower – risk of harm



# Electricity Services

- In some cases, technologies such as analogue meters can be substituted as a means to accommodate a client or patient suffering from EHS or environmental sensitivities

# Analogue meters

- Public utilities are agreeing to replace wireless smart meter with analogue meters
- As in Thompson v. HRT0 case, this often arises In the settlement of advocacy or threats of litigation disputes (Thompson was settled with minutes of settlement signed on October 25, 2012)

# Current Practices: Surveying the landscape

- In preparation for this talk, I asked some of the other presenters to provide "ground truthing" as to what is happening in various settings where EHS patients live and interact

# Surveying the landscape

- Good news: there are many situations and cases where EHS is being recognized and accommodated. That is an essential first step.
- Bad news: individuals often have to make persistent, Herculean efforts to obtain modest accommodations

# EHS and the workplace



# Employment and EHS

- Best protected workers are those represented by unions and professionals who have access to expertise
- Unclear how workers stricken by EHS fair in smaller, poorly organized workplaces and where employers are less aware of the OHSA, the OHRC and other laws

# One source of problem

- Who controls the introduction of new technology in the workplace and public spaces?
- Sweden and Nordic nations established laws in the 1970s and 1980s requiring consultation with workers and unions
- In North America, introduction of new tech considered a mgt. right by courts, tribunals
- Reflection of reduced power of workers

# Mgt can unilaterally change tech

- Environmental Commissioner of Ontario dismantled its wired network and required every employee to use laptops on a wireless network in 2010
- There was no consultation with staff, including other managers outside of one or two other senior staff. As the senior ECO lawyer, I was kind of miffed but this graphically illustrates extent of mgt power

# Consequences for workers *and* employers

- Decreased productivity
- Decreased analytical and critical thinking
- Increased health benefits
- Increased absenteeism
- Increased employee turn-over
- Changes in employee attitudes (either educated and supportive, or ill-informed and harrassing)

# Benefits of accommodation

- Improve productivity of employees generally
- Decrease absenteeism
- Decrease turnover rate
- Improve employee attitude, morale
- Decrease health benefit utilization
- Prevent development of environmental sensitivities in others
- Support and model best practices

# Achieving Accommodation

The *Canadian Human Rights Act* and policies apply to many venues under federal jurisdiction.

Disabled peoples have a right to have their environmental sensitivities accommodated

Human Rights are recognized via statutes in Ontario and other jurisdictions as a disability in case law, or incorporation by reference to the CHRC policy.

# Key Elements of CHRC Policy on Environmental Sensitivities

- Recognition as a legitimate disability (non-discrimination)
- Accommodation to improve access to indoor spaces (reduce symptom-triggering exposures)
- Where feasible, reduction and/or substitution with alternatives

# CHRC/Sears 2007 report

- In the 2015 Thompson case, the applicant Thomson tabled Margaret Sears 2007 report for the CHRC on environmental sensitivities as a key piece of evidence
- The Tribunal declined to recognize Dr. Sears' s CHRC report as proof that EMF stray voltage caused EHS in his particular case
- No incorporation by reference at HRT0 thus far

# Workplace Accommodation

- Employee duties: Raise the situation with management, usually via the joint health and safety committee (JHSC) and/or union
- Describe triggering exposures
- “Proof” of effects of adverse exposures is not required

# Workplace Accommodation

- Identify solutions (e.g. educate workers, change work location, telecommuting, flexible work hours)
- Educate patrons
- Maintain calm, informative relationships
- Report harassment or discrimination to superior (note: perceived favouritism may foster conflict)
- A third party may be of assistance

# Not absolute right

- Right to accommodation is not absolute; it is subject to a balancing of factors and reasonableness
- Measures are limited, not to cause “undue hardship” on the part of the employer

*Another perspective – in Sweden, an environment that does not support optimum functioning is considered to be the “problem” – not the person.*

# Best Practices: Management

- Participate in joint committees for Health and Safety, and the Environment. Accommodation improves the environment for all.
- Provide leadership for healthy workplace policies – e.g., a “lunch and learn” discussion or poll to support policy development.
- Consult individuals – sensitivities triggers vary, and individuals will identify solutions that will work for them.

# Benefits under the Workplace Safety and Insurance Act (WSIA)

- Claims for benefits under the WSIA for env. sensitivities have generated many cases and mixed results.
- Put simply, benefits will only be paid where it may be proved that the disabling condition arose out of the course of employment; i.e., that the workplace substantially contributed to the development of or exacerbation of the disabling health condition.

# Appellate body is the WSIAT

- Workplace Safety Insurance Appeals Tribunal (WSIAT) is the final level of decision-making under the WSIA.
- Further appeal to Divisional Court, OCA and SCC
- WSIAT has reviewed numerous claims based on a diagnosis of Multiple Chemical Sensitivity (MCS)

# Factors considered by WSIAT (1)

- In ES cases, WSIAT considers:
  - the nature and extent of exposure in the workplace
  - temporal relationship between the exposure and symptoms onset
  - the existence of prior health problems
  - results of medical tests
  - the worker's condition upon removal from exposure
  - other potential contributing factors
  - *existence of non-compensable psychological problems*

# Other Tribunals on EHS

- Landlord and Tenant Board
- Smart Meter cases
- BCHRT: Citizens for Safe Technology Society obo others v. B.C. Hydro and Power Authority (No. 3), 2014 BCHRT 211
- HRTTO: Thompson cases, 2012, 2015

# Landlord and Tenant Board

- EHS is a very tough problem for landlords because most tenants set up wireless services
- Cell towers often are built on top of buildings in downtown areas
- many landlords who run rooming houses or smaller units provide wireless services
- This is a wicked problem and thus far I have not seen many OLTB decisions on the issue

# Landlord and Tenant Board

- In contrast, the OLTB is doing a much better job on MCS
- The OLTB manages well defined accommodations very effectively
- E.g. I have represented seniors or OCD people on hoarding issues. In those cases, the OLTB will work with the Landlord, the Fire Dept. and the hoarder to resolve the competing rights in a manner that respects the tenant

# Smart Meter cases

- In 2013 the BCHRT issued a decision respecting wireless smart electricity meters. In Citizens for Safe Technology Society obo others v. B.C. Hydro and Power Authority (No. 3), 2014 BCHRT 211
- the BCHRT considered whether there is a nexus between EHS and smart meters.

# Tribunal open to argument that EHS is a disability

- The BCHRT undertook a “thorough review” of the submitted scientific literature on EHS and EMF, and similarly found at paragraph 135 that having considered the whole of the material, *it could not conclude that there was no reasonable prospect that the complainants can establish that EHS is a disability under the British Columbia HRC.* [emphasis added]

# BCUC *Certificate of Public Convenience*

- the BCUC dealt with the issue of the linkage between EHS and Smart Meters at page 137 of their decision of July 23, 2013 titled, *Certificate of Public Convenience and Necessity For the Advanced Metering Infrastructure Project*
- the Panel is not persuaded that there is a causal link between RF emissions and the symptoms of EHS.

# Nexus not clearly established

- It found at paragraph 139: On my reading of the evidence, the overwhelming message in the material filed relating to the impact of EMF exposure on people experiencing EHS symptoms is that there is currently no scientific basis to conclude there is a connection between EMF exposure and causality, exacerbation or simply reawakening of dormant EHS symptoms.

# Ontario cases

- In 2012, Michael Thompson filed an Application with the HRTO (File No. 2012 -10640- I) against the respondent respecting the installation of a smart electricity meter at his residence. It was the applicant's position that the smart meter, which uses wireless technology, had a substantial impact upon him due to his EHS.

# Thompson v PUC, HRT0 2012

- The applicant submitted a letter dated November 4, 2011 written by Dr. Kathleen Kerr of Women's College Hospital in support of his Application. The letter stated that the applicant suffers from Environmental Sensitivities, including sensitivities to EMF, and summarized the findings of several scientific and health studies.

# Application settled

- The respondent PUC ultimately agreed to replace the wireless smart meter with an analogue meter in February 2012 and the prior Application was settled with minutes of settlement signed on October 25, 2012.

# Thompson v PUC, HRTO 2015

- Michael Thompson filed a second case against PUC Distribution Inc. in Sault Ste. Marie in 2014
- In this case he claimed the respondent PUC had failed to accommodate his EHS disability by reducing the electromagnetic fields (“EMF”) **associated with** the underground electrical cables which provide electricity for his home.

# HRTTO case on stray voltage

- The applicant alleged that the respondent Public Utility discriminated against him by not doing more to reduce the EMFs entering his home.
- applicant argued that there must be a way for the respondent to lower the EMF levels, because other homes in Sault Ste. Marie have lower levels.

# HRT0 case on stray voltage

- Tribunal: the applicant had sincere belief that there was a correlation between the EMF levels in his house and the symptoms that he has described but there was an absence of credible evidence to support this belief.
- Nov. 4, 2011 WCH doctor's note speaks to adverse effect of wireless electrical meter

# HRT0 case on stray voltage

- The Nov. 2011 letter does not provide an opinion on the issue of whether the level of EMFs currently emanating from the underground electrical cables can result in Thompson experiencing symptoms associated with EHS.

# 2014 WHO report cited

- The WHO has made a similar determination. In an October 2014 document entitled “Electromagnetic Fields and Public Health: Mobile Phones Fact Sheet”, it stated that: (. . .) research has not been able to provide support for a causal relationship between exposure to electromagnetic fields and self-reported symptoms, or electromagnetic hypersensitivity.

# HRT0 Decision

- Feldman, at p. 11
- “there is no reasonable prospect that the applicant will be able to provide evidence that will establish, on a balance probabilities, that there is a link between his claimed disability, EHS, the respondent’s conduct and the transmission of electricity through the respondent’s underground cables that lead to the applicant’s home.”

# Smart Water Meters

- Different technology was used for smart water meters after smart electricity meter installation disputes – the meter only pulses data to 2-4 transmitters 4 times each day
- Toronto Water unwilling to accommodate and instead are threatening to enforce their by-law which permits prosecution of those who don't allow installation of a meter in their homes.

# Duty to mitigate

- Implicit in Toronto Water's approach is that EHS sufferers have a duty to mitigate by 1) allowing external installation of the smart meter on the outside walls of their homes and 2) installing shielding at their own expense
- EHS sufferers seeking accommodations must obtain legal assistance **on advocacy** and an expert to evaluate feasibility of this option

# More Evidence on Groundtruthing

- **More Evidence on Groundtruthing of Institutions – Universities, Hospitals, Courts etc.**

# Groundtruthing - Universities

- At universities, wireless networks and devices are seen as key components of teaching and learning. It's generally assumed that students will use laptops for lectures, and frequently access online materials during classes.
- What's more, many private companies use 'clicker' technology where students have portable wireless 'clicker' devices that interact with a responding screen infrastructure.

# WiFi Free space at Trent U



# Groundtruthing - Universities

- 1) helping to find a low EMF office;
- 2) installing filters that remove radiofrequency transients and harmonics from the power source at the fuse box local to my office;
- 3) allowing me to teach in a building near campus from 2006-09 with lower EMFs than the main campus;
- 4) removing wireless nodes near my office.

# Groundtruthing - Hospitals

- Generally most hospitals and health care settings approach accommodating employees who are EHS sufferers with compassion and care

# BC Govt study on Health Care

- In 2010 the BC Govt undertook a study on preventing and reducing adverse health effects to staff and patients in the Health Care sector
- No express reference to EHS in the 300 pp. report but many other related conditions discussed such as effect of lighting on wellness
- Missed opportunity, still very worthwhile

# Prevention of the Adverse Health Effects of the Health Care System

- Evidence Review: Prevention of the Adverse Health Effects of the Health Care System
- Population and Public Health, BC Ministry of Healthy Living and Sport, Feb. 2010
- Evidence Review prepared by: Elizabeth Keay  
Leah Siebold, Hollander Analytical

# Prevention of the Adverse Health Effects of the Health Care System

- Design of Health Care Facilities, Workflow and Enviro Practices
- Report recognizes risk reduction as required by BC Worker Compensation Act can be achieved through reductions in use of hazardous chemicals and materials
- No reference to EHS

# Expert Panel on Safety of Energy-Applying Medical Devices

- 2015 - Health Quality Ontario established the Expert Panel to Enhance the Safety and Quality of Energy-Applying Medical Devices in Ontario
- July 2016 - HQO - Report and Recommendations on Modernizing Ontario's Radiation Protection Legislation

# Societal and Agency Gaps in EHS Awareness

- Courts
- Lawyers – recommend ARCH
- Service Canada (Unclear)
- Service Ontario (Unclear)
- Movie Theatres (quiet zone requests)
- Municipalities (community centres, libraries, etc.)

# NETWORKING POLICY FOR CANADIAN COURTS

- MODEL WIRELESS NETWORKING POLICY FOR CANADIAN COURTS
- Prepared by Martin Felsky, Ph.D., J.D. for the Judges Technology Advisory Committee (“JTAC”), Draft 04 – rewritten 2014-01-17
- No reference to EHS

# Municipal accommodations

- Not clear on how municipalities are approaching accommodation in libraries and other municipally funded public spaces
- E.g. Toronto Water on smart meters
- There are proposals to make WiFi available in Toronto parks. Dr. Havas wrote a very strong letter condemning this idea

# Accommodating Clients and Patients in Offices

- Under the Occupier's Liability Act R.S.O. 1990, patients and clients are “invitees” and owed a higher duty of care than a trespasser or other visitor
- For this reason, we have a duty to protect them from certain harms in our offices once we become aware they are sensitive to wireless radiation.

# Advice to Lawyers

- ARCH Disability Law Centre, Tips on providing accessible legal services for persons with disabilities, 2017
- <http://www.archdisabilitylaw.ca/sites/all/files/Tips%20on%20providing%20accessible%20legal%20services%20-%20FINAL%20-%20September%202017.pdf>

# Law and Policy Reform

- Who regulates?
- Mostly it's the Feds
- Esp. on cell tower siting and regulation
- Safety standards

# *Radio Reference case, 1931*

- Since the 1930s, telecommunications has been interpreted exclusively as a federal power despite not being enumerated in the Constitution Act, 1867.
- In the Supreme Court's *Radio Reference* case of 1931, a majority of the justices ruled that telecommunications is an exclusive federal power.

# *Radio Reference case, 1931*

- Justice Robert Smith, for instance, decided that legislation regarding radio technologies does not deal directly with property or civil rights in the province.
- most of the justices found that such activities fall under the federal govt's power, since all powers not specifically enumerated are granted to the federal government under the "residual powers" doctrine.

# Dissenting Views

- However, two out of the five justices found that Parliament's jurisdiction was not exclusive, since the "receiving apparatus" is a piece of equipment, or property, that must be erected within the province.

# CRTC rules prior to Cellular Explosion

- the Canadian Radio-television and Telecommunications Commission (CRTC) in the past has required applicants for broadcasting licences to comply with municipal regulations. In its 1987 decision 87-376, the CRTC approved the location of a transmitter site conditional upon "evidence that (the applicant) has satisfied the zoning and land use requirements of the municipal authority with respect to the use of that site."

# Cell Tower siting became controversial

- Cell Tower siting became controversial in many communities beginning in the mid 2000s as the number of PDs in use exploded

# Toronto's Prudent Avoidance Policy

- In 1999, after Toronto Public Health assessed the available health and technical data, the Board of Health adopted a Prudent Avoidance Policy for the location of new telecommunications towers.
- recommended that levels of exposures to radiofrequency (RF) for the general public be kept 100 times below Health Canada's guidelines.

# Telus v. City of Toronto (2007)

- City of Toronto attempted to challenge federal jurisdiction to cite a new cell tower for Rogers in the late 2006 re: municipal planning: city lost
- <https://www.toronto.ca/legdocs/mmis/2007/cc/bgrd/cc7.5.pdf>
- currently 2,600 towers in the GTA, most in Toronto. The antennas and electronic equipment, communicate with cellphones

# FCM and CWTA Protocol

- In response, the Federation of Canadian Municipalities and the Canadian Wireless Telecommunications Association jointly developed a protocol to create a harmonized process to review antenna siting procedures. This includes a requirement to provide notice to communities when a tower is to be built.

# Quebec litigation

- *Rogers Communications Inc. v. Châteauguay (City)* reversed a decision of the Quebec Court of Appeal, and affirming that the Federal Government has exclusive jurisdiction over radiocommunication in Canada, including the authority to determine the location of radiocommunication infrastructure.

# Port Franks in Lambton Shores

- In 2012, Port Franks investigated whether it could designate the entire hamlet as a “white zone”
- Councilors advised by federal govt. any effort to do so would be blocked by the feds

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### Press Release: ONTARIO HAMLET INVESTIGATES RADIATION FREE LIVING

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#### No Green Light For Proposed Residential Cell Tower



**WireService.ca Press Release - May 14, 2012** - Lambton Shores Municipal Council last week heard two motions related to wireless communication installations in Port Franks, Ontario. Council passed a motion for non-concurrence regarding a residential tower site proposed by Bell Canada. A history-making motion brought forward by Councillor John Russell requested staff research and report in consideration of creating a 'white zone' in the hamlet of Port Franks; this motion also passed. This would be a first in Canada - protecting residents, employees, visitors and the area's unique natural environment from radiation generated by wireless communications installations. The report will include Official Planner consultation. Russell confirmed, "This has been sent to staff to investigate, and the issue will be brought back to Council with more information that answers how the idea fits within our planning parameters."

A 'white zone' is an area where outdoor and indoor air pollution by the radio frequency electromagnetic fields emitted by communications antennas is minimized or eliminated. Proven safer and effective communication technologies are available to improve services. For years, this area on the eastern shore of southern Lake Huron has had fibre optic cable - a newer technology that many Canadian communities lack.

Residents applauded Council's forwarding-looking decision to investigate this topic, "This is not a move against industry, it sets the health of the town as top priority." More than 200 residents of the 460 homes in Port Franks submitted statements opposing all proposed communications antennas due to health risks to the townspeople, area wildlife, and abundant natural areas home to many endangered species and included requests to deem the area a 'white zone'.

Public requests for further information can be sent to [TowerPF@yahoo.com](mailto:TowerPF@yahoo.com).



# Controversies continue

- Oakville, for instance, passed a motion requiring a 200-metre distance between cell towers and "sensitive land uses" such as homes. However, Industry Canada said it would overrule the 200-metre setback. Young encouraged Oakville's councillors to "stick to their guns on this issue and maintain their position on the 200-metre setback" to Ottawa, even if they are overruled in the future.

# Municipalities fight back

- municipalities have still attempted to exert their authority within constitutional boundaries.
- Activist view: Regardless of the constitutional supremacy of the federal government municipalities should continue to pass anti-tower by-laws as their constituents desire.

# Other initiatives

- Oakville, Guelph, and numerous other communities
- Clearly a strong interest in the issue by residents in certain municipalities.
- municipal govt is most accessible to its constituents and the one best able to advocate on their behalf.

# Other Provincial Legislation

- Occupational Health and Safety Act
- Worker Compensation legislation

# Healthy, safe workplaces are the law

- Provincial occupational health and safety (OHS) laws specify minimum standards – these apply to 90% of Canadian employers
- Joint Health and Safety Committees (JHSC) are implementation mechanism in larger workplaces while smaller ones have worker and mgt. OHS reps

# Workplace Hazardous Materials Information System (WHMIS)

- The Workplace Hazardous Materials Information System (WHMIS) is a mirror law integrating relevant provincial and federal laws.

# WHMIS

- This is a coordinated “floor” to prevent and control chemical exposures through labelling of hazards, worker education programs, etc.
- When permitted, meeting higher standards is frequently necessary and desirable.
- Other examples of mirror laws: Transportation of Dangerous Goods (TDGA)

# Safety Code 6

- Established 1979. Minor revisions 1991, 1993, 1999, 2009, 2015
- The purpose is to establish safety limits for human exposure to radiofrequency (RF) fields in the frequency range from 3 kHz to 300 GHz.
- Originally intended for individuals working at, or visiting, federally regulated sites.
- Health Canada recommends limits for safe human exposure

# Safety Code 6

- Health Canada does not regulate the general public's exposure to RF radiation
- Many provinces and territories apply the exposure limits in Safety Code 6 for general public exposure.
- Industry, Science and Economic Development Canada (ISED) regulates wireless devices and their associated infrastructure (such as cell towers), which are required to comply with Safety Code 6.

# Law Reform

- What is law reform about
- Legal change is not the same as social change; we must change hearts and minds as well as laws otherwise the reforms do not take hold.
- This is hard work!
- Similarly, good laws start with good meta-policies that are coherent and durable- must be integrated

# What are metapolicies??

- A metapolicy - otherwise known as a ‘policy on policies’ – provides a framework that sets out to define the range of compliance documents (e.g. regulations, policies, procedures, protocols) and establish a classification system which groups them (e.g. financial, information technology).

# More on metapolicies

- In addition, it identifies and describes the processes by which the compliance documents are developed, reviewed and made available to stakeholders.
- Metapolicy – Overarching Policies
  - Sub-policies; Laws; Regs; Guidelines; project approvals

# Metapolicies underpin law

- *If you don't like a particular law, it often is because you disagree with the meta-policy*
- *Core values and long-term prevention goals must inform the core meta-policies underpinning laws on EHS*
- Take a specific challenge e.g. wireless radiation in hospitals and work on meta-policy

# Promoting positive law reform

- How can we promote positive law reform?  
(hint: with good meta-policies)
- In short, good process plus good content, leads to positive law reform
- Examples; Pay Equity, Gay Rights, etc.
- Poor process often can result in highly questionable laws and policies

# Building a Social Consensus

- *we must come to a common understanding that sensitivities arise from physical causes, in order best to prevent and to treat conditions such as EHS.*
- *We can build that social consensus through advocacy, research and education*
- *Courts and Legislatures will respond e.g. MADD – drunk driving, Pay Equity, LGBTQ rights, etc.*

# Resist Safety Code 6 and FCM/CTCA Tower Siting Process

- Resistance to cell tower applications by municipalities can act as a message both to IESSD and to the telecommunications companies. It can engage citizens who otherwise care little about politics and show them that their local government is heeding their concerns.

# Resistance produces results

- My experience representing clients: Municipal and resident resistance encourages Industry Canada to reject towers application.
- Hopefully, Industry Canada will become more receptive to the concerns of local communities in making its final decisions, even though it is not constitutionally bound to do so.

# Mirror Legislation: A Long Term solution?

- What is needed to address the jurisdictional issues? I have advocated mirror legislation to deal with this wicked environmental health problem for the past 15 years
- In the absence of constitutional amendments, this is the only way to proceed.

# Mirror Laws: Mitigating harm

Goals for mirror laws - Reducing exposure:

- Hardwire everything possible
- ‘white zones’ clear of EMR
- Turn off all emitting devices at night
- Stay clear of appliances
- Consider Stetzer filters
- Corded phones only

# Thank you

- For additional information and details, please contact:
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# Brief Bio

David McRobert is an environmental lawyer based in southern Ontario, and retired Adjunct Professor. He was pro-bono counsel on the Board of the Wireless Radiation Safety Council of Canada from 2011 to 2013. He has worked with numerous clients on a range of wireless radiation safety, air pollution, water pollution and chemical sensitivity issues.

# Undeveloped Themes/Deleted slides

- **Re: USING MUNICIPAL POWERS ON HEALTH UNDER ONTARIO MUNICIPAL ACT, SO 2001?**
- **PROBLEMS WITH USING NUISANCE TO ADDRESS EHS, STRAY VOLTAGE, ETC.**