



Ontario
Human Rights Commission
Commission ontarienne des
droits de la personne

Policy and guidelines on disability and the duty to accommodate

ISBN: 0-7794-0687-7

Revised version approved by the Commission: November 23, 2000

(Please note: minor revisions were made in December 2009 to address legislative amendments resulting from the *Human Rights Code Amendment Act, 2006*, which came into effect on June 30, 2008.)

Also available on the Internet: www.ohrc.on.ca

Available in other accessible formats on request

Disponible en français

Contents

1. Introduction	4
2. What is disability?	6
2.1 The definition in the Human Rights Code	6
2.2 A broader approach to understanding disability: a social perspective	7
2.3 Non-evident disabilities	7
2.4 Mental disability	8
3. <i>Prima facie</i> discrimination because of disability.....	8
3.1 Discrimination and insurance	9
4. The duty to accommodate	10
4.1 General principles	10
4.1.1 Respect for dignity	10
4.1.2 Individualized accommodation	10
4.1.3 Integration and full participation	11
4.2 Legal principles	12
4.3 Most appropriate accommodation.....	14
4.3.1 Essential duties and the current job	15
4.3.2 Alternative work.....	16
4.3.3 Return to work.....	18
4.4 Duties and responsibilities in the accommodation process.....	18
4.4.1 Confidentiality.....	21
5. Undue hardship.....	21
5.1 Excluded factors	22
5.1.1 Business inconvenience.....	22
5.1.2 Employee morale	22
5.1.3 Third-party preference.....	23
5.1.4 Collective agreements or contracts.....	23
5.2 Onus of proof and objective evidence.....	24
5.3 Elements of the undue hardship defence.....	24
5.3.1 Cost.....	24
5.3.2 Outside sources of funding	26
5.3.3 Health and safety	27
5.4 Minimizing undue hardship	30
5.4.1 Cost recovery	30
5.4.2 Distributing costs.....	31
5.4.3 Reducing financial burden.....	31
5.4.4 Tax deductions.....	31
5.4.5 Improvements to productivity, efficiency or effectiveness	31
5.4.6 Second Injury and Enhancement Fund.....	31
5.4.7 Creative design solutions	32
5.4.8 A less expensive alternative.....	32
5.4.9 Phasing in accommodation	32
5.4.10 Establishing a reserve fund.....	33
5.4.11 Assessing the impact of remaining costs	33
5.4.12 Expert assessment.....	33
6. Accommodation planning and implementation	34
6.1 Organizational policy.....	34
6.2 Accessibility review	35
7. For more information.....	36

Purpose of OHRC Policies

Section 30 of the Ontario *Human Rights Code* (*Code*) authorizes the Ontario Human Rights Commission (OHRC) to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*.^{*} The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the *Code*. They are important because they represent the OHRC's interpretation of the *Code* at the time of publication.^{**} Also, they advance a progressive understanding of the rights set out in the *Code*.

Section 45.5 of the *Code* states that the Human Rights Tribunal of Ontario (the Tribunal) may consider policies approved by the OHRC in a human rights proceeding before the Tribunal. Where a party or an intervenor in a proceeding requests it, the Tribunal *shall* consider an OHRC policy. Where an OHRC policy is relevant to the subject-matter of a human rights application, parties and intervenors are encouraged to bring the policy to the Tribunal's attention for consideration.

Section 45.6 of the *Code* states that if a final decision or order of the Tribunal is not consistent with an OHRC policy, in a case where the OHRC was either a party or an intervenor, the OHRC may apply to the Tribunal to have the Tribunal state a case to the Divisional Court to address this inconsistency.

OHRC policies are subject to decisions of the Superior Courts interpreting the *Code*. OHRC policies have been given great deference by the courts and Tribunal,^{***} applied to the facts of the case before the court or Tribunal, and quoted in the decisions of these bodies.^{****}

^{*} The OHRC's power under section 30 of the *Code* to develop policies is part of its broader responsibility under section 29 to promote, protect and advance respect for human rights in Ontario, to protect the public interest, and to eliminate discriminatory practices.

^{**} Note that case law developments, legislative amendments, and/or changes in the OHRC's own policy positions that took place after a document's publication date will not be reflected in that document. For more information, please contact the Ontario Human Rights Commission.

^{***} In *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 at para. 53 (Ont. Bd. Inq.), the tribunal applied the United States Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (4th Cir. 1971) to conclude that OHRC policy statements should be given "great deference" if they are consistent with *Code* values and are formed in a way that is consistent with the legislative history of the *Code* itself. This latter requirement was interpreted to mean that they were formed through a process of public consultation.

^{****} Recently, the Ontario Superior Court of Justice quoted at length excerpts from the OHRC's published policy work in the area of mandatory retirement and stated that the OHRC's efforts led to a "sea change" in the attitude towardss mandatory retirement in Ontario. The OHRC's policy work on mandatory retirement heightened public awareness of this issue and was at least partially responsible for the Ontario government's decision to pass legislation amending the *Code* to prohibit age discrimination in employment after age 65, subject to limited exceptions. This amendment, which became effective December 2006, made mandatory retirement policies illegal for most employers in Ontario: *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 16 at para. 45. See also *Eagleson Co-Operative Homes, Inc. v. Théberge*, [2006] O.J. No. 4584 (Sup.Ct. (Div.Ct.)) in which the Court applied the OHRC's *Policy and Guidelines on Disability and the Duty to Accommodate*, available at: www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2

1. Introduction

Under the *Code*,¹ everyone has the right to be free from discrimination because of disability or perceived disability in the social areas of employment, services, goods, facilities, housing, contracts and membership in trade and vocational associations. This right means that persons with disabilities² have the right to equal treatment, which includes the right to accessible workplaces, public transit, health services, restaurants, shops and housing.

On average, 30 – 50% of human rights claims cite the ground of disability. Most are in the area of employment, with services constituting the second largest area. For this reason, this Policy focuses on the workplace, with specific guidance to support employers, unions and employees in the fulfilment of their duties and rights under the *Code*.³

In 1989, the OHRC published its *Guidelines on Assessing Accommodation Requirements for Persons with Disabilities*. These Guidelines were introduced after extensive consultations with stakeholders, and created for the first time a standard for the interpretation of “undue hardship.” The Guidelines were cited before tribunals and the courts, and were an important interpretative tool. Since that time, there have been several important legal decisions, notably from the Supreme Court of Canada, with respect to the ground of disability and the duty to accommodate. These decisions have assisted the OHRC in its evolving understanding of equality for persons with disabilities. Significantly, the Supreme Court has noted the need to adapt society so that its structures and attitudes include persons with disabilities. This requires a shift in our approach to the entire area, one that affirms the centrality of human dignity in achieving equality.

In 1999, the OHRC invited stakeholders to provide input on the revisions to the Guidelines. Over 150 stakeholders were approached. They represented a broad spectrum of interests, including consumers and organizations from the disability community, employer associations, educational institutions, law firms, labour, provincial and municipal government agencies, business and trade associations and service providers.

Several themes emerged from these consultations, and have informed these revisions:

- There is a need to reaffirm the standard of undue hardship that was created in 1989.
- While undue hardship is a high standard, it is necessary to ensure equality. It is, in this sense, “reasonable” and accommodation to the point of undue hardship is “reasonable accommodation,.”
- Individual accommodation has grown in significance as a central principle of human rights law.
- More guidance is needed on the definition of disability, as well as more practical direction on the steps required in the accommodation process.
- The principle of design by inclusion and barrier removal has to be underscored.
- More information on the needs of persons with mental disabilities is a priority.

Policy and guidelines on disability and the duty to accommodate

- Unions and employee associations have a critical role to play in the accommodation process.
- There is a need to clarify the impact of accommodation on performance standards and on access to jobs other than the “pre-disability” job.
- The principle of dignity with risk (i.e., the ability of persons with disabilities to assume risk to themselves) has to be balanced with health and safety considerations.

As a result, there are several new features in this *Policy and Guidelines*, which replaces the 1989 *Guidelines*. The reader will find references to case law and international human rights obligations, as well as a resource section.

The right to be accommodated and the corresponding duty of the employer and union are now well established in statute and case law. Accommodation is a fundamental and integral part of the right to equal treatment. The duty to accommodate means that the terms and conditions of the workplace, or the functions of a job, may have to be changed. The *Code* recognizes that an employer may have operating rules, policies and procedures that may be necessary for business reasons, or that there may be certain legal requirements such as health and safety legislation. There may also be collective agreements that set out the terms and conditions governing the workplace.

Accommodation with dignity is part of the broader principle that our society should be structured and designed for inclusiveness. This principle, which is sometimes referred to as integration, emphasizes barrier-free design and equal participation of persons with varying levels of ability. Integration is also much more cost-effective than building parallel service systems, although it is inevitable that there will be times when parallel services are the only option. Inclusive design and integration are also preferable to “modification of rules” or “barrier removal,” terms that, although popular, assume that the *status quo* (usually designed by able-bodied persons) simply needs an adjustment to render it acceptable. In fact, inclusive design may involve an entirely different approach. It is based on positive steps needed to ensure equal participation for those who have experienced historical disadvantage and exclusion from society’s benefits.⁴ The right to equality can be breached by a failure to address needs related to disadvantage.

As the Supreme Court of Canada has observed:

*[T]he principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field.*⁵

This positive approach is more effective because it is accessible and inclusive from the start. Employers and others who set standards or requirements “owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace [or other] standards.”⁶ A proactive approach to disability accommodation is therefore necessary.

Policy and guidelines on disability and the duty to accommodate

Those responsible for accommodation⁷ should be aware of the standards for accommodation. The following guiding principles should be kept in mind:

- The needs of persons with disabilities must be accommodated in the manner that most respects their dignity, to the point of undue hardship.
- There is no set formula for accommodation – each person has unique needs and it is important to consult with the person involved.
- Taking responsibility and showing willingness to explore solutions is a key part of treating people respectfully and with dignity.
- Voluntary compliance may avoid complaints under the *Code*, as well as save the time and expense needed to defend against them.

2. What is disability?

2.1 *The definition in the Human Rights Code*

Section 10 (1) of the *Code* defines “disability” as follows:

“because of disability” means for the reason that the person has or has had, or is believed to have or have had,

- (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*

“Disability” should be interpreted in broad terms. It includes both present and past conditions, as well as a subjective component based on perception of disability. Although sections 10(a) to (e) set out various types of conditions, it is clear that they are merely illustrative and not exhaustive. Protection for persons with disabilities under this subsection explicitly includes mental illness,⁸ developmental disabilities and learning disabilities. Even minor illnesses or infirmities can be “disabilities,” if a person can show that she was treated unfairly because of the perception of a disability.⁹

Conversely, persons with an ailment who cannot show they were treated unequally because of a perceived or actual disability will be unable to meet even the *prima facie* test for discrimination. It will always be critical to assess the context of the differential treatment to determine whether discrimination has taken place, and whether the ground of disability is engaged.

2.2 A broader approach to understanding disability: a social perspective

The Supreme Court of Canada has shed new light on the approach to be taken in understanding disability. In *Mercier*,¹⁰ a case arising in Quebec, the Supreme Court made it clear that disability must be interpreted to include its subjective component, since discrimination may be based as much on perceptions, myths and stereotypes as on the existence of actual functional limitations.

In *Mercier*, the complainants were denied employment or dismissed when it was discovered that they had medical conditions. However, their conditions did not result in any functional limitations. The employers argued that since the conditions did not give rise to any functional limitations, they could not be “disabilities” under Quebec’s human rights law. The Supreme Court of Canada disagreed.

The Court chose not to create an exhaustive definition of disability. Instead, it opted for an equality-based framework that takes into account evolving biomedical, social and technological developments. This includes a socio-political dimension that emphasizes human dignity, respect and the right to equality. Thus, a disability may be the result of a physical limitation, an ailment, a perceived limitation or a combination of all these factors. The focus is on the *effects* of the distinction, preference or exclusion experienced by the person and not on proof of physical limitations or the presence of an ailment.

Another Supreme Court of Canada decision¹¹ has since confirmed that “social handicapping,” i.e., society’s response to a real or perceived disability, should be the focus of the discrimination analysis.

2.3 Non-evident disabilities

The nature or degree of certain disabilities might render them “non-evident” to others. Chronic fatigue syndrome and back pain, for example, are not apparent conditions. Other disabilities might remain hidden because they are episodic. Epilepsy is one example. Similarly, environmental sensitivities can flare up from one day to the next, resulting in significant impairment to a person’s health and capacity to function, while at other times, this disability may be entirely non-evident. Other examples might include:

- persons whose disabilities do not actually result in any functional limitations but who experience discrimination because others believe their disability makes them less able

Policy and guidelines on disability and the duty to accommodate

- persons who have recovered from conditions but are treated unfairly because of their past condition
- persons whose disabilities are episodic or temporary in nature.

Other disabilities may become apparent based on the nature of the interaction, such as when there is a need for oral communication with a person who is deaf, or there is a need for written communication with a person who has a learning disability. A disability might become apparent over time through extended interaction. It might only become known when a disability accommodation is requested, or the disability might remain “non-evident” because the individual chooses not to divulge it for personal reasons.

Regardless of whether a disability is evident or non-evident, a great deal of discrimination faced by persons with disabilities is underpinned by social constructs of “normality” which in turn tend to reinforce obstacles to integration rather than encourage ways to ensure full participation. Because these disabilities are not “seen,” many of them are not well understood in society. This can lead to stereotypes, stigma and prejudice.

2.4 Mental disability

Although mental disability is a form of non-evident disability, it raises particular issues that merit independent consideration. Over the years, many employers have expressed the need for specific guidance on the issue of mental disability. Section 10 of the *Code* expressly includes mental disabilities. Persons with mental disabilities face a high degree of stigmatization and significant barriers to employment opportunities.¹² Stigmatization can foster a climate that exacerbates stress, and may trigger or worsen the person’s condition. It may also mean that someone who has a problem and needs help may not seek it, for fear of being labelled.

The Supreme Court of Canada has recognized the distinct disadvantage and negative stereotyping faced by persons with mental disabilities, and has held that discrimination against individuals with mental disabilities is unlawful. In *Gibbs v Battlefords*,¹³ the Court struck down an insurance plan for employees with disabilities that limited benefits for mental disabilities to a lower level than for physical disabilities. It is therefore the OHRC’s position that such distinctions are *prima facie* discriminatory.

3. *Prima facie* discrimination because of disability

Once a disability within the meaning of section 10 of the *Code* is established, the individual has the burden of showing a *prima facie* case of discrimination.

Discrimination under the *Code* can be direct (refusal to grant a job or provide access to services or housing, for example, because of a disability), indirect, constructive (adverse effect) or based on society’s failure to accommodate actual differences.

Policy and guidelines on disability and the duty to accommodate

In some cases, it will be clear that discrimination has occurred. In others, a preliminary assessment tool may be helpful. The Supreme Court of Canada has suggested three broad inquiries to determine if discrimination has taken place:¹⁴

(1) Differential treatment

Was there substantively differential treatment, either because of a distinction, exclusion or preference, or because of a failure to take into account the complainant's already disadvantaged position within Canadian society?

(2) An enumerated ground

Was the differential treatment based on an enumerated ground?

(3) Discrimination in a substantive sense

Finally, does the differential treatment discriminate by imposing a burden upon, or withholding a benefit from, a person? The discrimination might be based on stereotypes of a presumed group or personal characteristics, or might perpetuate or promote the view that a person is less capable or worthy of recognition or value as a human being or as a member of Canadian society who is equally deserving of concern, respect and consideration. Does the differential treatment amount to discrimination because it makes distinctions that are offensive to human dignity?

Given the clear historical disadvantage experienced by persons with disabilities, it is likely that most differential treatment because of disability will result in a finding of *prima facie* discrimination.¹⁵ This would include not only unfair treatment because of disability, but also neutral factors or requirements that have an adverse impact on persons with disabilities. It would also include inappropriate responses, or a lack of response to the person's condition or stated need for accommodation.

3.1 Discrimination and insurance

Discrimination may also take place where a term or condition of employment requires enrolment in a group insurance contract and an applicant does not qualify for the insurance plan because of disability. The term or condition of employment itself would be viewed as a violation of the *Code*.¹⁶

If an employee is excluded because of a disability from a benefit, pension, superannuation plan or fund or a contract of group insurance, an employer must compensate the employee an amount equivalent to the contribution that the employer would have otherwise made on behalf of an employee who does not have a disability.¹⁷

Compensation to employees takes on different forms, such as contributions to benefit premiums or accrual of vacation credits. Where employers, as a matter of course, pay a certain form of compensation to other employees who are absent from work, employees absent due to disability are also entitled to such compensation.¹⁸

4. The duty to accommodate

4.1 General principles

4.1.1 Respect for dignity

The duty to accommodate persons with disabilities means accommodation must be provided in a manner that most respects the dignity of the person, if to do so does not create undue hardship.¹⁹ Dignity includes consideration of how accommodation is provided and the individual's own participation in the process.

Human dignity encompasses individual self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. It is harmed when people are marginalized, stigmatized, ignored or devalued.²⁰ Privacy, confidentiality, comfort, autonomy, individuality and self-esteem are important factors as well to show whether an accommodation maximizes integration and promotes full participation in society.

Different ways of accommodating the needs of persons with disabilities should be considered along a continuum from those ways that are most respectful of privacy, autonomy, integration and other human values, to those that are least respectful of those values.

Perhaps the most common example of an accommodation that demonstrates little respect for the dignity of a person with a disability is a wheelchair entrance over a loading dock or through a service area or garbage room. Persons with disabilities should have the same opportunity as others to enter a building in a manner that is as convenient and pleasant for them as it is for others.

4.1.2 Individualized accommodation

The essence of accommodating people with disabilities is individualization. As a result of the three-step test proposed by the Supreme Court of Canada and re-affirmed by the Ontario Court of Appeal in *Entrop*,²¹ each person with a disability must be considered, assessed and accommodated individually.

Example: A corporate policy provides for obligatory termination in the event that an employee in a safety-sensitive position tests positive after a breathalyzer test. This blanket policy does not provide for individualized assessment or the appropriateness of the outcome in the circumstances and, accordingly, does not accommodate employees on an individual basis.

There is no set formula for accommodating people with disabilities. Each person's needs are unique and must be considered afresh when an accommodation request is made. A solution may meet one person's requirements but not another's, although many accommodations will benefit large numbers of persons with disabilities.

4.1.3 Integration and full participation

International human rights standards point to the importance of full participation and enjoyment of life for persons with disabilities. The United Nations' *Declaration of the Rights of Disabled Persons*²² provides in sections 3 and 8 that:

3. Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and full as possible.

[...]

8. Disabled persons are entitled to have their special needs taken into consideration at all stages of economic and social planning.

With these principles in mind, achieving integration and full participation for persons with disabilities requires barrier-free and inclusive design and removal of existing barriers. Preventing and removing barriers means persons with disabilities should be able to access their environment and face the same duties and requirements as everyone else with dignity and without impediment. Where barriers continue to exist because it is impossible to remove those barriers at a given point in time, then accommodation should be provided to the extent possible, short of undue hardship.

It is well established in human rights law that equality may sometimes require different treatment that does not offend the individual's dignity. In some circumstances, the best way to ensure the dignity of persons with disabilities may be to provide separate or specialized services. However, employment, housing, services and facilities must be built or adapted to accommodate people with disabilities in a way that promotes their integration and full participation. Segregated treatment in services, employment or housing for individuals with disabilities is less dignified and is unacceptable, unless it can be shown that integrated treatment would pose undue hardship or that segregation is the only way to achieve equality.²³

4.1.3 (a) Design by inclusion

Integration requires up-front barrier-free design and inclusion-by-design to fully integrate persons with disabilities into all aspects of society as much as possible.

This approach combats "social handicapping" and recognizes that social attitudes and actions often contribute to "handicaps": a person may have few or even no limitations other than those created by non-inclusive thinking. The Supreme Court has noted the need to "fine-tune" society so that structures and assumptions do not exclude persons with disabilities from participation in society²⁴ and it has affirmed that standards should be designed to reflect all members of society, insofar as this is reasonably possible.²⁵

Policy and guidelines on disability and the duty to accommodate

When constructing new buildings, undertaking renovations, purchasing new computer systems, launching new websites, setting up new policies and procedures, offering new services, or implementing new public transit routes, design choices should be made that do not create barriers for persons with disabilities.

Inclusive design is the approach that is most respectful of the dignity of persons with disabilities.

4.1.3(b) Removing barriers

Persons with disabilities are currently excluded by many kinds of barriers, including physical, attitudinal and systemic ones. Significant changes are required as part of the duty to accommodate to provide equal access to employment (including collective agreements), transportation systems, buildings (except private residences), rental accommodation, services, restaurants, shopping centres, stores and other places and activities. These changes are necessary to give meaning to the right to equality and freedom from discrimination guaranteed to persons with disabilities under Part I of the *Code*.

A systemic barrier is not just a single rule or policy but a combination of policies and/or guidelines that result in the exclusion of people identified by a *Code* ground such as disability. Organizations should understand and be aware of the possibility that systemic barriers may exist within their organization, and actively seek to identify and remove them.

Barrier removal maximizes integration with one's environment so ideally everyone is able to participate fully and with dignity. Identifying and removing systemic barriers also makes good business sense. It may reduce and prevent the filing of human rights complaints and can make facilities and procedures more comfortable for other groups such as seniors and for all people in general.

4.1.3(c) Accommodating remaining needs

Even up-front barrier-free or inclusive design and systematic removal of existing barriers may not result in full participation for persons with disabilities. At this point, differential treatment might be required to provide equal opportunity to full participation.

Again, accommodating remaining needs through differential treatment must be done in a manner that maximizes integration and dignity.

4.2 Legal principles

Once a *prima facie* case of discrimination is found to exist, the legal burden shifts to the person responsible for accommodation to show that the discrimination is justifiable. The following sections will deal with the basic legal test that persons responsible for

Policy and guidelines on disability and the duty to accommodate

accommodation must meet, and with the shared responsibilities of all parties to the accommodation process.

Section 11 of the *Code*, combined with section 9, prohibits discrimination that results from requirements, qualifications, or factors that may appear neutral but which have an adverse effect on persons with disabilities. This is often called “adverse effect,” or “constructive” discrimination. Section 11 allows the person responsible for accommodation to demonstrate that the requirement, qualification or factor is reasonable and *bona fide* by showing that the needs of the group to which the complainant belongs cannot be accommodated without undue hardship.

Section 17 also creates an obligation to accommodate, specifically under the ground of disability. Section 17 states that a right is not infringed if the person with a disability is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right. However, this defence is not available unless it can be shown that the needs of the person cannot be accommodated without undue hardship.

Section 17 addresses two important differences between disability and other *Code* grounds.²⁶ First, it recognizes that discrimination against persons with disabilities is not always grounded in negative stereotypes but rather can be based on society’s failure to accommodate actual differences. Second, it emphasizes the need for individualized accommodation, because the ground of disability “means vastly different things depending upon the individual and the context.”²⁷

The Ontario Court of Appeal has confirmed that both sections 11 and 17 apply to persons with disabilities.²⁸ However, as a result of two landmark decisions of the Supreme Court of Canada,²⁹ the distinction between direct discrimination and adverse effect discrimination has become of much less practical significance. The Ontario Court of Appeal has confirmed that this “unified approach” should be applied to Ontario human rights law as well.³⁰ The practical result is that in most cases of discrimination on the ground of disability, individualized accommodation will be necessary.

The Supreme Court of Canada sets out a framework for examining whether the duty to accommodate has been met.³¹ If *prima facie* discrimination is found to exist, the person responsible for accommodation must establish on a balance of probabilities that the standard, factor, requirement or rule:

1. was adopted for a purpose or goal that is rationally connected to the function being performed,
2. was adopted in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal, and
3. is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.

As a result of this test, the rule or standard itself must be inclusive and must accommodate individual differences up to the point of undue hardship rather than maintaining discriminatory standards supplemented by accommodation for those

Policy and guidelines on disability and the duty to accommodate

who cannot meet them. This ensures that each person is assessed according to his or her own personal abilities instead of being judged against presumed group characteristics.³²

The ultimate issue is whether the person responsible for accommodation has shown that accommodation has been provided up to the point of undue hardship. In this analysis, the procedure to assess accommodation is as important as the substantive content of the accommodation.³³

The following non-exhaustive factors should be considered in the course of the analysis:³⁴

- whether the person responsible for accommodation investigated alternative approaches that do not have a discriminatory effect
- reasons why viable alternatives were not implemented
- ability to have differing standards that reflect group or individual differences and capabilities
- whether persons responsible for accommodation can meet their legitimate objectives in a less discriminatory manner
- whether the standard is properly designed to ensure the desired qualification is met without placing undue burden on those to whom it applies
- whether other parties who are obliged to assist in the search for accommodation have fulfilled their roles.

4.3 Most appropriate accommodation

The duty to accommodate requires that the most appropriate accommodation be determined and then be undertaken, short of undue hardship. The most appropriate accommodation is one that most respects the dignity of the individual with a disability, meets individual needs, best promotes integration and full participation, and ensures confidentiality.

Accommodation is a process and is a matter of degree, rather than an all-or-nothing proposition, and can be seen as a continuum. At one end of this continuum would be full accommodation that most respects the person's dignity. Next is phased-in accommodation over time, followed by the most appropriate accommodation only being implemented once sufficient reserve funds have been set aside. Alternative accommodation (that which would be less than "ideal") might be next on the continuum when the most appropriate accommodation is not feasible. Alternative accommodation might also be accomplished at a later date if immediate implementation would result in undue hardship. Or, alternative accommodation might be implemented as an interim solution while the most appropriate accommodation is being phased in or implemented at a later date.

Whether an accommodation is "appropriate" is a determination completely distinct and separate from whether the accommodation would result in "undue hardship" (the test that has to be met under sections 11 and 17(2) of the *Code*).

Policy and guidelines on disability and the duty to accommodate

Accommodation will be considered appropriate if it will result in equal opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges experienced by others or if it is proposed or adopted for the purpose of achieving equal opportunity, and meets the individual's disability-related needs. If the accommodation meets the individual's needs and does so in a way that most respects dignity, then a determination can be made as to whether or not this "most appropriate" accommodation would result in undue hardship.

The Tribunal has ruled that short of undue hardship, the highest point in the continuum of accommodation must be achieved.³⁵ However, if there is a choice between two accommodations which are equally responsive to the person's needs in a dignified manner, then those responsible are entitled to select the one that is less expensive or that is less disruptive to the organization.

4.3.1 Essential duties and the current job

The *Code* guarantees equal treatment to all persons capable of performing the essential duties or requirements of the job or service. No one can be judged incapable of performing those duties until efforts have been made to accommodate the individual up to the point of undue hardship. The first step is to separate the essential from the non-essential duties of the job. Where possible, non-essential tasks can be reassigned to another person. The person with the disability should then be assessed in terms of his or her ability to perform the essential duties, and accommodation should be considered on that basis.

There is little guidance on how to distinguish between essential duties and others. In one Tribunal decision, the word "essential" was defined as follows:

*"Essential" means that which is "needed to make a thing what it is; very important; necessary" -Synonyms are "indispensable, requisite, vital." Thus, peripheral or incidental, non-core or non-essential aspects of a job are not pertinent to a determination under [s. 17(1)].*³⁶

Conclusions about inability to perform essential duties should not be reached without actually testing the ability of the person. It is not enough for the employer or person to assume that the person cannot perform an essential requirement. Rather, there must be an objective determination of that fact.³⁷

The duty to accommodate may require employers to consider modifying performance standards or productivity targets. The term "performance standard" refers broadly to qualitative or quantitative standards that may be imposed on some or all aspects of work, whether they are set by the employer or through collective bargaining. A productivity target is a performance standard that relates specifically to the output of work expected by the employer. Performance standards generally can be distinguished from qualification standards, which are the skills or attributes that one must have to be eligible for a particular job:

Policy and guidelines on disability and the duty to accommodate

Production standards identify the level at which an employee must perform job functions in order to perform successfully. Qualification standards, on the other hand, identify the skills and abilities necessary to perform the functions at the required level.³⁸

The central issue in determining whether or how performance standards should be modified is whether the standards in question are essential duties or requirements within the meaning of section 17 of the *Code*. If the person is unable to perform the standard, but the standard is not considered an essential part of the job, it can be changed or the function removed from the employee altogether and reassigned.

If the standard is essential, the employer is nevertheless required to accommodate the employee under section 17(2) of the *Code*. Keeping in mind the overall objective of the inclusion of employees with disabilities in the workplace, sections 17 (1) and (2) of the *Code* together include an employer's obligation to accommodate a person. This accommodation may include an adjustment of that performance standard as long as doing so does not result in undue hardship. If it does amount to undue hardship, the employer has a defence.

This does not preclude the employer from enforcing performance standards that are unrelated to the disability. The employer is entitled to a productive employee and to develop standards and targets that maximize organizational objectives.

4.3.2 Alternative work

Although accommodation in the pre-disability job is always preferable, it may not always be possible. The issue of whether an employee is entitled to have access to a job other than the pre-disability job is a matter of some debate. Nothing in the *Code* or in section 17 specifically restricts the requirement to accommodate a worker with disability to the pre-disability position. Conversely, nothing in section 17 expressly authorizes it either. Nevertheless, in light of the broad and purposive interpretation that should be afforded to human rights legislation, it is the OHRC's view that accommodation in a job other than the pre-disability job may be appropriate in some circumstances. Section 17 may therefore include access to alternative work. Some of the following considerations may assist employers in determining whether such accommodation is available under section 17(2).

The following questions should be considered:

- Is alternative work possible and available, at present or in the near future?
- If it is not available, can a new position be created without causing undue hardship?
- Does it require additional training and does the training impose undue hardship?
- Do the tasks performed match the job description, or is there flexibility in the workplace with regard to an employee's responsibilities?
- Does the alternative work policy contravene a collective agreement?

Policy and guidelines on disability and the duty to accommodate

- What are the terms of the collective agreement or individual contract of employment?
- What are the past practices of the workplace? How interchangeable are workers? Do employees frequently change positions either permanently or temporarily for reasons other than disability accommodation?³⁹

Depending on how the previous questions are answered, accommodation may therefore include job restructuring, reassignment to open positions, retraining for alternative positions or job bundling if that would not constitute undue hardship for the employer. This will depend on the circumstances of the employment and the labour environment at a given workplace. In the final analysis, the employee must be able to perform a useful and productive job for the employer.⁴⁰

Three of these options are discussed in the following sections.

4.3.2(a) Temporary alternative work

The term "alternative work" means different work or work that does not necessarily involve similar skills, responsibilities and compensation. Temporary alternative work may be an appropriate accommodation either in a return to work context, or in a situation where a disability renders an employee temporarily unable to accomplish the pre-disability job.

Temporary alternative work can be an appropriate accommodation to assist a person where the nature of the disability and its limitations are temporary or episodic.

4.3.2(b) Permanent alternative work

An employer-initiated alternative work arrangement must consider the circumstances of the individual's return to work. When an employee asks to be reinstated in a previous position, the employer may make the appropriate inquiries to assess whether the employee is fully able to carry out the essential functions of the job. Whenever possible, the returning employee should be given an opportunity to prove his or her ability to perform the pre-disability job.⁴¹

Where the employee can no longer perform his or her current job and if alternative work is appropriate based on the analysis described above, the OHRC is of the view that the employer should consider permanent alternative work. This is consistent with a line of labour arbitration cases that have found that the duty to accommodate may include significant workplace reorganization⁴² as well as with the obligation to provide suitable work in order to satisfy the duty to re-employ injured workers.⁴³

Reassignment to a vacant position should be considered an appropriate accommodation only when accommodation in the current position would cause undue hardship. The vacant position must be vacant within a reasonable amount of time, but the employer is not required to "promote" the employee. Reassignment is not available to job

applicants. If reassignment creates a conflict because of a collective agreement, accommodation needs should prevail over the collective agreement. When reassignment takes place, the person must be qualified for the reassigned position. The vacant position must be equivalent to the current one, although a less equivalent position would be acceptable if no equivalent one exists.

4.3.3 Return to work

Accommodating a person who has been absent from work may involve any of the above forms of accommodation but also raises unique issues. People who return to work after an absence related to a ground in the *Code* are protected by the *Code*.⁴⁴ They generally have the right to return to their jobs, and this is frequently referred to as the “pre-disability job.” Both employers and unions must co-operate in accommodating employees who are returning to work. Accommodation is a fundamental and integral part of the right to equal treatment in the return to work context.

The right to return to work for persons with disabilities only exists if the worker can fulfil the essential duties of the job after accommodation short of undue hardship.⁴⁵ If a person cannot fulfil the essential duties of the job, despite the employer's effort to accommodate short of undue hardship, there is no right to return to work. As noted in the preceding section, there may also be a right to alternative work.

Under the *Code*, there is no fixed rule as to how long an employee with a disability may be absent before the duty to accommodate has been met. This will depend on the ability of the employee to perform the essential duties of the job considering the unique circumstances of every absence and the nature of the employee's condition, as well as circumstances in the workplace. Also important is the predictability of absence, both in regards to when it will end and if it may recur and the frequency of the absence. The employee's prognosis and length of absence are also important considerations. It is more likely that the duty to accommodate will continue with a better prognosis, regardless of the length of absence.

The duty to accommodate does not necessarily guarantee a limitless right to return to work. On the other hand, a return to work program that relies on arbitrarily selected cut-offs or that requires an inflexible date of return may be challenged as a violation of the *Code*. Ultimately the test of undue hardship is the relevant standard for assessing return to work programs.

4.4 Duties and responsibilities in the accommodation process

The accommodation process is a shared responsibility. Everyone involved should co-operatively engage in the process, share information and avail themselves of potential accommodation solutions.

Policy and guidelines on disability and the duty to accommodate

The person with a disability is required to:

- advise the accommodation provider of the disability (although the accommodation provider does not generally have the right to know what the disability is)
- make her or his needs known to the best of his or her ability, preferably in writing, so that the person responsible for accommodation may make the requested accommodation
- answer questions or provide information regarding relevant restrictions or limitations, including information from health care professionals, where appropriate and as needed
- participate in discussions regarding possible accommodation solutions
- co-operate with any experts whose assistance is required to manage the accommodation process or when information is required that is unavailable to the person with a disability
- meet agreed-upon performance and job standards once accommodation is provided⁴⁶
- work with the accommodation provider on an ongoing basis to manage the accommodation process
- discuss his or her disability only with persons who need to know. This may include the supervisor, a union representative or human rights staff.

The employer is required to:

- accept the employee's request for accommodation in good faith, unless there are legitimate reasons for acting otherwise
- obtain expert opinion or advice where needed
- take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated,⁴⁷ and canvass various forms of possible accommodation and alternative solutions, as part of the duty to accommodate⁴⁸
- keep a record of the accommodation request and action taken
- maintain confidentiality
- limit requests for information to those reasonably related to the nature of the limitation or restriction so as to be able to respond to the accommodation request
- grant accommodation requests in a timely manner, to the point of undue hardship, even when the request for accommodation does not use any specific formal language
- bear the cost of any required medical information or documentation. For example, doctors' notes and letters setting out accommodation needs, should be paid for by the employer.

Unions and professional associations are required to:

- take an active role as partners in the accommodation process⁴⁹
- share joint responsibility with the employer to facilitate accommodation⁵⁰
- support accommodation measures irrespective of collective agreements, unless to do so would create undue hardship.

Policy and guidelines on disability and the duty to accommodate

The duty to accommodate a disability exists for needs that are known. Organizations and persons responsible for accommodation are not, as a rule, expected to accommodate disabilities of which they are unaware. However, some individuals may be unable to disclose or communicate their needs because of the nature of their disability. In such circumstances, employers should attempt to assist a person who is clearly unwell or perceived to have a disability, by offering assistance and accommodation. On the other hand, employers are not expected to diagnose illness or “second-guess” the health status of an employee.

Example: An employer is unaware of an employee's drug addiction but perceives that a disability might exist. The employer sees that the employee is having difficulty performing, and is showing signs of distress. If the employer imposes serious sanctions or terminates the employee for poor performance, without any progressive performance management and attempts to accommodate, these actions may be found to have violated the *Code*.⁵¹

Before terminating or sanctioning an employee for “unacceptable behaviour,” an employer might first consider whether the actions of the employee are caused by a disability, especially where the employer is aware or perceives that the employee has a disability. Employers should always inform all employees that a disability-related assessment or accommodation can be provided as an option to address performance issues. Progressive performance management and discipline as well as employee assistance supports ensure that all employees have a range of opportunities to address performance issues on an individualized basis before sanctions or termination are considered. For example, severe change in an employee's behaviour could signal to an employer that the situation warrants further examination.

Mental illness should be addressed and accommodated in the workplace like any other disability. In some cases, an employer may be required to pay special attention to situations that could be linked to mental disability. Even if an employer has not been formally advised of a mental disability, the perception of such a disability will engage the protection of the *Code*. Prudent employers should try to offer assistance and support to employees before imposing severe sanctions. It should be borne in mind that some mental illnesses may render the employee incapable of identifying his or her needs.

Example: John has bipolar disorder. He has chosen not to disclose to his employer because he is concerned about how he would be treated at work if it were known that he had a mental disability. He experiences a crisis at work, followed by a failure to appear at work for several days. The employer is concerned about John's absence and recognizes that termination for failure to report to work may be premature. The employer offers John an opportunity to explain the situation after treatment has been received and the situation has stabilized. Upon learning that a medical issue exists, the employer offers assistance and accommodation.

Policy and guidelines on disability and the duty to accommodate

Once disability-related needs are known, the legal onus shifts to those with the duty to accommodate. For example, counselling or referral through Employee Assistance Programs (EAPs) could be the solution for an underlying disability that might be aggravated by workplace or personal stress.

There may be instances where there is a reasonable and *bona fide* basis to question the legitimacy of a person's request for accommodation or the adequacy of the information provided. In such cases, the accommodation provider may request confirmation or additional information from a qualified health care professional to obtain the needed information. No one can be forced to submit to an independent medical examination, but failure to respond to reasonable requests may delay the provision of accommodation until such information is provided.

4.4.1 Confidentiality

Persons with disabilities are not necessarily required to disclose private or confidential matters, and should disclose information to the accommodation provider only as it pertains to the need for accommodation and any restrictions or limitations.

Example: An employee with AIDS has provided documentation to demonstrate her need for a flexible schedule, rest periods to manage periods of fatigue, and time to attend appointments with health care professionals. However, it is not necessary for the employee to disclose that she has AIDS. The employer is entitled to know that the employee has a disability and that she needs certain accommodations to remain productive at work.

Maintaining confidentiality for individuals with mental illness may be especially important because of the strong social stigmas and stereotyping that still persist about such disabilities.

Documentation supporting the need for particular accommodation (flexible hours, a different supervisor, a particular technical aid, for example) should be provided only to those who need to be aware of the information. It may be preferable in some circumstances for information to be provided to the company's health department or human resources staff rather than directly to the supervisor, to further protect confidentiality. Medical documentation should be kept separate from the person's corporate file.

5. Undue hardship

The *Code* prescribes three considerations in assessing whether an accommodation would cause undue hardship. These are:

- cost
- outside sources of funding, if any
- health and safety requirements, if any.

Policy and guidelines on disability and the duty to accommodate

Accommodating someone with a disability is seldom as expensive or difficult as is sometimes imagined. Over two-thirds of job accommodations cost under \$500; many cost nothing at all.⁵²

The *Code* sets out only three considerations. This means that no other considerations, other than those that can be brought into those three standards, can be properly considered under Ontario law. There have been cases that have included such other factors as employee morale or conflict with a collective agreement. However, the Ontario legislature has seen fit to enact a higher standard by specifically limiting undue hardship to three particular components. The broad and purposive interpretation of the *Code* and human rights generally means that rights must be construed liberally and defences to those rights should be construed narrowly.⁵³ Moreover, the *Code* has primacy over legislation,⁵⁴ and also prevails over agreements such as collective agreements.⁵⁵

Several factors are therefore excluded from considerations that are frequently raised by respondents. These are business inconvenience, employee morale, customer preference and collective agreements or contracts.⁵⁶

5.1 Excluded factors

5.1.1 Business inconvenience

"Business inconvenience" is not a defence to the duty to accommodate. If there are demonstrable costs attributable to decreased productivity, efficiency or effectiveness, they can be taken into account in assessing undue hardship under the cost standard, providing they are quantifiable and demonstrably related to the proposed accommodation.

5.1.2 Employee morale

In some cases, accommodating an employee may generate negative reactions from co-workers who are either unaware of the reason for the accommodation or who believe that the employee is receiving an undue benefit. The reaction may range from resentment to hostility. However, the person responsible for providing accommodation should ensure that staff are supportive and are helping to foster an environment that is positive for all employees. It is not acceptable to allow discriminatory attitudes to fester into workplace hostilities that poison the environment for disabled workers.

Moreover, people with disabilities have a right to accommodation with dignity. It is an affront to a person's dignity if issues of morale and misconception stemming from perceived unfairness are not prevented or dealt with. In such cases, those responsible will not have met their duty to provide accommodation with dignity.

5.1.3 Third-party preference

Human rights case law notes that third party preferences do not constitute a justification for discriminatory acts, and the same rule applies to customer preferences.⁵⁷

5.1.4 Collective agreements or contracts

Collective agreements or other contractual arrangements cannot act as a bar to providing accommodation. The Courts have determined that collective agreements and contracts must give way to the requirements of human rights law. To allow otherwise would be to permit the parties to contract out of their *Code* rights under the auspices of a private agreement. Accordingly, subject to the undue hardship standard, the terms of a collective agreement or other contractual arrangement cannot justify discrimination that is prohibited by the *Code*.

A union may cause or contribute to discrimination by participating in formulating a work rule, such as a provision in the collective agreement, that has a discriminatory effect.⁵⁸ Unions and employers are jointly responsible for negotiating collective agreements that comply with human rights laws. They should build conceptions of equality into collective agreements.⁵⁹

Example: When a union and employer are negotiating a collective agreement, the principle of seniority is maintained as a general principle. However, the union and employer can together address how employees with disabilities will be accommodated.

However, if an employer and a union cannot reach an agreement on how to resolve an accommodation issue, the employer must make the accommodation in spite of the collective agreement. If the union opposes the accommodation, or does not co-operate in the accommodation process, then the union may be named as a respondent in an application filed with the Tribunal.

Unions will have to meet the same requirements of demonstrating undue hardship having regard to costs, and health and safety. For example, if the disruption to a collective agreement can be shown to create direct financial costs, this can be taken into account under the cost standard. Issues surrounding terms of a collective agreement relating to health or safety are dealt with under the section dealing with “health and safety.”

In non-unionized environments, employers can make flexible employment arrangements to meet their duty to accommodate. The same sort of flexible employment arrangements should be considered in unionized environments, although they may fall outside the collective agreement where the duty to accommodate arises.

5.2 Onus of proof and objective evidence

To claim the undue hardship defence, the person who is responsible for making the accommodation has the onus of proof.⁶⁰ It is not up to the person with a disability to prove that the accommodation can be accomplished without undue hardship.

The nature of the evidence required to prove undue hardship must be objective, real, direct and, in the case of cost, quantifiable. The person responsible for accommodation must provide facts, figures and scientific data or opinion to support a claim that the proposed accommodation in fact causes undue hardship. A mere statement, without supporting evidence, that the cost or risk is “too high” based on impressionistic views or stereotypes will not be sufficient.⁶¹

Example: A deaf patient requires a sign language interpreter in a hospital. The hospital administrator refuses to provide the accommodation, stating, “If everyone wanted signers, it would bankrupt us.” The hospital administrator does not provide financial information to justify this claim, and does not provide demographic evidence to show the likely number of patients who may require signers. As a result, the hospital’s defence will be unlikely to succeed.

Objective evidence includes, but is not limited to:

- financial statements and budgets
- scientific data, information and data resulting from empirical studies
- expert opinion
- detailed information about the activity and the requested accommodation
- information about the conditions surrounding the activity and their effects on the person or group with a disability.

5.3 Elements of the undue hardship defence

5.3.1 Cost

The Supreme Court of Canada has said that, “one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment”.⁶² The cost standard is therefore a high one.

Costs will amount to undue hardship if they are:

- quantifiable;
- shown to be related to the accommodation; and
- so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its viability.

This test will apply whether the accommodation will benefit one person or a group.

Policy and guidelines on disability and the duty to accommodate

The costs that remain after all costs, benefits, deductions and other factors have been considered will determine undue hardship.

All projected costs that can be quantified and shown to be related to the proposed accommodation will be taken into account. However, mere speculation (for example, about monetary losses that may follow the accommodation of the person with a disability) will not generally be persuasive.

The financial costs of the accommodation may include:

- capital costs, such as the installation of a ramp, the purchase of screen magnification or software
- operating costs such as sign language interpreters, personal attendants or additional staff time
- costs incurred as a result of restructuring that are necessitated by the accommodation
- any other quantifiable costs incurred directly as a result of the accommodation.

Concerns may arise about the potential increase in liability insurance premiums by the perceived health and safety risks of having persons with disabilities on particular job sites. Increased insurance premiums or sickness benefits would be included as operating costs where they are quantified, such as actual higher rates (not hypothetical), and are shown not to be contrary to the principles in the *Code* with respect to insurance coverage.⁶³ Where the increased liability is quantifiable and provable, and where efforts to obtain other forms of coverage have been unsuccessful, insurance costs can be included.

For the purposes of determining whether a financial cost⁶⁴ would alter the essential nature or substantially affect the viability of the organization, consideration will be given to:

- the ability of the person responsible for accommodation to recover the costs of accommodation in the normal course of business (see section 4.4.1)
- the availability of any grants, subsidies or loans from the federal, provincial or municipal government or from non-government sources which could offset the costs of accommodation
- the ability of the person responsible for accommodation to distribute the costs of accommodation throughout the whole operation (see section 4.4.2)
- the ability of the person responsible for accommodation to amortize or depreciate capital costs associated with the accommodation according to generally accepted accounting principles,
- the ability of the person responsible for accommodation to deduct from the costs of accommodation any savings that may be available as a result of the accommodation, including:
 - tax deductions and other government benefits (see section 4.4.4)
 - an improvement in productivity, efficiency or effectiveness (see section 4.4.5)
 - any increase in the resale value of property, where it is reasonably foreseeable that the property might be sold
 - any increase in clientele, potential labour pool, or tenants

Policy and guidelines on disability and the duty to accommodate

- the availability of the Workplace Safety and Insurance Board's *Second Injury and Enhancement Fund*⁶⁵ (see section 4.4.6).

Larger organizations, including businesses and governments, may be in a better position to set an example or provide leadership in accommodating persons with disabilities. Accommodation costs will likely be more easily absorbed by larger organizations. Large employers, for example, are more likely to have the opportunities and the means to provide employment opportunities for greater numbers of persons with disabilities in a manner that accommodates their needs.

The phrase "benefits of enhancing equality" is intended to include consideration of benefits from the accommodation that may accrue to a person's co-workers, family, friends, fellow students or the general public by the accommodation being made.

5.3.1(a) Heritage buildings

The accessibility of heritage buildings raises controversial issues. A general exemption from accessibility requirements for heritage properties is not included in the *Policy* because it would result in broad exclusions as more and more buildings gain protection because of their heritage status. In a situation involving a heritage property, it is recognized that the cost of making the proposed accommodation may be increased by the necessity to preserve defining historic design features. However, aesthetic features, in and of themselves, that are not historic design features, are not to be included in the assessment.

The test of altering the essential nature or substantially affecting the viability of the enterprise allows the preservation of the defining features of a heritage property to be taken into account as a justifiable factor in assessing undue hardship.

5.3.2 Outside sources of funding

The availability of outside sources of funding may alleviate accommodation costs.⁶⁶ Organizations can make use of outside resources to meet their duty to accommodate and must first do so before claiming undue hardship.

There are three potential sources of funding to consider:

1. Funds that may be available to the individual only, provided through government programs and that are linked to the individual's disability.

Resources such as services or programs, might be available to accommodate the needs of persons with disabilities that could also aid them at work, in their apartment or while accessing a service.

Policy and guidelines on disability and the duty to accommodate

Persons with disabilities might be expected to first avail themselves of outside resources available to them when making accommodation requests to an employer or service provider. However, such resources should most appropriately meet the accommodation needs of the individual, including respect for dignity.

2. Funds that would assist employers and service providers defray the cost of accommodation.

Other outside accommodation resources might be available to a person with a disability when more than one organization has an overlapping or interconnected sphere of responsibility for the duty to accommodate.

Example: A lawyer, who is deaf and who works for a large law firm, receives real-time captioning or sign language interpreter accommodation funded and provided by a court. While the lawyer is acting in court, the court takes responsibility for the duty to accommodate, relieving the lawyer's employer of its responsibility during this time period only.

3. Funding programs to improve accessibility for persons with disabilities – a corporate or organizational responsibility.

Governments have a positive duty to ensure that services generally available to the public are also available to persons with disabilities. Governments should not be allowed to evade their human rights responsibilities by delegating implementation of their policies and programs to private entities.⁶⁷ An organization that assumes responsibility for a government program must attend to the accommodation needs of its users.

5.3.3 Health and safety

Health and safety requirements may be contained in a law or regulation, or result from rules, practices or procedures that have been established independently or in conjunction with other businesses or services engaged in similar kinds of activity.

Organizations have a responsibility to undertake health and safety precautions that would ensure that the health and safety risks in their facilities or services are no greater for persons with disabilities than for others. Where a health and safety requirement creates a barrier for a person with a disability, the accommodation provider should assess whether the requirement can be waived or modified. If waiving the health and safety requirement is likely to result in a violation of the *Occupational Health and Safety Act (OHSA)*, the employer should generate alternative measures based on the equivalency clauses of the *OHSA*.⁶⁸ The employer is required to show an objective assessment of the risk as well as demonstrate how the alternative measure provides equal opportunity to the person with a disability. The employer might be able to claim undue hardship after these measures were undertaken and a significant risk still remains.

5.3.3(a) *Bona fide and reasonable requirements*

Health and safety risks will amount to undue hardship if the degree of risk that remains after the accommodation has been made outweighs the benefits of enhancing equality for persons with disabilities. The person responsible for accommodation will have to satisfy the three-step test set out in Section 3.2.

Health and safety standards that are genuinely adopted for the protection of workers, clients or the public will usually meet the second step of the test. On the other hand, a standard that is established to circumvent human rights legislation will not meet this test.

The third step requires the organization to demonstrate that the standard is reasonably necessary and that accommodation cannot be accomplished without incurring undue hardship.

Health or safety risks that result in undue hardship could be reduced to acceptable levels over time (for example, by adding safety features or changing job descriptions to accommodate an employee with a disability). Development of a new technology to allow an employee with a disability to operate certain machinery more safely, for example, may take some time. In principle, therefore, a person responsible for accommodation could be required to phase in an accommodation that would lessen the health or safety risk over time, provided that the delay is reasonable and justified in relation to the development time attributed to the accommodation.

5.3.3(b) *Assumption of risk*

A person with a disability may wish to assume a risk. The risk created by modifying or waiving a health and safety requirement is to be weighed against the right to equality of the person with a disability. Where the risk is so significant as to outweigh the benefits of equality, it will be considered to create undue hardship.

In determining whether an obligation to modify or waive a health or safety requirement, whether established by law or not, creates a significant risk to any person, consideration will be given to:

- the significance, probability and seriousness of the risk
- the other types of risks that the person responsible for accommodation is assuming within the organization
- the types of risks tolerated within society as a whole, reflected in legislated standards such as licensing standards, or in similar types of organizations.

The “risk” that remains after all precautions including accommodations (short of undue hardship based on cost) have first been made to reduce the risk will determine undue hardship.

Where a modification or waiver of a health and safety requirement could place an individual with a disability at risk, the person responsible for accommodation is obliged to explain the potential risk to the person. Where possible, persons with disabilities

Policy and guidelines on disability and the duty to accommodate

should be allowed to assume risk with dignity, subject to the undue hardship standard. At the same time, the organization has an obligation under health and safety legislation not to place persons in a situation of direct threat of harm. High probability of substantial harm to anyone will constitute an undue hardship.

Seriousness of the risk

The fact that a person has a disability, in and of itself, is not sufficient to establish that there is a risk. Evidence will be required to prove the nature, severity, probability and scope of the risk.

In determining the seriousness or significance of a risk, the following factors should be considered:

- the nature of the risk
 - what could happen that would be harmful?
- the severity of the risk
 - how serious would the harm be if it occurred?
- the probability of the risk
 - how likely is it that the potential harm will actually occur?
- is it a real risk, or merely hypothetical or speculative?
 - could it occur frequently?
- the scope of the risk
 - who will be affected by the event if it occurs?

These five factors should be considered together to determine the seriousness of the risk. If the potential harm is minor and not very likely to occur, the risk should not be considered to be serious. A risk to public safety shall be considered as part of the scope of the risk, while the likelihood that the harmful event may occur would be considered as part of the probability of risk.

The seriousness of the risk is to be determined after accommodation and on the assumption that suitable precautions have been taken to reduce the risk.

Example: An ambulance dispatcher with a hearing impairment manages emergency calls over the telephone. Her capacity to do so safely and reliably is properly assessed while using a prescribed hearing aid and a hearing aid-compatible telephone.

Consideration of other types of risk

When assessing the seriousness of the risk posed by the obligation to modify or waive a health or safety requirement, consideration must be given to the other types of risks that are assumed within an organization. For example, many jobs have risks that are inherent to the nature of the work itself.

As well, job applicants may be denied employment on the basis of limitations related to their disabilities. Yet these same or similar limitations may be developed by employees

Policy and guidelines on disability and the duty to accommodate

who have been on the job for several years, with little or no effect on their ability to satisfactorily perform their duties and with no impact on their careers.

Everyday risk

Many sources of risk exist in the workplace, aside from those risks that may result from accommodating an employee with a disability. All employees assume everyday risks that may be inherent in a work site, or in working conditions, or which may be caused by a co-worker's fatigue, temporary inattentiveness or stress. Employers have recognized that not all employees are 100% productive every day, and many provide counselling programs or other means of coping with personal problems, emotional difficulties or other problems that may arise. Risks created by these situations are factored into the level of safety or risk that we all accept in our lives every day.

A potential risk that is created by accommodation should be assessed in light of those other, more common sources of risk in the workplace.

Risks in society as a whole

Risks that are present in comparable enterprises or in society as a whole should be considered. While maximizing safety is always desirable, as a society we constantly balance the degree of safety to be achieved against competing benefits. For example, we balance the risk of injury in contact sports against the benefits of participating in sports activities or because of the economic and entertainment benefits. We balance the risks involved in permitting higher speed limits against the benefits of increasing the efficient flow of traffic. We balance the risks involved in driving affordable cars against the costs that would be involved in making them even safer.

5.4 Minimizing undue hardship

The following factors and strategies must be considered to avoid undue hardship and meet the duty to accommodate under the *Code*:

5.4.1 Cost recovery

Persons responsible for accommodation should take steps to recover the costs of accommodation. For example, by making reasonable changes to business practices or obtaining grants or subsidies, the expense of making accommodation can be offset. If the person responsible for accommodation believes that such measures will not be effective in avoiding undue hardship, s/he will have to demonstrate that such steps to recover costs are inadequate in the circumstances, are impossible or will not yield the needed resources.

In other words, the person responsible for accommodation would be required to establish that the costs that remain after steps are taken to recover costs will alter the essential nature or substantially affect the viability of the enterprise.

5.4.2 Distributing costs

Costs of accommodation must be distributed as widely as possible within the organization responsible for accommodation so that no single department, employee, customer or subsidiary is burdened with the cost of an accommodation. The appropriate basis for evaluating the cost is based on the budget of the organization as a whole, not the branch or unit in which the person with a disability works or to which the person has made an application. In the case of government, the term "whole operation" should refer to the programs and services offered or funded by the government. There may be accommodations that require substantial expenditure, which, if implemented immediately, would alter the essential nature of government programs or substantially affect their viability in whole or in part. In such instances, it may be necessary to implement the required accommodation incrementally.

5.4.3 Reducing financial burden

Organizations should consider spreading the financing of accommodation over time by taking out loans, issuing shares or bonds, or other business methods of financing. Amortization or depreciation is another means that an organization might be expected to use to reduce the financial burden, where possible.

5.4.4 Tax deductions

Tax deductions or other government benefits flowing from the accommodation will also be taken into account as offsetting the cost of accommodation.

5.4.5 Improvements to productivity, efficiency or effectiveness

The person responsible for accommodation is expected to consider whether accommodation of the needs of a person with a disability may improve productivity, efficiency or effectiveness, expand the business or improve the value of the business or property.

Example: An accommodation that affects a significant number of people with disabilities, such as persons requiring wheelchair access, could open up a new market for a storekeeper or a service provider. By building a ramp, several more persons will be able to access a store.

5.4.6 Second Injury and Enhancement Fund⁶⁹

The effects of the Second Injury and Enhancement Fund of the Workplace Safety and Insurance Board (the WSIB) must be considered. In the event of an injury to a worker, where the injury is caused by the worker's disability, a claim may be made against this fund even if the employer did not have knowledge of the employee's pre-existing condition. The rates for the employer will not be increased as a result of making claims on the fund.

Approximately 90% of employees in the province of Ontario are under the protection of the WSIB. Since the fund is available to most employers, there will be few instances where increased liability insurance premiums for risk of injury to a person due to a pre-existing condition or disability will be a factor in creating undue hardship.

5.4.7 Creative design solutions

Creative design solutions can often avoid expensive capital outlay. This may involve specifically tailoring design features to the person's functional capabilities. Design solutions must be most respectful of dignity.

5.4.8 A less expensive alternative

Where undue hardship is claimed, cost and risk estimates should be carefully examined to ensure that they are not excessive in relation to the stated objective. If so, a determination should be made as to whether a less expensive or lower-risk alternative exists that could accomplish the accommodation (either as an interim measure to a phased-in solution or permanently) while still fully respecting the dignity of the person with a disability.

5.4.9 Phasing in accommodation

Some accommodations will be very important but will be difficult to accomplish in a short period of time.

Example: A small municipality may be able to show that to make its community centre or transportation system accessible in a single year would cause undue hardship. Or, a small employer may find it impossible to make its entrance and washroom facilities accessible immediately without undue hardship.

In these situations, undue hardship should be avoided by phasing in the accessible features gradually.

Some accommodations will benefit large numbers of persons with disabilities, yet the cost may prevent them from being accomplished. One approach that may reduce the hardship is to spread the cost over several years by phasing in the accommodation gradually.

Example: A commuter railroad might be required to make a certain number of stations accessible per year.

In many cases, while accommodation is being phased in over an extended period of time, it may still be possible to provide interim accommodation for the individual. If both short- and long-term accommodation can be accomplished without causing undue hardship, then both should be considered simultaneously.

5.4.10 Establishing a reserve fund

A second method of reducing the impact of the cost of an accommodation is to establish a reserve fund into which the person responsible for accommodation makes payment under specified conditions. One of the obvious conditions should be that the reserve fund is to be used only to pay for accommodation costs in the future. Accommodations could gradually be accomplished by expenditures out of the reserve fund or could eventually be accomplished once enough funds had been set aside.

A reserve fund should not be considered as an alternative to a loan where the accommodation could be made immediately and the cost paid back over time. Rather, the reserve fund is to be used in circumstances where it would create undue hardship for the person responsible for accommodation to obtain a loan and accomplish the accommodation immediately. The reserve fund is one of several financing options to be considered in assessing the feasibility of an accommodation. If a reserve fund is to be established, provision should be made for considering future changes in circumstances.

Both phasing in and establishing a reserve fund are to be considered only after the person responsible for accommodation has demonstrated that the most appropriate accommodation could not be accomplished immediately. Phasing in is to be preferred to establishing a reserve fund wherever possible.

5.4.11 Assessing the impact of remaining costs

After all costs, benefits deductions, outside sources of funding and other factors have been considered, the next step is to determine whether the remaining (net) cost will alter the essential nature or affect the viability of the organization responsible for making the accommodation.

The person responsible for accommodation would need to show how it would be altered or its viability affected. It will not be acceptable for the person responsible for accommodation to merely state, without evidence to support the statement, that the company operates on low margins and would go out of business if required to undertake the required accommodation.

Finally, if undue hardship can be shown, the person with a disability should be given the option of providing or paying for that portion of the accommodation that results in undue hardship.

5.4.12 Expert assessment

Where an undue hardship analysis anticipates assessing substantial capital or operating expenditures or procedural changes (for example, in making physical alterations to an apartment building, work site, vehicle or equipment or changing health and safety requirements), it might be advisable for the person responsible for accommodation to obtain a proposal and estimate from experts in barrier-free design and construction.

6. Accommodation planning and implementation

The best defence against human rights claims is to be fully informed and aware of the responsibilities and protections included in the *Code*. Organizations can achieve this by developing disability accommodation policy and procedures as well as by conducting an accessibility review.

6.1 Organizational policy

Organizations are responsible for dealing effectively, quickly and fairly with situations involving claims of harassment or discrimination. Organizations can be held liable by a court or tribunal if they or responsible staff members do not act to end discrimination or harassment in their workplaces.

When an act of harassment or discrimination or a need for accommodation is ignored, there are costs in terms of low morale, high stress, damaged professional reputations and employee absences.

Developing internal anti-discrimination policies and procedures to resolve complaints as part of a broad program to build a harassment-free and discrimination-free environment offers many benefits. Dealing promptly with these issues saves time and money. Letting people know the rules and defining unacceptable forms of behaviour makes it possible to avoid costly and upsetting hours in the courts or before specialized tribunals. In that way, strong policies and programs that prevent human rights complaints and help an organization effectively meet its duty to accommodate make good business sense.

The following should be part of any complete strategy to resolve human rights issues that arise in the workplace:

- anti-harassment or anti-discrimination policy
- disability accommodation policy
- complaint resolution procedure
- ongoing education programs.

These elements should be developed in co-operation with the union or other workplace or organizational partners.

A disability accommodation policy should:

- outline rights and responsibilities
- require barrier analysis and prevention
- prepare and document accommodation plans
- monitor and evaluate implementation.

6.2 Accessibility review

Organizations should consider developing accessibility review plans, undertaking reviews and implementing the necessary changes to make facilities, procedures and services accessible to employees, members, tenants, clients or customers with disabilities.

Conducting the accessibility review will show to what extent an organization is accessible to persons with disabilities and what needs to be done.

An accessibility review plan should:

- state the purpose of the review plan along with a rationale, context and guidance for conducting a review
- acknowledge an organization's obligations under the *Code* to ensure accessibility for employees, clients or customers with disabilities
- identify internal and external resources that would provide guidance for conducting the review
- summarize current internal and external initiatives
- identify quality service measures
- outline the scope of the review and identify potential barriers as they may relate to procedures and practices, facilities, services and communications
- outline timeframes and responsibilities around conducting an accessibility review of the organization
- outline a communications plan for the accessibility review so that senior management, staff, members, clients, etc. are aware and supportive of the initiative and its purpose.

Results of the accessibility review should be documented in a "Summary of findings and recommendations report" and submitted to senior management. Senior management should make the results available to all concerned, along with a plan for undertaking barrier removal.

Accessibility review plans and barrier removal are up-front ways that an organization can address the needs of persons with disabilities. Developing and using a disability accommodation policy will also help an organization meet its duty to accommodate the individual needs of employees and customers with disabilities in accordance with the *Code*. Such a policy will make it clear to both employees with disabilities, others who require accommodation and managers responsible for providing accommodation what company procedures are in place to assist persons with disabilities effectively.

7. For more information

Please visit www.ontario.ca/humanrights for more information on the human rights system in Ontario.

The Human Rights System can also be accessed by telephone at:

Local: 416-326-9511

Toll Free: 1-800-387-9080

TTY (Local): 416-326 0603

TTY (Toll Free) 1-800-308-5561

To file a human rights claim, please contact the Human Rights Tribunal of Ontario at:

Toll Free: 1-866-598-0322

TTY: 416-326-2027 or Toll Free: 1-866-607-1240

Website: www.hrto.ca

To talk about your rights or if you need legal help with a human rights claim, contact the Human Rights Legal Support Centre at:

Toll Free: 1-866-625-5179

TTY: 416-314-6651 or Toll Free: 1-866-612-8627

Website: www.hrlsc.on.ca

Endnotes

¹ R.S.O.1990, c. H.19.

² The terms "disability" and "person with a disability" are used throughout this document instead of "handicap" or "handicapped person." Although the term "handicap" is used in the *Code*, many people with disabilities prefer the term "disability."

³ During consultations held in 1999 by the OHRC, stakeholders highlighted the particular issues facing educational institutions and persons seeking access to them. Many of the principles set out in this Policy apply to service sectors as well, but the Commission will be undertaking new Guidelines for the educational sector to address these concerns.

⁴ In *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28 (18 May 2000), online: Supreme Court of Canada www.lexum.umontreal.ca/csc-scc/en/index.html [hereinafter "*Granovsky*"], the Supreme Court recognized that the primary focus in the disability analysis is on the inappropriate legislative or administrative response (or lack thereof) of the State (at para. 39). The Court states (at para. 33):

Section 15(1) ensures that governments may not, intentionally or through a failure of appropriate accommodation, stigmatize the underlying physical or mental impairment, or attribute functional limitations to the individual that the underlying physical or mental impairment does not entail, or fail to recognize the added burdens which persons with disabilities may encounter in achieving self-fulfillment in a world relentlessly oriented to the able-bodied.
[emphasis added.]

Although in *Granovsky* the focus was State action, similar principles apply to persons responsible for accommodation under human rights law.

⁵ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 78, online: www.lexum.umontreal.ca/csc-scc/en/index.html [hereinafter "*Eldridge*"].

⁶ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 at para. 68 [hereinafter "*Meiorin*"].

⁷ The term "person (or organization or company) responsible for accommodation" includes individuals, partnerships, corporations, companies, unions, joint ventures and organizations. More than one "person" may be responsible for accommodation, and where this term is used, it refers to all parties who are obliged to take part in the accommodation.

⁸ Mental illness has been described as "significant clinical patterns of behaviour or emotions associated with some level of distress, suffering (pain, death), or impairment in one or more areas of functioning (school, work, social and family interactions). At the root of this impairment are symptoms of biological, psychological or behavioural dysfunction, or a combination of these." See Canadian Psychiatric Association, *Mental Illness and Work*, (brochure), online: Canadian Psychiatric Association homepage <http://cpa.medical.org/MIAW/MIAW.asp> at pg. 1

⁹ The *Code*'s definition of "disability" includes perceived disability.

¹⁰ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27 (3 May 2000), online: Supreme Court of Canada www.lexum.umontreal.ca/cscscc/en/index.html [hereinafter "*Mercier*"].

¹¹ *Granovsky*, *supra* note 4.

¹² *Mental Illness and Work*, *supra* note 8.

¹³ *Gibbs v. Battlefords and Dist. Co-operative Ltd.* (1996), 27 C.H.R.R. D/87 (S.C.C.).

¹⁴ This was first articulated in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, online: Supreme Court of Canada www.lexum.umontreal.ca/csc-scc/en/index.html (date accessed: 4 August 2000) [hereinafter "*Law*"]. The approach has been affirmed in several subsequent cases, most notably two cases dealing with discrimination on the basis of disability: *Mercier*, *supra* note 10 and *Granovsky*, *supra* note 4.

¹⁵ The facts of *Granovsky*, *supra* note 4 illustrate an exception to this general proposition. Where a scheme targets a particular group (for example, those who are less fortunate than the complainant), it is unlikely to be considered discriminatory to exclude more advantaged groups.

¹⁶ Subsection 25(1) of the *Code*

¹⁷ Subsection 25(4) of the *Code*.

¹⁸ Conversely, in *O.N.A. v. Orillia Soldiers Memorial Hospital* (1999), 169 D.L.R. (4th) 489, leave to appeal

to S.C.C. refused [1999] S.C.C.A. No. 118, online: QL (SCCA) [hereinafter “Orillia”], nurses on unpaid leave of absence due to disability did not accumulate service after periods set out in the collective agreement, and the employer was not required to contribute premiums to employee benefit plans after the employees had received long-term disability payments for a specified time. The Ontario Court of Appeal held that there was no contravention of the *Code* because these nurses were not treated differently from those in the appropriate comparator group, namely employees who were not working for other reasons.

¹⁹ The Supreme Court’s recent decisions in *Law*, *supra* note 14 and *Granovsky*, *supra* note 4 have confirmed that the concept of human dignity is central to discrimination analysis. These cases indicate that if an accommodation marginalizes, stigmatizes or demeans the person with a disability’s sense of worth or dignity as a human being, it will not be appropriate. In commenting on the *Eaton* case, the Court said in *Granovsky*, *supra* note 4 at para. 74:

...Emily’s claim might have succeeded if ...the Court had been persuaded that the Board’s response to the challenge posed by Emily’s placement [the accommodation] **had itself violated Emily’s dignity as a human being equally deserving of consideration**, or placed discriminatory obstacles in the way of her self-fulfillment. [Emphasis added.]

²⁰ *Law*, *supra* note 14 at para. 53.

²¹ *Entrop v. Imperial Oil Limited* (21 July 2000), Docket C29762 at para. 77-81 (Ont. C.A.), online: Court of Appeal for Ontario www.ontariocourts.on.ca [hereinafter “*Entrop*”].

²² United Nations, *Declaration of the Rights of Disabled Persons*, proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975.

²³ *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 [hereinafter “*Eaton*”].

The Supreme Court stated that “integration should be recognized as the norm of general application because of the benefits it generally provides” (at para. 69). However, the Court found that in Emily Eaton’s circumstances, segregated accommodation was in her best interests. The Court was of the view that this was one of those unusual cases where segregation was a more appropriate accommodation.

²⁴ *Eaton*, *ibid* at para. 67.

²⁵ *Meiorin*, *supra* note 6 at para. 68.

²⁶ *Eaton*, *supra* note 23 at para. 66-7. The unique nature of disability has been recognized by the Supreme Court of Canada.

²⁷ *Ibid*, at para. 69.

²⁸ *Supra*, note 21.

²⁹ *Meiorin*, *supra* note 6, and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [hereinafter “*Grismer*”].

³⁰ *Entrop v. Imperial Oil Limited* (21 July 2000), Docket C29762 at para. 77-81 (Ont. C.A.), online: Court of Appeal for Ontario www.ontariocourts.on.ca [hereinafter “*Entrop*”].

³¹ *Meiorin*, *supra* note 6.

³² *Grismer*, *supra* note 29 at para. 20.

³³ *Ibid*, at para. 66.

³⁴ *Meiorin*, *supra* note 6 at para. 65.

³⁵ *Quesnel v. London Educational Health Centre*, (1995) 28 C.H.R.R. D/474 at para. 16 (Ont. Bd. of Inq.) [hereinafter “*Quesnel*”].

³⁶ *Cameron v. Nel-gor Nursing Home* (1984), 5 C.H.R.R. D/2170 at D/2192 (Ont. Bd. of Inq.) [dictionary citations omitted].

³⁷ *Ibid*. See also *Crabtree v. 671632 Ontario Ltd. (c.o.b. Econoprint (Stoney Creek))*, [1996] O.H.R.B.I.D. No. 37 (Ont. Bd. of Inq.), online: QL (HRBD).

³⁸ Robert L. Burgdorf, *Disability Discrimination in Employment Law* (Washington D.C.: Bureau of National Affairs, 1995) at 241.

³⁹ See M. K. Joachim, “The Duty To Accommodate Disabled Workers and the Provision of Alternative Work: An Unexplained Assumption” (2000) 7 *Charter and Human Rights Litigation* 407 for an excellent review of labour and human rights case law. Although Joachim locates the right to alternative employment in section 17(1), it can also be viewed as being located in the section 17(2) and the duty to accommodate. Whichever is the correct reasoning, employees should have some access to alternative employment.

⁴⁰ *Hamilton Civic Hospitals and CUPE, Local 794* (1994), 44 L.A.C. (4th) 31 [Ont. Arb. Award.]

⁴¹ In *Chamberlin v. 599273 Ontario Ltd cob Stirling Honda* (1989), 11 C.H.R.R. D/110 (Ont. Bd. of Inq.),

the Board of Inquiry (Tribunal) found that the employer should have given the complainant the opportunity to prove he could still perform his old job.

⁴² An employer may have to move an employee to a job more consistent with the employee's health status; *Re Calgary District Hospital Group and U.N.A. Loc. 121-R* (1994), 41 L.A.C. (4th) 319 (Alta. Lab. Rel. Bd.). The employer may have to look for work comparable to the original job rather than giving the employee an inferior position; *Re York County Hospital and Ontario Nurses' Association* (1992), 26 L.A.C. (4th) 384 (Ont. Lab. Rel. Bd.). The employer may even need to create a new job by joining together all the light duties and then reassigning the heavy duties to other employees; *Re Greater Niagara Hospital and Ontario Nurses Association* (1995), 50 L.A.C. (4th) 34 (Ont. Lab. Rel. Bd.). In one decision, the employer's duty to accommodate included not only the duties and requirements associated with the current job but also the duties and requirements associated with a bundle of tasks within the ability of an employee with a disability; *Re Mount Sinai Hospital and the O.N.A.* (1996), 54 L.A.C. (4th) 261 (Ont. Lab. Rel. Bd.).

⁴³ *Workplace Safety and Insurance Act*, S.O. 1997 c. 16 Sch. A, s. 40 and 41 [hereinafter "WSIA"].

⁴⁴ There are also rights and obligations pertaining to return to work set out in the WSIA that may exist concurrently with human rights protections.

⁴⁵ See Section 17 of the *Code*.

⁴⁶ In some cases, accommodation may require the modification of job standards. See the section entitled "Essential duties and the current job."

⁴⁷ *Meiorin*, *supra* note 6 at para. 65-66.

⁴⁸ Human Rights Digest, vol. 1 no. 2 (February/March 2000) citing *Conte v. Rogers Cablesystems Ltd.* (1999), C.H.R.R. Doc. 99-227 (Can. Human Rights Tribunal), *Mazuelos v. Clark* (2000) C.H.R.R. Doc. 00-011 (B.C. Human Rights Tribunal) and *Gordy v. Oak Bay Marine Management Ltd.* (2000) C.H.R.R. Doc.00-040 (B.C. Human Rights Tribunal).

⁴⁹ The Supreme Court of Canada's decision in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 [hereinafter "*Renaud*"] sets out the obligations of unions.

⁵⁰ *Ibid* at 988.

⁵¹ For further information about drug and alcohol related disabilities, see Ontario Human Rights Commission, *Policy on Drug and Alcohol Testing* (1996, revised September 27, 2000), Online: Ontario Human Rights Commission website: www.ohrc.on.ca.

⁵² A. Cantor, "The Costs and Benefits of Accommodating Employees with Disabilities" (Toronto: 1996), online: Cantor + Associates Workplace Accommodation Consultants: www.interlog.com/~acantor/.

⁵³ There are a number of cases that confirm this approach to the interpretation of human rights statutes. In *Mercier*, *supra* note 10 the Supreme Court summarized these cases and outlined the relevant principles of human rights interpretation.

⁵⁴ Section 44 of the *Code*.

⁵⁵ *Renaud*, *supra* note 49.

⁵⁶ This is not an exclusive list. During the consultations, the issue of whether academic freedom may be a component of undue hardship was raised. Academic freedom is unrelated to the duty to accommodate and should not be a defence to accommodating persons with disabilities. For example, a student may require a more accessible classroom, or need more time in an examination because of a disability-related need. These are legitimate requests that do not diminish academic freedom. If an accommodation need places such a financial burden on the institution that it would amount to undue hardship by reason of cost or because it would substantially change the nature of the enterprise, or its viability, it would then meet the undue hardship standard. For more information, please see the OHRC's *Guidelines on Accessible Education* at www.ohrc.on.ca.

⁵⁷ The issue of customer, third party and employee preference is discussed in J. Keene, *Human Rights in Ontario*, 2nd ed. (Toronto: Carswell, 1992) at 204-5.

⁵⁸ *Renaud*, *supra* note 49.

⁵⁹ *Meiorin*, *supra* note 6 at para. 68. Those setting standards and rules must be aware of the differences between individuals and groups of individuals. Standards and rules should not just be based on the 'mainstream' e.g. employees who do not have disabilities.

⁶⁰ *Grismer*, *supra* note 29 at para. 42.

⁶¹ *Meiorin*, *supra* note 6 at para. 78-79 and *Grismer*, *supra* note 29 at para. 41. Cases since *Meiorin* and *Grismer* have also applied this stringent requirement for objective evidence; see, for example, *Miele v. Famous Players Inc.* (2000), 37 C.H.R.R. D/1 (B.C.H.R.T.).

Policy and guidelines on disability and the duty to accommodate

⁶² *Grismer, supra* note 32 at para. 41

⁶³ Section 25(1) of the *Code*.

⁶⁴ For further discussion on minimizing costs, please refer to section 4.4 “Minimizing Undue Hardship.”

⁶⁵ *Second Injury and Enhancement Fund (S.I.E.F), Policy Document (08-01-05) in the Pre-Bill 99 Operational Policy Manual of the Workplace Safety and Insurance Board (W.S.I.B).*

⁶⁶ The Access Fund is an example of an outside source of funding. It helps community organizations develop barrier-free facilities, so persons with disabilities can be active volunteers and participate in potential employment opportunities. The Access Fund is part of Ontario’s Equal Opportunity and Disability Partnerships and designed in partnership with the Ontario Trillium Foundation, which delivers the program.

⁶⁷ See *Eldridge, supra* note 5.

⁶⁸ R.S.O. 1990 c. 0-1. The OHSR regulations have equivalency clauses that allow for the use of alternative measures to those specified in its regulations, provided the alternative measures afford equal or better protection to workers.

⁶⁹ *Supra*, note 65.