



The Law Society of
Upper Canada | Barreau
du Haut-Canada

**Accommodation of Creed and Religious Beliefs,
Gender Related Accommodation and
Accommodation for Persons with Disabilities**

Legal Developments and Best Practices

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INTRODUCTION

To implement initiatives included in the Law Society of Upper Canada's (hereinafter "LSUC") equity and diversity action plans/corporate activities and to maintain the LSUC as an equitable employer and service provider free of discrimination, the LSUC has drafted a policy on accommodation for its benchers, members, employees and clients. The policy addresses accommodation of creed and religious beliefs, gender or family related accommodation, accommodation requirements for persons with disabilities and other matters that may be essential to ensuring policy consistency with the *Bicentennial Report and Recommendation on Equity Issues in the Legal Profession* (the *Bicentennial Report*)¹.

In 2001, the LSUC also drafted, for adoption by Convocation, a *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements*. The purpose of the guide is to assist law firms in accommodating differences that arise from the personal characteristics enumerated in the Ontario *Human Rights Code*² and under Rule 5.04 of the *Rules of Professional Conduct*³. The guide summarizes relevant background studies, discusses law firms' legal and professional responsibility to accommodate in employment and services, lists some of the benefits to law firms of having a written policy on accommodation and provides a model policy on accommodation.

To allow a full understanding of the legal requirements of the LSUC and of law firms to accommodate employees, benchers, members and/or clients, this document will provide an overview of the legislation and case law in Ontario. The document will also describe accommodation practices, adopted by organizations, which go above and beyond the legal requirements. These organizations may be described as best practice organizations. Since the definition of accommodation is so wide and varied, looking at best practice organizations may help formulate innovative approaches that an organization may wish to provide to its employees, members or

¹The Law Society of Upper Canada, *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession*, (Toronto: The Law Society of Upper Canada, 1997).

² R.S.O. 1990, c. H. 19.

³ Adopted by Convocation of the Law Society of Upper Canada on June 22, 2000, effective November 1, 2000.

clients. This document will underline the importance of improving equity in the workplace and in the provision of services and of broadening the goals to accommodate employees, members or clients. Best practices from organizations have been placed in “grayscale” text following the overview of legal requirements to which they relate.

DEFINITION OF BEST PRACTICE

Best practices are defined by those organizations who are at the pinnacle of their practice or exhibit the highest standards in relation to their peers. When dealing with accommodation issues, an organization may be a best practice model when,

- it addresses key barriers that affect employment equity and the provision of services;
- it strives to ensure the workplace is free of discrimination and harassment;
- it is pro active in providing the means for employees, members or clients who require accommodation;
- it encourages management commitment and accountability; and
- it provides clear and concise policies that address these issues.

Adopting best practice tactics is strategically important when organizations recruit for the most talented and competent employees. It is much easier to attract good employees when the employer offers excellent benefits. The employer can instill a sense of commitment and worth to employees by offering services and employment policies that increase workplace and personal living standards. As well, incentives and services such as flexible work arrangements and childcare provide added benefits, may increase employee productivity and help reduce turn over.

LEGISLATION AND JURISPRUDENCE: DEFINITIONS

In the context of employment, an employer has a number of responsibilities when human rights issues arise. It must respond to internal complaints of discrimination lodged by its employees. Generally, it should ensure that it has a complaint mechanism in place and that there is corporate awareness of what constitutes discrimination. Once the employer receives an internal human rights complaint, it must take the matter seriously and act promptly. In addition, it should

provide the complainant with information regarding its actions in response to the complaint⁴.

The LSUC has adopted a *Workplace Harassment and Discrimination Prevention Policy & Procedures*. Many law firms have also adopted written policies on harassment and discrimination. The importance of adopting an accommodation policy to complement a workplace harassment and discrimination policy is clear. Under the Ontario *Human Rights Code* and relevant case law, employers have a duty to reasonably accommodate employees short of undue hardship.⁵ This duty is an extension of an individual's right to be free of discrimination. Moreover, organizations have a duty to reasonably accommodate in the provision of services.

Creed, disability⁶, sex and family status are prohibited grounds of discrimination in employment under the *Human Rights Code*⁷. The *Code* applies to the workplace, including terms and conditions of employment, recruiting, application forms, interviews, promotions, office dress codes and shift schedules.

The *Code* also provides the right to equal treatment, without discrimination, with respect to services, goods and facilities⁸.

The following provides an overview of the Ontario legal and jurisprudential definitions of terms such as creed and religion, disability, gender and family status.

⁴ *Moffatt v. Kinark Child and Family Service* (December 2, 1998), Doc. 98-19 (O.H.R.B.I.D.) and *Bryan v. Premark Canada Inc.* (November 6, 1998), Doc. 98-18 (O.H.R.B.I.D.).

⁵ *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536.

⁶ Although the *Code* prohibits discrimination based on "handicap" and provides an extensive definition of the term "because of handicap" (at section 10), the terms "disability" and "person with a disability" will be used throughout this document instead of "handicap" or "handicapped person" Many persons with disabilities prefer the term "disability". In English, the term handicap is considered obsolete.

⁷ *Supra* note 2. Section 5 of the *Code* states that:

Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or handicap.

⁸ Section 1 of the *Code*, *supra* note 2.

Definition of Creed

Although the term “creed” has not received statutory definition, the Human Rights Commission has adopted the following definition:

Creed is interpreted to mean "religious creed" or "religion." It is defined as a professed system and confession of faith, including both beliefs and observances or worship. A belief in a God or gods, or a single supreme being or deity is not a requisite.

Religion is broadly accepted by the Commission to include, for example, non-deistic bodies of faith, such as the spiritual faiths/practices of aboriginal cultures, as well as *bona fide* newer religions (assessed on a case by case basis).

The existence of religious beliefs and practices are both necessary and sufficient to the meaning of creed, if the beliefs and practices are sincerely held and/or observed⁹.

The Commission is of the opinion that “creed” does not include secular, moral or ethical beliefs or political convictions. Religions that incite hatred or violence against other individuals or groups or practices and observances that purport to have a religious basis but which contravene criminal law are not protected under the *Code*.

Overall, case law interpretations of the term creed are few and courts and other tribunals have tended to use the term interchangeably with religion. Case law has recognized that differential treatment of persons professing established religions such as Protestantism, Catholicism, or Judaism, infringes the *Code*.

Courts and tribunals have recognized that the definition of creed encompasses the faith of a community but also that of *an individual*. Human rights legislation such as the *Code* protects personal religious beliefs, *and practices or observances*, even if they are not essential elements of the creed, provided they are *sincerely held*. “It is the religious or spiritual essence of an action, not any mandatory or perceived as mandatory nature of its observance that attracts protection.”¹⁰ The following are examples of this principle:

⁹ *Policy on Creed and the Accommodation of Religious Observances* (Toronto: Ontario Human Rights Commission, October 20, 1996) at 2.

¹⁰ *Syndicat Northcrest v. Amselem*, [2004] SCJ No. 46, 2004 SCC 47.

- Tribunals ¹¹ have used the *Oxford English Dictionary* to define the word “creed”: “An accepted or professed system of religious beliefs; *the faith of a community or an individual*, especially as expressed or capable of expression in a definite formula.” An employer’s conduct of insisting that its employees be clean-shaven and wear a cap discriminated against a Sikh employee because of his creed in the broadest sense of the term: he was a Sikh and Sikhism is a creed, and the wearing of a turban and the rule against cutting body hair are formal and fundamental requirements of that creed.
- A tribunal ¹² was of the opinion that a Jehovah’s Witness, who was employed as a nurse but refused to initiate blood transfusions by hanging blood, could receive the protection of the *Code* even though the evidence was clear that her stand on this matter reflected her own personal interpretation of the Bible and not that of other Jehovah’s Witnesses. The tribunal concluded that discrimination by reason of a personal religious belief is caught by the words creed or religious affiliation.
- A Human Rights Board of Inquiry considered whether creed includes individual beliefs, which are consistent with the holder's creed but are not established tenets of that creed¹³. Even though the Sikh religion requires the wearing of a Kirpan (the Sikh sacred dagger) by all Sikhs, it did not require any minimum length of Kirpan. The complainant claimed that he should be allowed to wear an eight-inch Kirpan. The board was of the opinion that the service provider, in this case a hospital, should have been able to accommodate that request.
- A Human Rights Board of Inquiry¹⁴ had to determine the extent to which “creed” includes *religious practices*, the manifestations of beliefs. In some cases, creed had been said to include the right of a Sikh to wear a turban and wear a beard, or the right of an orthodox Sikh to wear a Kirpan in a hospital. The Human Rights Board of Inquiry made it clear that religious practices or customs pursuant to religious beliefs are an inherent part of a “creed” or religion. It was held that, since it is a tenet of orthodox Judaism that the period of time from sunset Friday to sunset Saturday constitutes the Sabbath, and that an adherent to the creed must not work during that period of time, observance of the Sabbath is included within the definition of creed.

¹¹ Unreported decision of an Ontario Human Rights Board of Inquiry, complainant: Singh, dated May 31, 1977 (Professor P.A. Cumming).

¹² *Re Peterborough Civic Hospital and Ontario Nurses= Association* (1981), 3 L.A.C. (3d) 21 (Ont.; S.R. Ellis, B. Switzman, W.J. Whittaker).

¹³ See *Pritam Singh v. Workmen=s Compensation Board Hospital* (1981), 2 C.H.R.R. D/459 (O.H.R.B.I.D.). See also *Shepherd v. Pines Motel, Cave Lounge and Eldon Dodds* (1993), 22 C.H.R.R. D/343 (O.H.R.B.I.D.) where the Human Rights Board of Inquiry held that the Roman Catholic religion is a creed and the fact that some practising Catholics are willing to work on Sunday is irrelevant to the fact that the complainant=s concept of the Sabbath, endorsed by his Church and honestly and sincerely held by him, was different. The purport of the *Code* is the protection of individuals who wish to practise their religion freely.

¹⁴ *Morley Rand v. Sealy Eastern Limited* (1982), 3 C.H.R.R. D/938 (O.H.R.B.I.D.).

- A tribunal allowed for two days to be taken as religious holidays by an employee who is an adherent of Wicca. Wicca is a secret tradition. It is the Old English word for “sorcerer” or “witch” from which the modern word “witch” is derived, and Wicca is the religion commonly known, and commonly misunderstood, as Witchcraft. A griever was asking for religious leave with pay for two religious holidays. While the griever admitted that his religion did not prohibit him from working on the two high holidays, his evidence also made it clear that working would significantly reduce both the religious and festive aspects of those occasions for him. The tribunal looked at the sincerity of the griever’s beliefs which had their roots in what the tribunal had determined to be a religion. The griever was entitled to religious leave¹⁵.
- A member of the Free Presbyterian Church of Scotland believed that he should not work on Sundays. A Human Rights Board of Inquiry¹⁶ concluded that religious principles do not have to be formulated from officials of a church, or proclaimed by edict through religious hierarchy. If the employee’s beliefs about the Sabbath derived from his experience of the religious sources to which he subscribes, it should not disqualify him from claiming protection under the term “creed”. The religious beliefs of an individual, developed through personal interpretation of religious experience and faith, are equally entitled to protection as the more formalized precepts of organized religion. Furthermore, the accuracy and correctness of one’s religious interpretations do not appear to be a matter for a Human Rights Board of Inquiry. It would be highly inappropriate for a Human Rights Board of Inquiry to purport to judge the validity of the spiritual and religious perspectives of complainants. It should be ascertained that the beliefs are sincerely held, and fall within the rubric of the category of religion.
- The Supreme Court of Canada upheld the right of a Jewish tenant to set up a succah on the balcony of his condominium, in contravention of condominium rules. Mr. Amselem would not set up the succah on shared property, and sincerely believed he was obliged to set up the succah on his own property. The trial judge erred in requiring Mr. Amselem to remove the succah because he based his reasoning on what he perceived to be the objective and obligatory requirements of Judaism, thus failing to recognize that freedom of religion under the Quebec Charter and Canadian Charter does not require a person to prove that his or her practices are supported by any mandatory doctrine of faith. *The Supreme Court affirmed that an expansive definition of religion that focuses on personal choice, individual freedom, and autonomy is appropriate.*¹⁷

Tribunals have not included “political opinion” in the definition of creed but have left the door open for such an interpretation:

¹⁵ *Re Humber College and Ontario Public Service Employees Union* (1987), 31 L.A.C. (3d) 266 (Ont.; K.P. Swan, F. Briggs, R.J. Gallivan).

¹⁶ *Janssen v. Ontario (Milk Marketing Board)* (1991), 13 C.H.R.R. D/397 (O.H.R.B.I.D.).

¹⁷ *Syndicat Northcrest v. Amselem*, *supra* note 10.

- The Ontario Court of Appeal is of the opinion that even if it can be said that political opinion may constitute creed, there was no evidence in *Jazairi v. Ontario (Human Rights Commission) (No. 1)*¹⁸ that the applicant's political views amounted to a creed. The complainant was a Muslim Arab from Iraq. He argued that as a result of expressing his opinions about the political stance of the State of Israel, colleagues at work labeled him anti-Semitic and anti-Israeli. On the facts of the case it was decided that mere political opinion does not constitute a "creed". The Court of Appeal did not determine whether a political perspective, such as communism, that is made up of a recognizable cohesive belief system or structure may constitute a "creed".

Definition of “Because of Disability”

The *Human Rights Code* states that the term “because of disability”,

means for the reason that the person has or has had, or is believed to have or have had:

- 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,
- a condition of mental impairment or a developmental disability,
- a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- a mental disorder, or
- an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*.

Case law has defined the term “disability” broadly to include: alcoholism¹⁹, cancer²⁰, AIDS²¹, hypertension²², back pains²³, diabetes²⁴, injuries²⁵, allergies and asthma²⁶, depression and anxiety²⁵,

¹⁸ (1999), 36 C.H.R.R. D/1 (Ont. C.A.).

¹⁹*Re Molson's Brewery and United Brewery Workers* (1979), 23 L.A.C. (2d) 392 (Ont.; B.L. Adell); *Re Alcan Rolled Products Company (Kingston Works) and United Steelworkers of America, Loc. 343* (1996), 56 L.A.C. (4th) 187 (Ont.; O.V. Gray); *Re Espanola (Town) and C.U.P.E., Loc. 534* (1997), 61 L.A.C. (4th) 149 (Ont.; W.A. Marcotte, D. Carriere-Uren, M. Piquette); *Ottawa Civic Hospital and O.N.A.* (1995), 48 L.A.C. (4th) 388 (Ont.; R.M. Brown, B. Ulehla, R. LeBlanc); *Entrop v. Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18 (Ont. C. A.).

²⁰ *Ontario (Human Rights Commission) v. Gaines Pet Foods Corp.* (1993), 28 C.H.R.R. D/256 (Ont.Ct., Gen. Div)

²¹ *Jerome v. Paul DeMarco* (1992), 16 C.H.R.R. D/402 (O.H.R.B.I.D.).

²² *Horton v. Niagara (Regional Municipality)* (1988), 9 C.H.R.R. D/4611 (O.H.R.B.I.D.)

cerebral palsy²⁶, malformation of fingers²⁷ and developmental handicap²⁸.

Discrimination based on disability results in part on the construction of a society based solely on "mainstream attributes".²⁹ Consequently, a fundamental rethinking of the able-bodied norm and design is necessary to truly attain substantive equality³⁰.

²³ *Board of Education for City of Toronto and C.U.P.E., Local 134* (1994), 39 L.A.C. (4th) 137 (Ont.; G Brent); *Municipality of Metropolitan Toronto and C.U.P.E., Local 79* (1994), 35 L.A.C. (4th) 357 (Ont.; B.B. Fisher)

²⁴ *Corporation of City of Thunder Bay (Grandview Lodge) and S.E.I.U., Local 268* (1993), 27 L.A.C. (4th) 194 (Ont.; R.D. Joyce).

²⁵ *Hamilton Civic Hospitals and C.U.P.E., Local 794* (1995), 44 L.A.C. (4th) 31 (Ont.; R.L. Kennedy, F. Hilton, P.W. Bates).

²⁶ *Morgoch v. City of Ottawa* (1990), 11 C.H.R.R. D/80 (O.H.R.B.I.D.)

²⁵ *Bonner v. Ontario (Ministry of Health)* (1992), 16 C.H.R.R. D/485 (O.H.R.B.I.D.).

²⁶ *Kellerman v. Al=s Restaurant and Tavern Ltd.* (1986), 8 C.H.R.R. D/3924 (O.H.R.B.I.D.)

²⁷ *Cameron v. Nel-Gor Nursing Home* (1984), 5 C.H.R.R. D/2170 (O.H.R.B.I.D.).

²⁸ *Hickling v. Lanark, Leeds and Grenville County Roman Catholic School Board* (1986), 7 C.H.R.R. D/3546 (O.H.R.B.I.D.), reversed (1987), 8 C.H.R.R. D/4235 (Ont. Div. Ct.), affirmed (1989), 10 C.H.R.R. D/6336 (Ont. C.A.) and *Boehm v. National System of Baking* (1987), 8 C.H.R.R. D/4110 (O.H.R.B.I.D.)

²⁹ *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241.

³⁰The Supreme Court of Canada has recognized that discrimination based on disability is mostly socially constructed:

The concept of disability must therefore accommodate a multiplicity of impairments, both physical and mental, overlaid on a range of functional limitations, real or perceived, interwoven with recognition that in many important aspects of life the so-called "disabled" individual may not be impaired or limited in any way at all [...]

The bedrock of the appellant=s argument is that many of the difficulties confronting persons with disabilities in everyday life do not flow ineluctably from the individual=s condition at all but are located in the problematic response of society to that condition. A proper analysis necessitates unbundling the impairment from the reaction of society to the impairment, and a recognition that much discrimination is socially constructed [...] Exclusion and marginalization are generally not created by the individual with disabilities but are created by the economic and social environment and, unfortunately, by the state itself. Problematic responses include, in the case of government action, legislation which discriminates in its effect against persons with disabilities, and thoughtless administrative oversight.

Courts have chosen not to create an exhaustive definition of disability. The Human Rights Commission states:

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 ailment³¹.

The term “disability” must be interpreted to recognize that discriminatory acts may be based as much on perceptions, myths and stereotypes as on the existence of actual functional limitations³². The Supreme Court of Canada has said that society’s response to real or perceived disability should be the focus of the discrimination analysis³³. 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:

- Employers refused to hire a police officer and a gardener-horticulturalist because the pre-employment medical exam in both cases revealed an anomaly of the spinal column. The medical evidence in each case indicated that the individuals could perform the normal duties of the position in question and that they had no functional limitations. The Supreme Court of Canada was asked to define the term “handicap”, a term not specifically defined in the Quebec *Charter of Human Rights and Freedoms*. The Supreme Court was of the view that

Granovsky v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R. 703 at para. 29 and para. 30.

³¹ *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: Ontario Human Rights Commission, November 23, 2000) at 9 (hereinafter “the *Guidelines*”).

The *Guidelines* were approved by the Ontario Human Rights Commission on November 23, 2000 and released on March 22, 2001. In 1989, the Ontario Human Rights Commission published its *Guidelines on Assessing Accommodation Requirements for Persons with Disabilities*. In 1999, the Commission invited stakeholders to provide input on the revisions to the guidelines. Over 150 stakeholders were approached representing 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. The overwhelming response to the Commission’s consultations showed that stakeholders rely upon the guidelines for directions in fulfilling the obligation to accommodate in a variety of situations. As a result of the consultations, the Commission released the *Guidelines*.

³² *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] S.C.J. No. 24 (hereinafter “*Mercier*”) See also: the *Guidelines*, *ibid*.

³³ *Granovsky*, *supra* note 30.

the word disability does not mean a physical or mental anomaly that necessarily results in functional limitations. Disability can include an ailment, even one with no resulting functional limitation, as well as the perception of such an ailment. The definition should go beyond the biomedical basis of disability. A multidimensional approach that includes a socio-political dimension is appropriate. One must place the emphasis on human dignity, respect, and the right to equality rather than a simple biomedical condition. The approach recognizes that the attitudes of society and its members often contribute to the idea or perception of a “handicap”. In fact, a person may have no limitations in everyday activities other than those created by prejudice and stereotypes. *A disability may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors. It is the combined effect of all these circumstances that determines whether the individual has a disability.* Courts will determine whether an actual or perceived ailment causes the individual to experience the loss or limitation of opportunities to take part in the life of the community on an equal level with others. The disability may be actual or perceived and the cause and origin of the disability are immaterial³⁴.

The definition of disability in the *Code* provides protection to persons who have a disability, persons who had a disability but no longer suffer from it, persons believed to have a disability whether they do or not, and persons believed to have had a disability, whether they did or not. In other words, the definition protects those who have or have had an actual or perceived disability³⁵.

Case law defines “having a disability” as “not being able to do one or more important things that most people can do.”

- Cindy Cameron was refused employment as a Nurse=s Aide. She has a deformity of her left hand which results in three fingers being shorter than those of a normal hand. She was refused the position because the respondents felt that she would not be able to do the required lifting and might pose a risk to the elderly patients. The evidence showed that Ms Cameron was able to perform all the necessary duties, including the necessary lifting. The Human Rights Board of Inquiry was of the view that having a disability means not being able to do one or more important things that most people can do. The Human Rights Board of Inquiry concluded that Ms Cameron was discriminated against and that the employer failed to establish that she was incapable of performing the essential duties of the job³⁶.
- A Human Rights Board of Inquiry found that the complainant had a degree of physical disability, and was unable to work at her job without constant pain. One does not need to be absolutely incapacitated. (The complainant required surgery due to a condition known as virginal breast hypertrophism). There must be *some* inability to do something others can

³⁴ *Mercier, supra* note 32.

³⁵ *Entrop, supra* note 197.

³⁶ *Cameron, supra* note 27.

normally do. The Human Rights Board of Inquiry was of the opinion that her disability was caused by a birth defect or genital anomaly since there was a genetic link with respect to virginal hypertrophy of the breasts³⁷.

Courts have recognized the disadvantage and negative stereotyping faced by persons with mental disabilities. The definition of disability in the *Code* includes non-evident disabilities and mental disability. The Human Rights Commission talks about the particular issues raised by such disabilities:

Regardless of whether a disability is evident or non-evident, a great deal of discrimination faced by persons with disabilities force 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 [...]

Persons with mental disabilities face a high degree of stigmatization and significant barriers to employment opportunities. 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 labelled³⁸.

Mental disability disorders do not have to be of a severe nature:

- A Human Rights Board of Inquiry found that an adjustment disorder with depressed mood is a mental disorder and therefore constitutes a disability pursuant to the *Code*. There is nothing in the *Code* to suggest that only mental disorders of a severe nature are classified as disabilities³⁹.

Some cases have suggested that the disability must be beyond the individual's control:

- A Human Rights Board of Inquiry held that the complainant suffered from an allergy, which is accepted as a “disability” under the *Code*. The Human Rights Board of Inquiry criticized the fact that the complainant took an analgesic without satisfying herself that it did not contain aspirin, to which she was allergic. The Human Rights Board of Inquiry concluded that there was no disability if the individual had played some part in triggering or contributing to the handicap⁴⁰.
- Obesity is not a “disability” under the *Code* unless it is in the nature of an ongoing physical limitation or perceived limitation which the individual cannot change⁴¹.

³⁷*Bielecky v. Young, MacNamara* (1992), 20 C.H.R.R. D/215 (O.H.R.B.I.D.)

³⁸*Guidelines, supra* note 31 at 10.

³⁹*Chamberlin v. 599273 Ontario Ltd.* (1989), 11 C.H.R.R. D/110 (O.H.R.B.I.D.)

⁴⁰*Quimette v. Lily Cups Ltd.* (1990), 12 C.H.R.R. D/19 (O.H.R.B.I.D.)

⁴¹*Ontario (Human Rights Commission) v. Vogue Shoes* (1991), 14 C.H.R.R. D/425 (O.H.R.B.I.D.)

Accommodation Based on Gender or Family Status

A distinction can be found in the definition of “sex” and “gender”. “Sex” is understood as a biological reality with so-called natural and immutable characteristics, and the concept of “gender” designates aspects of femininity and masculinity inculcated through the process of socialization, and thus susceptible to variation in time and space, in accordance with the specific perceptions of a particular culture at a given moment of its history⁴². For the purposes of accommodations, we will use the terms sex and gender interchangeably. The term “family status” is defined in the *Code* as the “status of being in a parent and child relationship”.

The principle of accommodation applies to all grounds of the *Code*, but certain grounds and issues arise more frequently. For accommodation based on gender, most cases deal with pregnant women and nursing mothers. Some cases on accommodation are based on family responsibilities. Although most case law has included family responsibilities under the category of family status⁴³, if the purpose of accommodating employees or clients is to redress inequalities, family responsibilities usually contribute to inequality based on gender. Even with the entrance of women into the workforce, it is recognized that women still disproportionately bear the burden of childcare in society⁴⁴. As Justice L’Heureux-Dubé states in *Symes*, while for most men the responsibility of children does not impact on the number of hours they work or affect their ability to work, a woman’s ability even to participate in the work force may be completely contingent on her ability to acquire child care. Much of the burden remains on the shoulders of women. While this may not be as accurate when family responsibilities include taking care of other members of the family, such as parents, it nevertheless seems appropriate to discuss the issue of family responsibilities under the title of accommodation of gender.

⁴² Michelle Boivin, A The Category of “Woman/Women in Discrimination Based on Sex” (1999) 14 C.J.L.S. 203 at 214.

⁴³ *Broere v. W.P. London and Associates Ltd* (1987), 8 C.H.R.R. D/4189 (O.H.R.B.I.D.)

⁴⁴ *Symes v. Canada*, [1993] 4 S.C.R. 695.

THE DUTY TO ACCOMMODATE

For years, courts and tribunals have defined discrimination in terms of “direct”, “adverse effect”⁴⁵ or “systemic”⁴⁶.

“Direct discrimination” exists where an employer adopts a practice or rule which on its face discriminates on a prohibited ground.

“Adverse effect discrimination” means that an employer, for genuine business reasons, adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the work force.

“Systemic discrimination” means practices or attitudes that have, whether by design or impact, the effect of limiting an individual’s or a group’s right to the opportunities generally available because of attributed rather than actual characteristics.

In the past, the distinction between direct and adverse effect discrimination was important in human rights jurisprudence because the test to justify a *prima facie* discriminatory rule and the appropriate remedy were different depending on whether the rule was discriminatory on its face (direct discrimination) or facially neutral but discriminatory in its effect (adverse effect discrimination). In cases where it was found that direct discrimination existed, the rule was struck down in its entirety. In cases of adverse effect discrimination, the employer had the opportunity to demonstrate that the rule was a *bona fide* occupational requirement and reasonably necessary for the operation of the workplace. Since the discrimination was not direct, the rule could stand, provided reasonable accommodation could be provided so that the employee would not suffer the effect of the discrimination.

⁴⁵ Adverse effect discrimination has also been termed “indirect” or “constructive” discrimination.

⁴⁶ The terms have usually been defined in the context of employment. It is recognized that the definitions also apply to the service-provision context.

The Ontario *Human Rights Code* prohibits adverse effect discrimination. However, under section 11 of the *Code*, an employer may justify a workplace rule that has the effect of discriminating against a person or group of persons on a prohibited ground, including disability, by showing that the rule is a *bona fide* occupational requirement and that the needs of the person or group cannot be accommodated without undue hardship⁴⁷.

Section 17 of the *Code* also creates an obligation to accommodate persons with disabilities. Section 17 states that there is no violation of the right of a person with a disability if that person 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 hardship⁴⁸.

Section 17 recognizes that discrimination based on disability can be based on society's failure to

⁴⁷ Section 11 of the *Code*, *supra* note 2, imposes a duty to accommodate:

(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or

(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

(2) The Commission, the board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

⁴⁸ Section 17 of the *Code*, *supra* note 2, imposes a duty to accommodate persons with disabilities:

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

(2) The Commission, the board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Section 17 applies to cases involving services as well as employment. See *Youth Bowling Council of Ontario v. McLeod* (1991), 14 C.H.R.R. D/120 (Ont. Div. Ct.).

accommodate actual differences and emphasizes the need for individual accommodation.

Recent Supreme Court of Canada case law, though accepting that the development of human rights jurisprudence was well served in distinguishing between direct and adverse effect discrimination and in recognizing adverse effect discrimination as a form of discrimination, is less inclined to distinguish between the two types of discrimination⁴⁹.

The Supreme Court suggests the following three-step analysis:

Once a plaintiff establishes that the standard is *prima facie* discriminatory, the onus shifts to the defendant to prove on a balance of probabilities that the discriminatory standard is a *bona fide* occupational requirement or has a *bona fide* and reasonable justification. In order to establish this justification, the defendant must prove that:

- it adopted the standard for a purpose or goal rationally connected to the function being performed;
- it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and

the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship⁵⁰.

In Ontario, the Court of Appeal has adopted the three-step analysis set out by the Supreme Court of Canada which means that, in cases of *prima facie* discrimination based on disability, an individual may rely on section 11 or 17 of the *Code*. In cases of *prima facie* discrimination based on other grounds, an individual may rely on section 11 of the *Code*. Under either section, to justify the workplace or service related rules, the three steps of the analysis must be satisfied⁵¹.

⁴⁹ *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 (the Meiorin case). The test in Meiorin was developed in the employment context. In *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (the Grismer case), the Supreme Court of Canada confirmed that the unified approach to adjudicating discrimination claims adopted in Meiorin applied to all claims of discrimination, including claims related to the provision of services.

⁵⁰ See Grismer, *ibid.* at par. 20 (the test is applied in the context of the provision of services) and Meiorin, *ibid.* at par. 54 (the test is applied in the employment context).

⁵¹ *Entrop*, *supra* note 197.

The Ontario Court of Appeal has maintained the distinction between direct and adverse effect discrimination but it has much less practical significance. It applies mostly in cases that can be neatly characterized as cases of direct discrimination. In those cases, the *bona fide* occupational requirement defence will not apply and a discriminatory rule will be struck down. If the discrimination cannot easily and clearly be characterized as direct, the three-step test applies.

Accommodation of Religious Beliefs

Discrimination cannot be tolerated unless the employer takes reasonable steps to accommodate the affected person⁵². Typically, in the context of creed, issues arise with regard to break policies, flexible scheduling, rescheduling, religious leave and dress codes.

In order to accommodate an individual, the needs of the religious group to which an individual belongs must be determined. Tribunals have looked to the accepted religious practices and observances that are part of a given religion or creed and individual beliefs that are sincerely held. For example, school teachers of the Jewish faith request a paid day of leave in order to observe Yom Kippur. In order to assess the needs of the group, the employer should seek information about the tenets of the Jewish faith, which establish that observant Jews cannot work on Yom Kippur⁵³.

A number of cases have dealt with the concept of “reasonable accommodation”. Dress codes, work schedules or shift work sometimes impact adversely on individuals because of religious requirements. When this happens, the obligation to accommodate the individual, based on the needs of the group, is triggered under the *Code*.

1. Break Policies

Some religions require that their members observe periods of prayer at particular times during a day. This practice may conflict with an employer=s regular work hours or daily routines in the

⁵² There are also exceptions provided by the legislation. For example, there is a section in the *Code* which allows an institution or organization that is primarily engaged in serving the interests of persons protected by the *Code* to restrict membership or participation to persons similarly identified, and a section in the *Code* that provides for special programs.

⁵³ The Supreme Court of Canada imposed a duty to accommodate in such a case in *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525.

workplace. The employer has a duty to accommodate the employee=s needs, short of undue hardship, for example by providing modified break policies, flexible hours and/or providing a private area for devotions.

2. Religious Leave

When an employee requests time off to observe a holy day, the employer has an obligation to accommodate the employee. The extent of the accommodation required is an issue that comes up frequently: does the person have to be paid? Until what point? What about unpaid leave?

Organizations are encouraged to allow employees holy days off for religious observance without suffering any financial loss, unless this would result in undue hardship on the firm. This approach is consistent with the understanding that accommodation is a means of removing the barriers which prevent persons from enjoying equality of opportunity in a way which is sensitive to their individual circumstances⁵⁴. An employee who is required to use vacation days, unpaid leave or who has to change his or her work schedule in order to observe his or her holy days is suffering a burden for observing his or her religion, something members of the majority religion are not required to do.

Organizations are also encouraged to adopt policies that allow for flexibility in the number of days off for religious observance. Case law has suggested that employers should, *at a minimum*, provide employees with paid religious days off to the extent of the number of religious Christian days that

⁵⁴ However, tribunals have accepted that employers can fulfill their duty to accommodate the religious needs of employees by providing appropriate scheduling changes in lieu of leave with pay, without first demonstrating that a leave of absence with pay would result in undue hardship. See *Ontario v. Grievance Settlement Board* (2000), 50 O.R. (3d) 560 (Ont. C.A.).

Although the Court of Appeal reversed the Divisional Court and the Grievance Settlement Board in *Ontario v. Grievance Settlement Board*, the decision of the Board is more in line with the right to equality entrenched in the *Human Rights Code*. The Board was of the view that the employee had a right to have recognized holy days off for religious observance without suffering any financial loss:

To the extent that the Grievor has been subjected to adverse effect discrimination so as to be entitled to accommodation by the Employer, in the absence of a demonstration that granting the days requested for religious observance with pay would have imposed undue hardship on the Employer, the Grievor would not be required to use vacation days, unpaid leave etc. in order to be able to observe his holy days [...]. Requiring the Grievor to use his vacation benefits would have had the effect of imposing a financial burden on him to observe his holy days, something members of the majority religion were not required to do. (Quoted by the Court of Appeal in *Ontario v. Grievance Settlement Board* (2000), 50 O.R. (3d) 560 at para. 24.)

are also statutory holidays⁵⁵. However, it is not necessary to limit the number of days off for religious observances to the same number of religious Christian days already allowed by the firm. The fact that the dominant Christian religion has only two or three mandatory holy days does not mean that equal treatment without discrimination will follow if every other religion is given two or three days off with pay to observe only some of their holy days.

The following are examples of case law that requires employers to accommodate by providing religious leave:

- Three Jewish teachers employed by a Catholic school board were denied access to the special purpose paid-leave provisions in the collective agreement so that they could observe Yom Kippur. They were told instead that they could take the day off without pay. The Supreme Court of Canada⁵⁶ examined the nature of the accommodation which would be required to alleviate the adverse effect of the discrimination. An offer of unpaid leave was insufficient accommodation. The Court concluded that paid religious leave should have been available. It seems from this decision that equality of treatment requires at a minimum that employees receive paid religious days off, to the extent of the number of religious Christian days that are also statutory holidays, namely two days (Christmas and Good Friday) and three days when the employer makes Easter Monday a holiday.
- An employee was an observant member of the Jewish faith and had to use vacation time, lieu time or unpaid leave to celebrate Jewish holy days. The Human Rights Board of Inquiry ruled that the employee was discriminated against and that Ms. Shapiro's proposal that she work overtime to make up for the time she lost from work to celebrate Rosh Hashana was a reasonable one. An employer who requires a Jewish employee to use vacation or lieu time or unpaid leave in order to celebrate Jewish holy days discriminates under the *Code*⁵⁷.
- In the absence of a demonstration that granting the days requested for religious observance with pay would have imposed undue hardship on the employer, an employee should not be required to use vacation days or unpaid leave in order to observe his holy days⁵⁸. Requiring the employee to use vacation benefits would have the effect of imposing a financial burden on him to observe his holy days, something members of the majority religion are not required to do. Where there has been adverse effect discrimination and an employer has taken reasonable steps toward fulfilling its obligation to accommodate which do not fully reach the desired end, an employee may also have to take some accommodating steps. Where

⁵⁵ *Chambly*, *supra* note 53.

⁵⁶ *Chambly*, *supra* note 53.

⁵⁷ *Shapiro v. Peel (Regional Municipality)* (1997), 30 C.H.R.R. D/172 (O.H.R.B.I.D.).

⁵⁸ *Re The Crown in Right of Ontario* (1991), 21 L.A.C. (4th) 129 (Ont. Grievance Settlement Board; W. Kaplan, P. Klym, C. Linton).

a collective agreement allows for leave of absence with pay for special leave, an employee should be entitled to use those days for religious observance.

3. Flexible Scheduling

The purpose of this measure is to allow a flexible work schedule for employees⁵⁹, or to allow for substitution or rescheduling of days when an employee's religious beliefs do not permit him or her to work certain hours. For example, Seventh Day Adventists and members of the Jewish faith observe the Sabbath from sundown Friday to sundown Saturday. Observant members of these religions cannot work at these times.

Flexible scheduling may include: alternative arrival and departure times on the days when the person cannot work for the entire period, or use of lunch times in exchange for early departure or staggered work hours⁶⁰. Where the person has already used up paid holy days to which he or she is entitled, the employer should also consider permitting the employee to make up lost time or to use floating days off.

The following case law is in favour of flexible scheduling as a reasonable accommodation:

- A complainant was an observant member of the Worldwide Church of God. Adherent members of that faith are required to observe 11 holy days over the calendar year. The Ontario Court of Appeal recognized that an employer's willingness to institute scheduling changes so that employees could fulfill their religious obligations without having to lose wages or encroach on pre-existing earned entitlements such as vacation time amounted to a reasonable accommodation⁶¹.
- A complainant alleged discrimination on the basis of creed because she was periodically required to work Friday evenings and Saturdays⁶². Her religion required strict observance of

⁵⁹ The Ontario Court of Appeal has recognized that employers can fulfill their duty to accommodate the religious needs of employees by providing appropriate scheduling changes in lieu of leave with pay. *Ontario v. Grievance Settlement Board*, *supra* note 54.

⁶⁰ It is to be noted that rescheduling may be impracticable if it imposes a financial difficulty because of the requirement of paying wages at a premium rate to individuals who work on Good Friday and Christmas. For example, the *Employment Standards Act* specifies that if an employee works on a public holiday, the employer will pay a premium rate of one and one-half times the employee's regular rate. However, subsection 25(3) of the act allows for an alternative, namely the substitution of public holidays where a public holiday falls on a working day. In that case an employer may, with the agreement of the employee or the employee's agent, substitute another working day for the public holiday, which day shall not be later than the next annual vacation of the employee, and the day substituted shall be deemed to be the public holiday.

⁶¹ *Ontario v. Grievance Settlement Board*, *supra* note 54.

⁶² *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, *supra* note 5.

the Sabbath from sundown Friday to sundown Saturday. She accepted part-time work instead of full-time work so that she would not have to work on Saturday. The Supreme Court of Canada held that this was a case of adverse effect discrimination and the employer had a duty to take reasonable steps to accommodate short of undue hardship. The employer had not made any efforts to rearrange working periods for her benefit.

- An orthodox Jew was discriminated against because of his creed when his employer required him to undertake a training program on Saturdays⁶³. The Human Rights Board of Inquiry concluded that the employer had a duty to accommodate. Any training program for the employee should be held at a time that does not conflict with the tenets and practices of his religion.
- A Human Rights Board of Inquiry found that an employer discriminated against an employee on the basis of his religion by requiring him to work on Sundays⁶⁴. The employee was a devout Catholic for whom Sunday was a holy day. The employer was under an obligation to modify the work schedule to accommodate the employee.
- A labour arbitration board⁶⁵ ordered that an employee who is a member of the Seventh Day Adventist Church and observes the Sabbath from sundown Friday to sundown Saturday be reinstated into his position after being unjustly discharged for refusing to work during the Sabbath. The Board ordered that he be reinstated in a position for which he is qualified and which does not involve any conflict with his religious beliefs, even if it involves a reduction in pay for him. If no such job exists, then the company and the union must attempt to return the employee to a job which might entail shift work which would not conflict with his religious beliefs. Possible options could include waiving the premium for Sunday work when substituted for Friday afternoon work, short work weeks, co-operating to establish a pool of qualified, willing employees who may be available for switching shifts, etc. The employee must be prepared to make reasonable sacrifices in order to return to employment of some kind with the company.

4. Dress Codes

The following are examples of rules about dress codes that have led to a duty to accommodate:

- An employer who insists that its employees be clean-shaven and wear a cap discriminates on the basis of creed if an employee is a Sikh and his religion requires him to wear a turban and has a rule against cutting body hair⁶⁶.
- A hospital regulation against offensive weapons that precludes a Sikh patient from wearing a

⁶³ *Morley Rand*, *supra* note 143.

⁶⁴ *Shepherd*, *supra* note 132.

⁶⁵ *Re Stelco Wire Products Co.* (1986), 25 L.A.C. (3d) 427 (Ont.: G.G. Brent, T. Jez, G.E. Clark)

⁶⁶ *Singh*, *supra* note 110; *Re Singh and the Crown in Right of Ontario (Ministry of Correctional Services)* (1980), 27 L.A.C. (2d) 295 (Ont. Grievance Settlement Board; M. Eberts, R. Cochrane, A. Fortier).

Kirpan (a small dagger worn as a religious observance) is discriminatory. It would have been reasonable for the respondent hospital to have educated its staff about the symbolic nature of the dagger. The hospital should have been able to accommodate the patient=s wearing an eight-inch Kirpan⁶⁷.

Best Practices: Religious Beliefs

Employees who wish to request day(s) off for an observance are often faced with the option of taking time off without pay or using existing vacation benefits in order to compensate for what an employer may see as a lost day of productivity. However, this assumes that the employee considers statutory holidays to be as important as do those who celebrate and observe these given days. By withholding salary or forcing an employee to use vacation time, employers penalize employees for holding beliefs that are not held by the dominant group.

The employer has several options of providing accommodation in such a situation. The employee may be granted the day(s) off without any consequences to salary or predetermined vacation benefits. Another option is to allow for flexible scheduling. The employee may, for example, make up for time taken for religious, creed, cultural, political or traditional Aboriginal practices by extending the workday or by working on days recognized by the organization as days of observance, such as Thanksgiving.

Further, an organization's break policy should allow for flexibility even when employees have scheduled work hours and breaks. An employee may require more than the allotted break period or may need additional and varied break times to observe her or his religion, cultural beliefs, political beliefs or traditional Aboriginal beliefs.

Within the physical confines of the organization, an employer may provide private space for the practise of beliefs. The space should be quiet, in proper condition and available at all times of the day. An employer may also wish to outfit the space with objects such as mats.

Employees who wish to dress in a manner keeping with the tenets of their beliefs should be allowed to do so short of undue hardship. If this creates a problem, employers should consider offering alternative job assignments within the organization.

Organizational Best Practice Models

The IBM Corporation, amongst its many workplace accommodation policies, has included a personal choice holidays policy, where employees are given the opportunity to structure vacation benefits to their needs.

Accommodation for Persons with Disabilities

According to 1991 information from Statistics Canada, the disability rate⁶⁸ of the population aged 15

⁶⁷ See *Pritam Singh, supra* note 132.

⁶⁸The term >disability rate= used by Statistics Canada includes the following categories: mobility, agility, seeing, hearing, speaking, other and unknown.

and over was 17.7% in Canada and 18.3% or approximately two million individuals in the province of Ontario.⁶⁹ These figures are supported by The National Population Health Survey. That survey states that in 1996, 13.2% of working-aged people (aged 15-69) had disabilities. This accounts for 1.23 million people with disabilities working at paid jobs, translating to 9.1% of the overall population of employed people in Canada.⁷⁰ These statistics reveal that there is a large pool of highly qualified employable persons with disabilities, and demonstrate the increasingly important need for accommodations in the workplace and in the provision of services.

In the context of the legal profession, the Law Society of British Columbia has conducted a survey of lawyers and law students with disabilities regarding barriers related to entering and practising in the legal profession. The survey results indicate that lawyers with disabilities experience ongoing discrimination, prejudice, negative attitudes and physical access barriers in a profession that is largely driven by the economic bottom line. Respondents reported that,

- they had great difficulty in finding employment;
- they had to work in settings where accommodations were not provided and the atmosphere was not supportive;
- employers are usually reluctant to have a lawyer who has a disability on staff because of the economic bottom line that drives the legal profession;
- disclosure of disability leads to discrimination;
- there are still various structural barriers throughout the judicial system that make it difficult to move in and around buildings, understand what is being communicated or read small-print documents;
- there are barriers that make it difficult for lawyers with disabilities to participate socially and network during events.

Respondents also noted that there are a number of barriers to legal services for members of the

⁶⁹Statistics Canada, *Population Aged 15 and Over with a Disability, By Nature of Disability*, <http://www.statcan.ca/english/pgdb/People/Health/health12a.htm>.

⁷⁰WORKink, *Employment Statistics Re: Persons with Disabilities*, <http://216.13.114.21/worklink/national/articles-single.asp?ID=3614>.

public, such as financial barriers, systemic access barriers and barriers in legal aid. Systems to help people needing legal services are usually designed for the able-bodied, and if any accommodations are made, it is as an afterthought. Respondents expressed concern about how prejudice against people with disabilities impacts on access to and fair treatment in the judicial system⁷¹. For example, ignorance of mental disability is still reflected in the legal system. Some respondents expressed concerns about access to and operation of legal aid and access to the right lawyers.

In 2004, the Law Society of British Columbia published a second report on disability in the legal profession. This second report recommended that the Law Society of British Columbia work to support a number of initiatives to remove or reduce barriers to practice. Some of these suggested initiatives are:

- Establish an ongoing Advisory Committee for Lawyers with Disabilities to the Law Society;
- Develop a business case to endorse and support a greater inclusion of lawyers with disabilities at all levels of the legal profession;
- Create a reserve fund and identify other sources of funding to assist law firms in providing accommodations for lawyers with disabilities;
- Establish and support a mentoring program for lawyers with disabilities;
- Develop an equity and diversity education program that includes diversity training for the judiciary and the legal profession; and
- Develop a program to have law firms commit to a series of tangible objectives regarding recruitment, hiring, retention, advancement and compensation for lawyers with disabilities.⁷²

Accommodations of persons with disability should focus on equal participation, maintaining the dignity of the person and inclusiveness:

Accommodation with dignity is part of a broader principle, namely, 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

⁷¹*Lawyers with Disabilities: Identifying Barriers to Equality* (Vancouver: The Law Society of British Columbia, 2001).

⁷²*Lawyers with Disabilities: Overcoming Barriers to Equality* (Vancouver: The Law Society of British Columbia, 2004).

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 benefits⁷³.

Accommodation policies should provide for systemic accessibility audits as well as a process whereby individual needs can be identified and accommodated.

1. Systemic Accessibility Audits and Action Plans

In order to be inclusive of persons with disabilities, it is important that organizations adopt proactive measures, such as,

- undertaking systemic accessibility audits on a regular basis;
- developing accessibility plans; and
- implementing changes to make facilities, procedures and services accessible to persons with disabilities.

The systemic accessibility audits must be organizational wide and include a review of, at the very least:

- The organization's policies and procedures, (such as performance appraisal process, criteria for partnership, recruitment practices and solicitor and client retainer forms and policies);
- the building design, structural elements, physical access, architectural and environmental elements, transportation and equipment; and
- the technological and communication equipment.

The systemic accessibility audits should be wide in scope and consider accessibility in employment and services. This means that organizations should be accessible even if there are no employees or members of the organization who are persons with disabilities. The audits should provide the basis for the development of long-term strategic action and implementation plans.

⁷³ *Guidelines, supra* note 31 at 6.

2. Individual Accommodations

Accommodating persons with disabilities also requires an individualized approach⁷⁴. Each person's needs must be considered individually in order to determine what changes can be made to a situation. The organization should consult with the person with disabilities to determine what he or she needs and how it can best be provided. The needs of persons with disabilities must be accommodated in a manner which most respects their dignity, if to do so does not create undue hardship.

Section 17 of the *Code*⁷⁵ provides that an organization has not infringed a person's right under the *Code* if the individual is incapable of performing or fulfilling the essential duties or requirements of a function. However, if the person can perform or fulfill the major requirements of the function, the organization has an obligation to remove the marginal requirements of the function. A person will only be considered "incapable of performing the essential requirements of a function" if the organization cannot accommodate him/her without undue hardship⁷⁶.

Organizations should determine what is essential to the performance of the function. They should establish on an objective basis, by testing the person or by giving the person an opportunity to try to perform the function, whether the person's disability renders her or him incapable of fulfilling the essential requirements of the function. If a person of the organization has a disability but is capable of performing the essential requirements of the function, the organization should reassign the marginal requirements or use an alternate method for having the requirements fulfilled. If the person of the organization cannot perform the essential requirements, accommodation is to be explored. The person will not be incapable if she or he can be accommodated without undue hardship.

The following standards for accommodation should be considered:

- recognition that the needs of persons with disabilities must be accommodated in the manner

⁷⁴ Emphasis will be placed here on individualized accommodation in the employment context although the law also applies to the provision of services.

⁷⁵ *Supra*, note 48.

⁷⁶ Section 17 applies to cases involving services as well as employment. See *Youth Bowling Council of Ontario v. McLoed*, *supra* note 48.

- 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 them⁷⁷.

Incapable of Performing or Fulfilling the Essential Duties or Requirements

The first step in analysing accommodation is to determine what is “essential”⁷⁸ and what is not. If necessary, nonessential requirements may have to be reassigned to someone else, or fulfilled using some alternate method. Then, if the person cannot perform the essential requirements, accommodation is to be explored that will enable performance of those essential requirements. The best course of action for an organization is to test the person about whose capacity there is some doubt, or to provide the person an opportunity to try.

Case law has established that in order to use the exception in section 17, an organization must establish on an objective basis, for example by testing the person, that a person's disability renders her or him incapable of fulfilling the essential requirements of the function. An organization must make decisions respecting the person with a disability based upon a fair and accurate assessment of her or his ability and not based upon a stereotype or misconception.

- Cindy Cameron was refused employment as a Nurse’s Aide because the employers felt that she would not be able to do the required lifting and might pose a risk to the elderly patients. She has a deformity of her left hand which results in three fingers being shorter than those of a normal hand. The employer had not asked Ms Cameron to demonstrate her grasp in a simulated lifting situation, or called Ms Cameron’s doctor to discuss her disability. In order to argue that a person is incapable of performing the essential duties of a job, the employer must show that the only operative reason for the employer's refusal to hire is that the handicapped person is incapable. An arbitrary assumption by an employer regarding a

⁷⁷*Guidelines, supra* note 31 at 7.

⁷⁸ The Human Rights Commission has interpreted the term “essential” to mean 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 essential to the position. *Disability, supra* note 31 at 19.

handicapped complainant's ability is not a defence even when such an assumption is held without any improper motive. The Human Rights Board of Inquiry provides an example of “non-essential aspects” of a job. If a person with a disability uses a pencil to write, and has no difficulties with any aspect of her work, but could not sharpen pencils by herself because of her disability,

- the employer could not use the exception of section 17, as pencil-sharpening would be a non-essential aspect of the job.⁷⁹
- An employer's requirement that a complainant, a police officer who was diabetic, be placed on restricted duties for a period of time did not constitute discrimination. The complainant was not in control of his diabetes during the three-year period, suffering several hypoglycaemic reactions which occasionally required hospitalization. When his condition was stabilized by proper medication, he was returned to his normal duties. *The employer was reasonable in finding him incapable of fulfilling his duties during that period, and that his needs could not be accommodated without undue hardship in terms of the risk to himself and the public*⁸⁰.
- A complainant began working as a coal handler. In 1981 he injured his left shoulder and was off work on compensation for long periods during 1981, 1982 and 1983. In June 1983, the complainant's personal physician certified that he was able to return to work. However, the employer refused to reinstate the complainant, believing that he continued to have difficulty. The onus is on the employer to establish that the person with a disability is incapable of performing the essential duties of the job, and at the same time to establish that the employer cannot take affirmative steps to reasonably accommodate the person. Many employers prejudge the ability of the handicapped to their disadvantage, and it is within the employer's knowledge as to what the essential duties of the job are, and what are the possibilities of reasonable accommodation. An employer must make a decision respecting employment of a person with a disability based upon a fair and accurate assessment of his or her true ability, and not based upon a stereotype or misconception about a disability. Where the disability does not, in itself, suggest that there is a reasonable certainty of his being unable to do the task, the logical route for the employer is to put the person to either the test of the job itself, or to the test of a simulated equivalent⁸¹.

The duty to accommodate for non-evident disabilities requires special attention. Non-evident disabilities can take the form of conditions such as learning disabilities, cognitive disabilities, or mental illness. These conditions often carry with them strong negative stereotypes and stigma, as

⁷⁹*Cameron, supra* note 27. Confirmed in *Entrop v. Imperial Oil Ltd. (No. 6)* (1995), 23 C.H.R.R. D/196 (O.H.R.B.I.D.).

⁸⁰ *Barnard v. Police Board of Commissioners (Fort Francis)* (1987), 9 C.H.R.R. D/4845 (O.H.R.B.I.D.)

⁸¹ *Belliveau v. Steel Co. of Canada* (1988), 9 C.H.R.R. D/5250 (O.H.R.B.I.D.). See also *Chamberlin, supra* note 39 and *Allan v. Singh* (1993), 22 C.H.R.R. D/337 (O.H.R.B.I.D.).

well as a general lack of understanding about the actual limitations of persons suffering from them. The Canadian Psychiatric Association notes that when it comes to accommodating mental illness in particular, persons with mental illness face perhaps the highest degree of stigmatization and the greatest barriers in employment as compared to persons with other disabilities.⁸² Employers and other employees in the workplace may have unwarranted fears and perceptions about the needs and abilities of persons with mental illness. When considering accommodation of employees with mental illness, employers should be especially aware of the impact of unfounded perceptions and the negative stigma and stereotypes that flow from them.

The courts have recognized that discrimination on the basis of disability contains a subjective component. With non-evident disabilities such as mental illness in particular, this subjective component can become especially important, as it is often the negative social constructs surrounding a disability, aside from the actual functional limitations, that gives rise to differential treatment.⁸³

- Dawn Metsala was initially employed as a payroll clerk. The position of payroll clerk was generally known to be stressful and involve lots of rigid deadlines. A few years after starting with the company, she was diagnosed with reactive depression and chronic fatigue syndrome and began a disability leave. After a number of years on leave, she was eventually accommodated by being given a clerical position within the same company. The company considered hiring her into a clerical position to be the complete fulfillment of its duty to accommodate her. Beyond giving her the position however, the subject of how she could be accommodated was never discussed, and the employer never asked whether she had a need for accommodation. She was not considered for other positions as they came up, because it was assumed that they would be too stressful for her. Employees with other disabilities, particularly physical disabilities, were differently, regularly, and successfully accommodated within the company, and the complainant was treated unequally vis-à-vis other employees with medical restrictions. The Board found that the employer had made assumptions about her particular handicap and had failed to make the appropriate inquiries to gather accurate information. As it is more difficult to ascertain the limits of the capabilities of an employee suffering with a mental disorder, it is even more incumbent on the employer to make inquiries and not act on the basis of assumptions. In cases such as these, the employer has a clear obligation to "ascertain the true nature of [the] medical condition or to clarify [the] nature of the restrictions".⁸⁴

⁸²Canadian Psychiatric Association, *Mental Illness and Work* (Ottawa: Canadian Psychiatric Association, 2004).

⁸³*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27; and *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28.

⁸⁴*Metsala v. Falconbridge Ltd.* [2001] O.H.R.B.I.D. No. 3.

Responsibilities of the Person with a Disability

Case law and the Ontario Human Rights Commission have established that a person with a disability has a responsibility to communicate his or her accommodation needs to the best of his or her ability.

The Ontario Human Rights Commission suggests that an employee with a disability has a responsibility to communicate with his or her employer in the following manner:

- Make his or her needs known to the best of his or her ability;
- 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; and
- Work with the accommodation provider on an ongoing basis to manage the accommodation process.⁸⁵

In some contexts, a person with a disability may be unable or unwilling to ask for the accommodation they need. Persons living with mental illness for example, will often be reluctant to disclose their illness, their need for accommodation, or both, out of fear of repercussions based on negative stereotyping and stigma.

Although persons with disabilities may be required to communicate their needs to the best of their ability, a lack of communication from a disabled employee does not necessarily result in a lack of obligation for the employer to accommodate. In some situations, even though the employee has not explicitly disclosed his or her illness or accommodation needs, the need for accommodation may still be clearly evident. For example, an employer who is aware of an employee's hospital stay related to mental illness, witnesses emotional difficulties at work, or has knowledge of the employee's mental state through another means may be imputed to have knowledge of the employee's mental health disability. Where such knowledge is imputed, the employer has a duty to make inquiries of the employee regarding their accommodation needs.⁸⁶

If the employee's ability to perform the essential functions of the job is at issue, the onus is on the

⁸⁵*Guidelines, supra* note 31, at 23.

⁸⁶See *Willems-Wilson v. Albright Drycleaners* (1997), 32 C.H.R.R. D/71 (B.C.H.R.T.); *Mager v. Louisiana-Pacific Canada* (1998), 33 C.H.R.R. D/457 (B.C. Trib.); and *Zaryski v. Percival Mercury Sales* (1995), 22 C.H.R.R. D/256 (Sask. Bd. Inq.).

employer to show that the person with the disability is incapable of performing the essential requirements of the job. Although it is ultimately the employer's responsibility to establish this inability, the disabled employee has a parallel responsibility to remain engaged in the discussion with the employer about his or her capabilities. If the employee clearly believes that he or she is capable of performing the essential duties of the job, the employee must effectively communicate this belief to the employer. An employee cannot simply remain silent when decisions are made in good faith that affects his or her interest, and then later say that the company failed to take initiatives.⁸⁷

- A complainant was hired with the Ministry of Health. He did not disclose his disability at the time of hiring or at any point before his disability required an absence from work. The employee's handicap was not self-evident, and the employer had no knowledge of its existence until his condition required time away from work. *It cannot reasonably be expected that the employer should undertake to accommodate a disability the existence of which it could not be expected to know.*⁸⁸
- The employer must demonstrate that it would suffer undue hardship in making any accommodation, but it cannot be in a position to do so in a precise way unless it knows what the needs of the group are. In some cases needs will be obvious. But in one case, when the extent of absences was raised with an employee, her response was that her problems had been overcome and that she would be able to work regularly in the future. Although some discussions concerning accommodation had occurred in the past, no new discussions of accommodation needs regarding her remaining medical conditions were brought prior to her being discharged. *Where an employee does not identify a need for accommodation until after being discharged, an employer is not in breach of an obligation to accommodate the employee's needs.* Although it is true that an employer must establish that it would suffer undue hardship in accommodating a particular employee, it can hardly be in a position to do so in the precise way required under the *Code* unless it knows what the needs of the employee are.⁸⁹
- The duty of accommodation imposed by statute is more than a cooperative and responsive one. There must, of necessity, be a dialogue to determine if an employee can be accommodated. On the one hand, an employer cannot comply with the duty of accommodation unless the grievor provides the information he or she has on the restrictions and handicap. The employer must know what the employee's needs are, to be able to assess and meet the restrictions. On the other hand, as the employer is in the unique position of

⁸⁷ Belliveau v. Steel Co. Of Canada (1988), 9 C.H.R.R., *supra* note 80.

⁸⁸ Bonner v. Ontario (Ministry of Health), *supra* note 25.

⁸⁹ *Re Belleville General Hospital and Service Employees Union, Local 183* (1993), 37 L.A.C. (4th) 375 (Ont.; I.G. Thorne). Applied in *Re Babcock and Wilcox Industries Ltd. and United Steelworkers of America, Local 2853a* (1994), 42 L.A.C. (4th) 209 (Ont.; D.R. Williamson).

knowing and managing its workforce, the ultimate duty rests on the employer to accommodate the griever to the point of undue hardship.⁹⁰

Responsibilities of Accommodation Provider

The accommodation provider also has responsibilities in the accommodation process.

The accommodation provider should respect the dignity of the person seeking accommodation. This means to act in a manner which recognizes the privacy, confidentiality, comfort, autonomy, and self-esteem of the person seeking accommodation, which maximizes his or her integration and promotes his or her full participation in the organization.

The accommodation provider should also, when applicable:

- maintain the confidentiality of persons seeking accommodation;
- request only information that is required to make the accommodation;
- take an active role in ensuring that possible solutions are examined;
- deal with accommodation requests in a timely way; and
- consider alternatives if the request cannot be fully accommodated.

Duty to Accommodate: Types of Accommodation

The Ontario Human Rights Commission has adopted its *Guidelines*⁹¹ which set out the scope of the requirement of accommodation for persons with disabilities. Tribunals have recognized that the *Guidelines* are influential and they have been adopted by the Ontario Workers' Compensation Board and by the Ontario Workers' Compensation Appeals Tribunal⁹². The *Guidelines* suggest the following:

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. 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 individuals are

⁹⁰ *Re Maple Leaf Foods Inc. and United Food & Commercial Workers, Local 175/633* (1996), 60 L.A.C. (4th) 146 (Ont.; B.A. Kirkwood).

⁹¹ *Supra* note 31.

⁹² For example, *Workers= Compensation Appeals Tribunal* decisions no. 288/91, 473/95, 1139/96, 647/95I/335/92, 288/91 and 968/90.

marginalized, stigmatized, ignored or devalued. Privacy, confidentiality, comfort, autonomy, individuality and self-esteem are important factors as well as to 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 which are most respectful of privacy, autonomy, integration and other human values, to those which are least respectful of those values⁹³.

In determining reasonable accommodation, the organization must consider the full range of options and balance the respective interests. A number of cases have dealt with the concepts of "reasonable accommodation". Accommodation in the context of disability usually takes the form of physical modifications such as building design changes and equipment modifications, modified work duties or relocation of work duties to another part of a building⁹⁴. The needs of persons with disabilities must be accommodated in a manner which respects their dignity. The following are examples of the types of accommodations provided by employers in this context:

Accommodation in the context of disability often takes the form of physical modifications such as building design changes and equipment modifications, modified work duties or relocation of work duties to another part of a building⁹⁵. The following are examples of the types of accommodations provided by employers or service providers in this context:

- removal of physical barriers that make it more difficult for persons with disabilities to gain access to the law firm or function within it;
- physical modifications⁹⁶;
- modified work duties⁹⁷;
- relocating work duties;

⁹³ *Guidelines, supra* note 31.

⁹⁴ *Re Babcock and Wilcox, supra* note 894.

⁹⁵ *Re Babcock and Wilcox, supra* note 894.

⁹⁶ Such accommodation must be done in a manner which respects the dignity of the person with a disability. Physical modifications can include the installation of an elevator to make a building wheelchair accessible, adding wheelchair ramps, changing lighting for those with sight impairments, changing ventilation for those with allergies etc.

⁹⁷ Such as rearranging an employee's work assignments and schedule rotations in such a manner as to permit the employee to perform a suitable combination of jobs or modifying an employee's duties.

- making all in-house communications (eg: policies, memos, manuals produced by the firm) accessible to all members of the firm⁹⁸;
- providing staff to assist members, staff and clients of the firm with disabilities⁹⁹;
- providing assistive devices¹⁰⁰.

Physical Modifications

- Ms. Barber was a wheelchair user. She alleged discrimination based on disability because at the time the only access to the second floor of the Sears store in the Pen Centre was through the freight elevator. The freight elevator was accessed through a foyer that was dirty and cluttered. The elevator had bare steel walls with doors opening top to bottom; and it took ten to fifteen minutes, sometimes up to half an hour, to have an employee come, remove freight from the elevator and transport her between floors. *A Human Rights Board of Inquiry was of the view that the needs of persons with disabilities must be accommodated in a manner which respects their dignity.* The services offered to the mobility impaired for going from one floor to another were very different from those offered other customers, and involved providing physical surroundings of a much lower quality than those provided in all other customer areas of the store. Such conditions did not provide access with dignity. On the other hand, renovations and alterations undertaken by Sears resulted in physical surroundings which were not as intimidating and were accepted as reasonable accommodation. As for the use of assisted access in the operation of the elevator, the Human Rights Board of Inquiry was of the view that autonomy is a necessary condition of dignity, but physical independence is not. Autonomy is a different concept from physical independence. If a person required assistance in order to eat but was able to decide when and what to eat, that person would be autonomous with respect to eating, though not physically independent with respect to eating. On balance of probabilities, it was not shown that the use of assistance in the operation of the elevator produces undignified access to the second floor¹⁰¹.
- Tanys Quesnel made an appointment for chiropractic treatment at a clinic operated by the London Educational Health Centre (L.E.H.C.). Tanys Quesnel has spinal muscular atrophy. She uses a wheelchair. When she attended the clinic, she was unable to gain access to the

⁹⁸ This may include making documents available in electronic form which can be read by a computer to a person with a disability that affects his or her ability to read print.

⁹⁹ For example the services of a staff person to read documents, unpublished decisions etc., that might not otherwise be accessible to a lawyer, staff or client with a disability, assistance with off-site work related activities, such as attendance at a hearing.

¹⁰⁰ These may make it easier for persons with various disabilities to perform the tasks essential to a legal practice, at the workplace or at a home office.

¹⁰¹ *Barber v. Sears Canada Inc.* (1994), 22 C.H.R.R. D/415 (O.H.R.B.I.D.).

building as there was no ramp, lift or elevator which could accommodate her wheelchair. In a telephone conversation, Doctors at the clinic offered to lift Ms. Quesnel up the stairs, to provide her with a home visit or to refer her to another chiropractor with wheelchair accessible premises. The Human Rights Board of Inquiry found that there were five ways in which Ms. Quesnel could be accommodated at the L.E.H.C. 1) by lifting her and carrying her into the building 2) by providing off-site services 3) by constructing an elevator 4) by constructing a wheelchair lift and 5) by constructing a wheelchair ramp. The Human Rights Board of Inquiry rejected the first two options as inconsistent with the obligation to integrate persons with disabilities in a way that is dignified and respectful. These methods would either render Ms. Quesnel completely dependent, or restrict her choices in a way that is not consistent with dignitary interest. The Human Rights Board of Inquiry also rejected constructing an elevator and a lift as too costly. However, it found that a wheelchair ramp was appropriate.

- David Brock has Muscular Dystrophy and is reliant on a wheelchair. Film Factory, a cinema complex, is not wheelchair accessible. David had to enter and exit via the back entrance. When David first attended the theatres, he used a manual wheelchair. His father would buy the tickets and ushers voluntarily agreed to lift David in his chair up the stairs to the theatre or auditorium. Inside the theatre, David would sit in his wheelchair at the end of the row on the aisle. David would be sit on an angle, which put stress on his neck and shoulders because he sat on the end, patrons would sometimes bump into his wheelchair in the dark. As David got older, he required the use of a motorized wheelchair. The new method was for him to enter and exit via the back or side entrance. The practice was for his father to buy the tickets, ask an usher to open the back door from the inside and let them into the auditorium. He would enter and go to the front and sit in the aisle next to the seats, on an angle. *The Human Rights Board of Inquiry states that at the heart of discrimination is the question of dignity. Human dignity means that an individual or group feels self-respect and self worth. It is concerned with physical and psychological integrity and employment.* Film Factory was ordered to pay \$3 000 to David and to renovate Film Factory to make it wheelchair accessible up to a maximum of \$60 000 over a three year period. Further, Film Factory was ordered to remove seats and provide designated wheelchair spaces within one month of the decision¹⁰².

Modified Work Duties

- The duty to accommodate includes duties and requirements associated with a bundle of existing tasks within the ability of disabled employees. There was a bundle of duties that the employee was capable of performing. A company was directed to arrange the employee's work assignments and scheduled rotations in such a manner as to permit the employee to perform a suitable combination of these jobs for a full eight-hour shift for each day in the regular work week¹⁰³.

¹⁰² *Brock v. Tarrant film Factory Ltd.* (2000) O.H.R.B.I.D. No.5.

¹⁰³ *Re Tarxien Co. and Canadian Auto Workers, Local 1090* (1997), 62 L.A.C. (4th) 129 (Ont.; T.E. Armstrong Q.C.); *Re Mount Sinai Hospital and Ontario Nurses' Association* (1996), 54 L.A.C. (4th) 261 (Ont.; R.M. Brown, H. Orton, G. Shaw).

- A tribunal has suggested that there may be instances where jobs can be modified in a non-substantive way by assigning the work that cannot be done by the employee to another employee, and that such work can be done by another employee without causing material disruption to the workforce. In essence, there are many ways to accomplish the same tasks in an equally productive way for the employer. It is not sufficient for the employer to say that the employee cannot perform any of the job descriptions, but the employer must also be able to show that the job descriptions cannot be changed without imposing undue hardship on the employer¹⁰⁴.
- The *Code* does not guarantee a grievor employment or require an employer to employ someone who cannot attend with reasonable regularity and perform a job that is meaningful and productive. While there may be an obligation to modify existing jobs, if the job has to be altered to such an extent that its essential characteristics have to be removed, that exceeds whatever obligation there may be on an employer to accommodate a disabled employee. A grievor suffered an injury to her right elbow at work. The employer, on at least five occasions, attempted unsuccessfully to return the grievor to work on modified duties. It was found that the only way in which the job could be altered so that the grievor could do it would be to remove the essential characteristics of the job associated with timely delivery of goods and material¹⁰⁵.
- A grievor was so seriously injured, she was incapable of performing many of the job duties of her position as a Registered Nurse Assistant. She desired to remain employed full-time. The employer offered modified duties, 24 hours per week of work and a position outside the bargaining unit on the basis of the medical information. The effect of transferring her out of the bargaining unit was to impose penalties and restrictive conditions upon her. It was held that the duty to accommodate does not impose unreasonable expectations on employers. Workplaces need not be totally reorganized and economic organizational realities are not to be disregarded. In this case the medical evidence showed that the grievor could not do many of the aspects of the job. The employer did not engage in an exercise of determining whether any other programs or work arrangements could be made available to the grievor. Essentially, the employer was making two alternatives available to the grievor. Either she would work 24 hours a week on the feeding programme or a full 37 hours work week in alternative jobs. Since the grievor could not work the full week, the employer chose not to consider any other alternatives. By failing to consider alternatives, the employer cannot be found to have satisfied the onus of proving undue hardship and accommodation. The employer seems to only be willing or able to find accommodation on a temporary or limited basis. But it was not willing to do so on a long-term basis for this grievor. The duty to accommodate is not temporary. It is ongoing unless undue hardship can be established¹⁰⁶.

¹⁰⁴ *Re Maple Leaf Foods Inc.*, *supra* note 9085.

¹⁰⁵ *Re Hamilton Civic Hospitals and Canadian Union of Public Employees*, *supra* note 253. See also *Re Community Nursing Home-Port Hope and U.F.C.W., Loc. 175 and 633* (1996), 60 L.A.C. (4th) 35 (Ont.; M.R. Gorsky).

¹⁰⁶ *Re Board of Governors of Riverdale Hospital and Canadian Union of Public Employees, Local 79* (1994), 41 L.A.C. (4th) 24 (Ont.; P. Knopf, M. Vorster, P. Crowley).

- There is a general assumption in the jurisprudence that the accommodation of an employee with a disability will not require the displacement of an incumbent, *but this is not a hard and fast rule*. The simple fact that a position is occupied does not create a legal obstacle to the accommodation of the employee with a disability. The ultimate determination of whether accommodation will require the displacement of an incumbent depends heavily on the specific facts of each situation. Under the concept of undue hardship, which can extend to everyone in the workplace, the union and individual employees may be called upon to shoulder some of the hardship to facilitate an accommodation. If the grievor is able to fulfill the essential functions of the occupied position, and moving him into the occupied position is the only accommodation available to him, the fact that the position is occupied should not stand in the way of the requirement that he be accommodated. Also influential in finding that the employer is required to displace an incumbent is the fact that the incumbent if displaced would not be unemployed, but would be moved into another comparable position, whereas the grievor, if not accommodated into the occupied position would face a situation of unemployment.¹⁰⁷
- The duty to accommodate would be largely illusory if the duty to secure light work was dependent upon existing vacancies. The employer did not sufficiently explore what light duty nursing jobs could meet the restrictions imposed upon this grievor¹⁰⁸.

Relocation of Work Duties

- An employee had a medical condition known as benign prostatic hypertrophy, a condition that requires urination on a more frequent and urgent basis than is ordinarily the case. A tribunal ordered that the employee be transferred to a position that did not require him to wear heavy gloves and apron and which was much closer to the washroom. Further, the frequent washroom breaks did not constitute undue hardship, even if they violated the collective agreement¹⁰⁹.

Best Practices: Persons with Disability Employee Accommodation

The issue of accommodation may arise before an individual is hired. An employer should ensure that recruiting efforts are made available to all potential applicants. For example, job advertisements

¹⁰⁷*Essex Police Services Board and Essex Police Assn. (Horoky) (Re)* 105 L.A.C. (4th) 193; and *Re Mohawk Council of Akwesasne and Ahkwasasne Police Association* 122 *Re Better Beef Ltd. and United Food & Commercial Workers International Union, Region 18* (1994), 42 L.A.C. (4th) 161244 (Ont.; B. Welling)161.

¹⁰⁸ *Re York County Hospital and O.N.A.* (1992), 26 L.A.C. (4th) 384 (Ont.; M.V. Watters, D. Mayne, K. Cribbie).

¹⁰⁹ *Re Maple Leaf Pork and United Food and Commercial Workers International Union, Local 1227* (1999), 83 L.A.C. (4th) 78 (Ont.; S.M. Beck).

should be made available in community newspapers or local organizations and alternative forms of posting should be accessible to those with sight impairments.

Accommodations provided for employees can vary greatly depending on job responsibilities and the type of disability involved. Types of accommodation may include: job restructuring, adjusting work schedules, flexible leave, assistive devices, special equipment, modification of work space, transportation needs, peer assistance and other human assistance.

Environmental and Physical Accommodations

The following best practices pertain to modifications and changes made to the physical workspace:
Changing lighting (brighter or softer settings) for those with sight impairments;

- Changing the ventilation, installing air filters or adjusting climate systems for those with allergies or sensitivities under certain temperatures;
- Providing larger work spaces for added mobility;
- Adjusting the height of shared items such as photocopiers, printers, fax machines, etc. For those who are hard of hearing, these devices should be removed from the immediate work area to reduce disruptive noises;
- Rearranging furniture and equipment to eliminate hazards for the sight impaired; and
- Adding vibrant colours or clear indicators to surfaces for those with low vision

Technological and Assistive Devices

The following best practices pertain to devices which aid or ease communication:

- Providing a speaker phone with memory for frequently used numbers or providing a telephone with a large keypad;
- Obtaining teletype devices to communicate with individuals with hearing impairments. Purchasing such a device may be an advantage over using one provided by the telephone company, as this eliminates third party communication with an operator;
- Having a speech synthesizer available to convert visual output for employees who are sight impaired;
- Providing tape recorders and additional software aids for those with learning disabilities or difficulty concentrating for long periods of time;
- Providing large monitors, alternative mouse styles, and adaptive keyboards; and
- Providing braille printers.

Peer or Human Assistance

Peer or human assistance refers to the aid provided by fellow employees and employers or the need to retain additional persons to aid the employee:

- Providing sign language interpreters;
- Providing opportunities to attend seminars and classes for training and educational programs;
- Using visual aids such as projectors for presentations; and
- Providing mentors for encouragement.

Job Modifications

The following relate to job modifications such as changing the duties or responsibilities, or providing options on scheduling:

- Offering flexible work arrangements;
- Providing the option of part-time work or job sharing for employees who return from leaves of absence;
- Reducing or adapting job duties; and
- Providing job transfers for positions which may be more suitable to the employee's needs.

Accommodation for Clients and Members

A major part of the daily functioning of the Law Society includes providing quality services to members of the profession and members of the general public. Therefore serious consideration should be given to ensuring accommodations for clients and members with Visual Impairments.

The following are examples of accommodations for persons with a visual impairment:

Providing forms in large print or braille;

Marking hallways and objects for those with low vision;

Removing barriers in hallways and major routes; and

Always clearly stating actions which are taking place, such as reading the denominations of bills when doing a monetary transaction.

Members and Clients who are Hearing Impaired

The following are examples of accommodations for persons with hearing impairment:

If an interpreter is unavailable, it is best to have written instructions and forms readily available;

Visual aids such as videos should be closed captioned;

Have a TTY device; and

Provide access to a private area or space to allow for privacy in discussing personal or sensitive matters.

Members and Clients with Mobility Impairments

The following are examples of structural modifications to accommodate clients and members with mobility impairments:

Ensure service areas and objects are at a lower level;

Provide alternative writing surfaces;

Ensure all areas are wide and free of any barriers; and

Have designated areas such as classrooms, cafeterias and common spaces with wider seating and working space.

Members and Clients with Speech Impairments

The following are examples of accommodations for persons with speech impairments:

- Remove any barriers, such as glass partitions, that may hinder proper communication;
- Provide alternative means of communication such as braille or writing. However, the client must find this an acceptable alternative; and
- Provide a private space to conduct business.

The Costs of Accommodation

Attempting to estimate the cost of providing accommodation is a difficult task as it can vary widely depending on the need. A creative and flexible approach is encouraged to ensure that individual requests are met. Costs may be nominal (for example when the employer simply ensures that barriers are removed), or may be very high (for example when the employer makes structural modifications). You will find below a breakdown of costs prepared by the Job Accommodation Network¹¹⁰. Although these figures are taken from American statistics, they are representative of possible costs within a Canadian organization:

Costs of Accommodations (In US Dollars)	Percentage
No Cost	19%
Between \$1 and \$500	50%
Between \$501 and \$1 000	12%
Between \$1 001 and \$2 000	7%
Between \$ 2 001 and \$5 000	9%
Greater than \$5 000	3%

In Canada, several services are available, either through the federal or provincial governments, to organizations who are proactive and seriously committed to providing opportunities to persons with disabilities. The Access Fund provides grants to nonprofit organizations to aid in the costs of renovations. The program is administered by the Ontario Trillium Foundation on behalf of the Ministry of Citizenship, Culture and Recreation¹¹¹.

¹¹⁰President=s Committee on Employment of People with Disabilities, *Cost and Benefits of Accommodations*, <http://www50.pcepd.gov/pcepd/archives/pubs/ek96/benefits.htm>.

¹¹¹Funding guidelines may be found on the Trillium website at <http://www.web.net/~trillium>.

Organizational Best Practice Models on Disability Accommodations

The following chart demonstrates numerous local, national and international organizations which have gone above and beyond the legal requirement to accommodate.

Organization	Best Practice Initiatives
Northern States Power Company	<p>The Special Needs Fund assists employees with disabilities by providing alternative means of paying for high-priced accommodations.</p> <p>Regularly holds employee awareness programs in order to advance its culture change strategy.</p>
AT&T Corporation	<p>Ideal- a program devised to enhance the understanding of persons with disabilities through training and encouraging advocacy.</p>
UnumProvident	<p>Transitional Work Program exists to facilitate the back to work transition for employees who have been on leave for long term disability. This provides the employee the ability to work part-time or temporarily until he/she is ready to work on a full-time basis.</p>
Pacific Telesis Group	<p>A job transfer will be considered if reasonable accommodations cannot be made within the employee's current position.</p>
Organization	Best Practice Initiatives
IBM Corporation	<p>Entry Point Program- a program to initiate recruitment of college students with disabilities for summer jobs or internships, with the goal of hiring full-time upon successful completion.</p> <p>Project Able Program - in partnership with staffing agencies and community services, this program is designed to provide a focal point of hiring persons with disabilities.</p> <p>All publications are available on audio cassettes and in braille.</p>
Royal Bank of Canada	<p>Wellsizing the Workplace Conference is a 3-day event that allows the bank and other organizations to share in best practices towards a common vision of workplace accessibility.</p> <p>The Goodwill Call Centre Training Program trains potential call centre reps and aids in job placement.</p> <p>The Valentine Gala is a fund raising event to raise awareness within the community.</p>

Accommodation Based on Gender or Family Status

It is now well established that discrimination based on pregnancy or childbearing potential is discrimination based on sex. When an employer refuses to employ women of childbearing potential or pregnant women, it must demonstrate that the requirement is a reasonable and *bona fide* qualification for the position. If it is not, discrimination has occurred and the employer must accommodate to the point of undue hardship:

- Inco Metals had a policy of refusing to employ women with childbearing potential in an area where there are accidental emissions of nickel carbonyl gas and the employer believed that exposure to such emissions could cause harm to a fetus. The Human Rights Board of Inquiry found that the risk of harm to the fetus was minimal. The requirement did not constitute a reasonable and *bona fide* qualification for the position. The complainant's capacity to become pregnant did not affect her ability to perform the jobs in this area. The risk of injury to the employee must be real and significant before it can be a *bona fide* occupational requirement¹¹².
- An employee working as a snack bar counter person at a golf course was asked whether she would be returning to work for the summer. The employee accepted, but informed the employer that she was pregnant. She was not hired because the employer wanted someone who would be available for the whole season. The Human Rights Board of Inquiry found that there was discrimination based on sex. Being available for the whole season was not a *bona fide* qualification for the job, since the employee could have been replaced for the three weeks that she wanted to be absent for childbirth¹¹³.
- A nurse who was a casual relief employee applied for a temporary staff nurse position. After the job posting had closed, but before the position was filled, the nurse disclosed that she expected to go on maternity leave starting approximately half-way through the nine-month employment term. As a result of her inability to complete the entire term of the job, she was denied the position. The Alberta Court of Appeal found that *the failure to hire the nurse for the term position because she will not be available for the entire term was a failure to hire because of pregnancy and therefore a prima facie case of discrimination on the basis of gender. The requirement of availability for the entire term of a temporary position could not be justified as a BFOR. It is not a core component of the job, and adjusting the job so as to remove the requirement would not result in undue hardship.*¹¹⁴

An employer has a duty to accommodate pregnant employees when her position may be harmful to her or the fetus:

- An employer refused to accommodate a request from an employee to be transferred from her job as a spray painter because she was pregnant. The employee requested that for the duration of her pregnancy she be allowed to work outside the paint room since, according to

¹¹²*Wiens v. Inco Metals Company* (1988), 9 C.H.R.R. D/4795 (O.H.R.B.I.D.).

¹¹³*Jenner v. Pointe West Development Corp.* (1993), 21 C.H.R.R. D/336 (O.H.R.B.I.D.)

¹¹⁴*United Nurses of Alberta, Local 115 v. Calgary Health Authority* [2004] A.J. No. 8, 2004 ABCA 7.

her doctor, the solvents could have a harmful effect on the fetus. The employer decided that the employee should take a leave of absence without pay until after the delivery, on the grounds that there might be harmful paint fumes in other parts of the factory as well. The Human Rights Board of Inquiry found that there was no objective basis for the concern about paint fumes outside the paint room area. Continued employment in the packing areas did not present an undue risk to the employee or the fetus. The employer could have accommodated the employee. Even if it had good reason to be concerned about air quality in the packing area, it could have provided a respirator for the employee. Moreover, the employee might have been given other work farther away from the paint room¹¹⁵.

- An employee was working as a customs inspector at Pearson International Airport in Toronto. She became pregnant and was advised by her doctor that her condition was serious and that she could continue to work but should work only straight days with weekends off for the remainder of her pregnancy. The Canadian Human Rights Tribunal found that she should have been accommodated immediately. Instead, she had to wait more than three months before being transferred to day shifts¹¹⁶.
- Pregnant employees working as police officers filed medical reports indicating that they should be relieved from responsibilities that would put them or their unborn children at risk. The employees targeted a number of other positions that they felt would be appropriate as alternative assignments. A tribunal found that there were at least three full-time first-class assignments available that the grievors could have assumed temporarily while the incumbents took over their patrols. The force could accommodate without undue hardship¹¹⁷.

The following are examples of accommodation based on family responsibilities:

- An employee, after her child was born, found that she could not find a babysitter to look after her child overnight. Her husband was a police officer who was also required to work shifts and could not regularly adjust his shift work to fit in with hers. The employee requested that she be accommodated because of her family status by being allowed to work straight day shifts. When this was denied, she requested permission to go on an unpaid care and nurturing leave allowed for in the collective agreement. The tribunal notes the obvious dilemma facing the modern family where present socioeconomic trends find both parents in the work environment, often with different rules and requirements. More often than not, we find the female parent in the position where she is required to strike the balance between family needs and employment requirements. Family status means a parent's right and duty to strike the balance coupled with a duty on the part of an employer to facilitate and

¹¹⁵*Heincke v. Kenneth Brownell* (1990), 14 C.H.R.R. D/68 (O.H.R.B.I.D.) upheld by the Ontario Divisional Court *Emrick Plastics Division v. Ontario Human Rights Commission* (1992), 16 C.H.R.R. D/300.

¹¹⁶*Brown v. Canadian Human Rights Commission* (1993), 19 C.H.R.R. D/39 (Canadian Human Rights Tribunal).

¹¹⁷*Re Orangeville Police Services Board and Orangeville Police Association* (1994), 40 L.A.C. (4th) 269 (Ont.; R. Ellis, Q.C.). See also *Lord v. Haldimand-Norfolk Police Services Board* (1995), 23 C.H.R.R. D/500 (O.H.R.B.I.D.).

accommodate that balance. To consider any lesser approach to the problems facing the modern family within the employment environment is to render meaningless the concept of family status as a ground of discrimination¹¹⁸.

Some emerging case law has held that while the ground of 'family status' offers protection for persons with family care obligations, not absolutely all family responsibilities will be subject to a duty to accommodate. The determination of exactly which care obligations will be protected and which will not is a determination that will often depend on the specific facts of the case.

- The complainant, a new mother, had difficulty securing a day care placement in her preferred regulated day care centre before the completion of her approved leave from work. Although the employer offered her another two weeks of leave, it would be months before she could get a placement at the daycare of her choice. *It is reasonable for an employer to expect an employee to return to work at the end of a leave, and to expect the employee to do what is necessary to ensure return.* In this case, the complainant steadfastly refused to take any alternate steps or change her plans to seek an alternative daycare. Although she is free to choose the daycare of her choice, it does not follow that she has a right to be accommodated simply on the basis of her assessment of what is best for her child.¹¹⁹
- The British Columbia Court of Appeal case confirmed that the ground of 'family status' is broader than simply the fact of being in a parent and child relationship *per se*, but also ruled that the ground does not necessarily encompass all of the everyday obligations of care in such a relationship. The appropriate determination of what falls under 'family status' is somewhere between these two extremes. Specifically, the court noted that a prima facie case of discrimination is present where a requirement or standard is imposed that results "in a serious interference with a substantial parental or other family duty or obligation of the employee." The court stated that the determination of whether a family duty meets this standard will vary from case to case, but noted that on the facts of that particular case, the employer had a duty to accommodate the parent whose child had a major psychiatric disorder that required the mother's attendance during after school hours.¹²⁰

Best Practices: Gender or Family Status Accommodation

Best practice models usually deal with family responsibilities of women employees including pregnancy, nursing mothers, and child care. Women disproportionately bear the responsibility of child rearing and employers should provide accommodations for individuals who have family responsibilities. Such accommodation usually takes the form of flexible scheduling, leaves of absence and daycare services.

¹¹⁸ *Brown, supra* note 1160.

¹¹⁹ *Wight v. Ontario (Office of the Legislative Assembly)* [1998] O.H.R.B.I.D. No. 13.

¹²⁰ *Health Services Assn. Of British Columbia v. Campbell River and North Island Transition Society* [2004] BCJ No. 922, 2004 BCCA 260.

Flexible Work Arrangements

Flexible work arrangements refer to scheduling options which vary from the standard office hours expected in the organization. These include a rearrangement of full-time hours by providing some flexibility, offering compressed work weeks where an employee works more hours per day in order to accumulate additional days off, a reduced work schedule and job sharing.

Employer Sponsored Services

Employers sometime provide services that assist individuals with family responsibilities. Some of those services are recognized as best practices, particularly when the employer absorbs some or all of the costs associated with providing those services. Such services can include offering on-site child care, being proactive in providing medical care for sick children, offering employee assistance programs to find child care workers, and contributing to the overall costs of adoption.

Organizational Best Practice Models in Gender or Family Status Accommodations

Listed below are organizations which demonstrate extraordinary efforts in providing gender accommodations for family responsibilities and are therefore recognized as best practice models. Please note that all of the organizations listed provide paid leaves of absence for dependent care, compressed workweeks, flexible scheduling arrangements and paid or unpaid time off for maternity leave. These are not listed in the individual tables for reasons of redundancy.

Organization	Best Practice Initiatives
Bureau of National Affairs Inc.	<ul style="list-style-type: none"> • The BNA Guild & Family Committee keeps employees abreast of work and family opportunities such as subsidized emergency back-up child care at a nearby daycare centre. • Provides priority placement at nearby childcare centres. • Contributes \$8,000 to the operation of the daycare centre and also half of the cost of care per child used by their employees. • Contributes up to \$2,000 in adoption expenses. • Provides up to \$600 a year for transportation.
IBM	<ul style="list-style-type: none"> • Individual Work Schedules Program allows employees to begin the day earlier or later, providing a four-hour window of flexibility.
Pacific Telesis	<ul style="list-style-type: none"> • Flexible work options, approximately 18% of managers telecommute 1 or 2 days a week. • Provides free of charge prenatal care, medical consumer information, family care and other health related services.
Price Waterhouse LLP	<ul style="list-style-type: none"> • Provides in-home emergency childcare services. • Adoption assistance reimbursement of up to \$3,000
Rouse Company	<ul style="list-style-type: none"> • Adoption reimbursement of \$4,500 • World Learning Scholarships provide scholarships to

	<ul style="list-style-type: none"> employees= children to spend a summer abroad Offers child care pre-tax spending accounts
Wisconsin Electric Power Company	<ul style="list-style-type: none"> Sick Child Care Plan is a subsidized program for children to be cared for at sick child care centres Wellness Benefits offers free baby care and routine physicals
AETNA inc	<ul style="list-style-type: none"> Employees may borrow up to \$25,000 for tuition for children.
PPG Industries	<ul style="list-style-type: none"> Provides up to 12 weeks of continuing income for leave related to pregnancy and recovery The Get Well Room allows employees to bring in mildly ill children to be cared for by health care professionals.

UNDUE HARDSHIP

The Code and the Human Rights Commission's Guidelines

The *Code* states that an employer or service provider has a duty to accommodate to the extent of *undue hardship*. Undue hardship on the employer will be assessed by *considering the cost, outside sources of funding, if any, and health and safety requirements*.¹²¹

The burden of proving undue hardship lies with the person responsible for providing the accommodation.

The *Code* specifically sets out three considerations. Several factors are therefore excluded from considerations that are frequently raised by organizations. These are business inconvenience¹²², employee morale¹²³, customer preference¹²⁴, and collective agreements or contracts¹²⁵.

¹²¹ Section 11 (2) of the *Code* for constructive discrimination and section 17(2) for accommodation for persons with disability.

¹²² The Ontario Human Rights Commission is of the view that:

"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.

See *Guidelines*, *supra* note 31 at 28.

¹²³ The Ontario Human Rights Commission is of the view that:

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 [...] However, it is not acceptable to allow discriminatory attitudes to fester into workplace hostilities that poison the environment.

Although "cost", "outside sources of funding" and "health and safety requirements" are not defined in the *Code*, the Human Rights Commission has interpreted those terms.

"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 law firm], or so significant that they would substantially affect its viability ¹²⁶.

Organizations should make use of outside resources, such as funds available to an individual requesting an accommodation, funds that would assist employers and service providers defray the cost of accommodation or funding programs to improve accessibility, in order to meet the duty to accommodate. Organizations must demonstrate that they have made use of outside resources before claiming undue hardship.

Undue hardship may also exist where an accommodation creates a potential conflict with a "health or safety" requirement. The health or safety requirement may be contained in a law or regulation, or it may be a rule, practice or procedure. The Human Rights Commission suggests that:

See *Guidelines*, *supra* note 31 at 28.

¹²⁴ Third-party preference does not constitute a justification for discriminatory acts. (See *Guidelines*, *supra* note 31 at 28).

¹²⁵ Collective agreements or contractual arrangements cannot act as a bar to providing accommodation. (See *Guidelines*, *supra* note 31 at 28).

¹²⁶ Taken from *Guidelines*, *supra* note 31 at 30.

Guidelines were initially produced by the Human Rights Commission in 1989 after the ground of disability was included in the *Human Rights Code* in 1982. In April 1999, the Commission undertook consultations with stakeholders to review the *Guidelines for Assessing Accommodation Requirements for Persons with Disabilities*. In November 2000, the Commission adopted its new policy document (released on March 22, 2001) which reiterates and explains the Commission's interpretation of the concept of "undue hardship".

The 1989 guidelines and the *Guidelines* are influential on adjudicators and have been adopted by the Ontario Workers' Compensation Board and by the Ontario Workers' Compensation Appeals Tribunal.

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 [. . .] 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 [. . .] 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 disabilities¹²⁷.

To demonstrate undue hardship, an organization must present evidence showing that the financial cost¹²⁸ of the accommodation (even with outside sources of funding) or health and safety risks¹²⁹

¹²⁷ *Guidelines, supra* note 31 at 34.

¹²⁸ The Ontario Human Rights Commission suggests that financial costs of the accommodation to be considered in deciding whether there is undue hardship are:

- capital and operating costs;
- the cost of additional staff time, beyond what can be accomplished through restructuring existing resources and job descriptions, in order to provide appropriate assistance to the person with a disability; and
- any other quantifiable and demonstrably related costs.

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

- the ability of the organization to recover the costs of accommodation in the normal course of business;
- 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 organization to distribute the costs of accommodation throughout the whole operation;
- the ability of the organization to amortize or depreciate capital costs associated with the accommodation according to generally accepted accounting principles; and
- the ability of the organization 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, an improvement in productivity, efficiency or effectiveness, any increase in the resale value of property, where it is reasonably foreseeable that the property might be sold and any increase in clientele, potential labour pool.

See *Guidelines, supra* note 31 at 31.

¹²⁹ The Ontario Human Rights Commission states that:

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 others. Where a health and safety requirement creates barriers 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 requirements is likely to result in a violation of the *Occupational Health and Safety Act*, the employer should generate alternative measures. The employer might be able to claim undue hardship after these measures were undertaken and a significant risk still remains.

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:

would create undue hardship. In that case it will provide details, in writing, of the cost of accommodation or the health and safety reasons that have lead her or him to conclude that there is undue hardship. The evidence required to prove undue hardship must be objective, real, direct, and, in the case of cost, quantifiable¹³⁰.

The Jurisprudence

Undue hardship is a relative concept. Accommodation may cause undue hardship to one organization but not to another. It is also possible that a method of accommodation which does not cause undue hardship to an organization now may cause undue hardship in the future. This may happen as circumstances change; for example, the number of persons requesting accommodation may increase significantly. Therefore, it is important to take into consideration all the relevant

-
- the significance, probability and seriousness of the risk;
 - the other types of risks that the person responsible for accommodation is assuming within the organization; and
 - 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 have first been made to reduce the risk will determine undue hardship.

In determining the seriousness of the risk, the following four factors will 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?

See *Guidelines*, *supra* note 31 at 34-37.

¹³⁰ The organization must present facts, figures, and scientific data or opinion to support a claim that the proposed accommodation in fact causes undue hardship. 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.

See *Guidelines*, *supra* note 31 at 30.

factors when attempting to determine when the standard of undue hardship is met.

Generally, arbitration cases have not demanded strict quantification of costs of accommodation. Many of the cases turn on the fact that the employer has not yet adequately considered forms of accommodation¹³¹.

The following jurisprudence has interpreted the terms "undue hardship".

1. General Rule

The following case law have outlined factors relevant when assessing undue hardship. It is noteworthy, however, that the case law does not interpret the Ontario *Human Rights Code's* definition of undue hardship:

- The Supreme Court of Canada states in *Alt. (HRC) v. Central Alberta Dairy Pool*¹³² that it is not necessary to provide a comprehensive definition of what constitutes undue hardship but it may be helpful to *list some of the factors* that may be relevant to such an appraisal: financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The list of factors is not exhaustive. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. This list is not exhaustive and the results which will be obtained from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.
- In *Re AirBC Ltd. and C.A.L.D.A.*¹³³, arbitrator McPhillips reviewed Canadian judicial and adjudicative authority and identified the following factors as relevant to the determination of undue hardship:
 - (1) interchangeability of the workforce and facilities;
 - (2) whether the employee's job itself exacerbates the disability;
 - (3) the extent of the disruption of a collective agreement;
 - (4) the effect on the rights of other employees;
 - (5) the effect on the morale of other employees;
 - (6) costs to the employer of the proposed accommodation including impact on efficiency, wage increases and other direct financial costs to be incurred (e.g. renovations), and
 - (7) the impact on the safety of the individual, other employees or the general public.

¹³¹ See section regarding Accommodation for persons with disability.

¹³² [1990] 2 S.C.R. 489.

¹³³ (1996), 50 L.A.C. (4th) 93 (Fed.; D.C. McPhillips).

2. Cost: Inconvenience or Interference in the Operation of the Business

Case law has described the concept of inconvenience or interference in the operation of a business:

- The duty to accommodate short of undue hardship imposes a duty on employers to take substantial or meaningful steps to accommodate the requirements of the complainant. Each case is unique. The term "undue" hardship indicates that there is some hardship which is due, and it is only hardship which goes beyond this minimum that can be relied upon by an employer as a defense. One relevant factor is whether the accommodation would cause "undue interference in the operation of the employer's business". For example, if the employer can prove that the requested accommodation caused, or could reasonably be expected to cause, great discontent among the other workers, that would be relevant. However, care must be taken to ensure that this discontent is not the result of discriminatory or uninformed attitudes on the part of these employees¹³⁴.
- Although any inconvenience to other employees is not sufficient to establish that there is undue hardship, substantial effects on other employees cannot be ignored in determining the issue¹³⁵. In a case where a unionized employee, if transferred into another bargaining unit with all the seniority accumulated from her original bargaining unit, would adversely affect someone's job security, it would impose undue hardship upon the union, and therefore, the employer was not required to accommodate her.
- In a case of extensive absenteeism, the tribunal did not distinguish between absences which occurred before an employee's disability is known to management and those occurring after the employer became aware of the problem. The grievor's poor attendance resulted in anger and frustration on the part of other members of the team. The negative impact of the absenteeism on the morale of other nurses is a factor to be considered in deciding whether accommodation has reached the point of undue hardship. Also to be considered along with the cost of accommodative measures to date is the additional cost of accommodation if the grievor were to be reinstated. One aspect of future accommodation is the burden which the employer would bear if a relapse occurred. The other element is the cost of monitoring the grievor's compliance with conditions of reinstatement. The cumulative burden of these forms of accommodation past and future constituted undue hardship¹³⁶.
- The threshold of undue hardship is crossed if the employer is required to maintain an employee with a disability in a position that is not of itself a useful and productive job in the context of the employer's operation¹³⁷.

¹³⁴Followed in *Re Ontario and O.P.S.E.U.* (1991), 21 L.A.C. (4th) 129 (Ont. Grievance Settlement Board; W. Kaplan, D. Klym, C. Linton).

¹³⁵ *Re Greater Niagara General Hospital and S.E.I.U., Loc. 204* (1995), 47 L.A.C. (4th) 366 (Ont.; G. Brent, R. Drew, A.M. Vereshagin).

¹³⁶ *Re Ottawa Civic Hospital and Ontario Nurses= Association, supra* note 197.

¹³⁷ *Re Hamilton Civic Hospitals and Canadian Union of Public Employees, supra* note 1050.

- An employee was hired as a Systems Operator by OHIP. He had in the past experienced major depressive episodes. During his employment, he suffered from depression. The employee received a negative performance appraisal and was rotated to a different work area to be appraised by another supervisor before his probationary period was over. At the end of two months, his employment was terminated because of unsatisfactory performance. The Human Rights Board of Inquiry found that there was no accommodation which could have assisted the employee. The Human Rights Board of Inquiry rejected the Commission's argument that the employee should be accommodated by having his probationary period extended so as to ensure that the employee was assessed on the basis of 12 months of work when he was not experiencing depression. The Human Rights Board of Inquiry states: I find exaggerated the suggestion the employer must show some massive disruption of the workplace in order to establish undue hardship¹³⁸.

3. Health Care and Patient Safety

Patient safety is a factor to consider when assessing undue hardship in health care cases:

- In a health care setting, adjustments that clearly jeopardize patient safety will constitute undue hardship¹³⁹.
- A registered nursing assistant is an insulin-dependent diabetic and has had hypoglycemic episodes at work. When hypoglycemic, the grievor becomes pale, speaks with a slur and cannot remember what she has just finished doing. The grievor was not fit to carry out her duties, especially dispensing medication to elderly patients. In considering whether there is undue hardship, both monetary cost and risk to others are to be considered. The question was: could the grievor be employed as a registered nursing assistant, in the form that position currently takes, without imposing undue hardship? The tribunal found that the grievor would pose an unacceptable risk to others in her role in dispensing medication without close supervision. The alternative proposed was to allow the grievor to work the midnight shift. This would represent some cost to the employer, such as the risk associated with dispensing medication (but she could obtain permission from the RN on each occasion so the risk to residents would be insignificant) and the fact that persons who work the midnight shift are more prone to sickness with resulting cost to the employer. These were seen as minimal and not representing undue hardship¹⁴⁰.

4. Religion

Undue hardship has been considered in cases of religious belief:

- A board stated that balancing "undue hardship" against the importance of freedom of religion

¹³⁸ *Bonner, supra* note 25.

¹³⁹ *Re Community Nursing Home-Port Hope and United Food & Commercial Workers International Union, Local 175 & 633* (1996), 60 L.A.C. (4th) 35 (Ont.; M.R. Gorsky).

¹⁴⁰ *Re Marianhill and Canadian Union of Public Employees, Local 2764* (1990), 10 L.A.C. (4th) 201 (Ont.; R.M. Brown).

is a difficult equation. The *Concise Oxford Dictionary* defines "hardship" as "severe suffering or privation" and "undue" as "excessive, disproportionate." Although the *Code* does not require that any individual or group accommodate others to the point of undue hardship, severe suffering, or disproportionate privation, it does conceive *of inconvenience, and some degree of disruption and expense*. Insofar as we want to make space within our communities for the comfortable co-existence of those who differ by religion, sex, sexual orientation, race, disability and family grouping, there will be commensurate costs to be borne by all ¹⁴¹.

Phasing In or Reserve Fund

The *Guidelines* suggest that, when there is undue hardship, an organization may consider phasing in, the accommodation creating a reserve fund to provide for accommodation. The *Guidelines* provide:

Accommodation is a matter of degree, rather than an all-or-nothing proposition. Different ways of accommodating the needs of persons seeking accommodation can be drawn along a continuum from those means which are most respectful of privacy, autonomy, integration and other human values, to those which are least respectful of those values.¹⁴²

There is also a continuum with respect to how the accommodation may be accomplished. At one end of this continuum would be full accommodation (i.e., that which would most respect the person's dignity) that could be done immediately. Next would be phased-in full accommodation¹⁴³, followed by full accommodation accomplished through a reserve fund¹⁴⁴. Alternative accommodation (i.e., that which would be less respectful of the person's dignity) that could be accomplished immediately would be next on the continuum, followed by phased-in and reserve fund alternative accommodations, respectively. Interim accommodation, which is most respectful of dignity, could be placed anywhere on the continuum in addition to alternatives to immediate, full accommodation.

In determining reasonable accommodation, the person considering the request, the

¹⁴¹ *Janssen, supra* note 165.

¹⁴² Perhaps the most common example of an accommodation which demonstrates little respect for the dignity of a person with a disability, is a wheelchair entrance over the loading dock or through the garbage room.

¹⁴³ An accommodation may be phased in over an extended time period. It may still be possible to make interim accommodation for an individual. If the short-term and long-term accommodation can be accomplished without undue hardship, both accommodations may be required. (See *Guidelines, supra* note 31 at 39-40)

¹⁴⁴ A law firm could establish a reserve fund into which payments are to be made under specified conditions. One of the conditions should be that the reserve fund is to be used only to pay for accommodation costs in future. Other conditions related to timing, amounts of expenditures, natures of the accommodation, etc., could be included in the settlement agreement. This is similar to phasing in an accommodation over a period of time, as it is anticipated that the accommodation would gradually be accomplished by expenditures out of the reserve fund or would eventually be accomplished once enough funds had been set aside.

A reserve fund should be used in circumstances where it would create undue hardship for the law firm to accomplish the accommodation immediately.

Accommodation Committee and the Managing Partner will consider the full range of options and balance the respective interests.

BEST PRACTICE MODELS OF MANAGEMENT COMMITMENT AND ACCOUNTABILITY FOR EMPLOYMENT EQUITY POLICIES

When adopting accommodation policies, it is important to discuss management commitment and accountability, and the organizational best practices which support such endeavours. Statements of commitment towards employment equity set forth by management provide the necessary foundations to implement and maintain goal development and strategies. Such statements affirm the notion that employment equity is an integral and necessary element of the workplace, and that discrimination will not be tolerated in any form.

In order to provide an organization wide commitment to employment equity, reinforcement should be presented from top-level management. This can be evidenced through management directives, providing employment equity training and seminars, goal setting and the creation and implementation of policies. Policies should be made readily available and accessible through a variety of means such as bulletin board postings, internet/intranet technologies and employee handbooks. The table below demonstrates organizational best practice models, consisting of companies who have shown that their commitment strategies are a crucial driving force.

Organization	Best Practice Initiatives
Dial Corp.	<ul style="list-style-type: none"> • All supervisors are required to attend training on how to clearly communicate leadership responsibility. • All directors receive one-on-one training from the Diversity Director on goal setting and maintenance. • Organization-wide annual self-audit on implementation of policies.
The Federal National Mortgage Association	<ul style="list-style-type: none"> • President and CEO head the Diversity Advisory Council comprised of senior managers to identify issues and develop strategies.
PPG	<ul style="list-style-type: none"> • Designed a video featuring the CEO, President, Senior Vice President of HR and other employees to explain the importance of employment equity, diversity and affirmative action. • The CEO has asked all senior managers to present individual annual reports on their diversity issues and

	<p>goals. These reports are then reviewed by the CEO.</p> <ul style="list-style-type: none"> •
Organization	Best Practice Initiatives
Proctor and Gamble	<ul style="list-style-type: none"> • Equity and diversity are mentioned in all of the organization=s brochures and promotional material. • The CEO speaks of the organization=s employment equity policies to corporate and non-corporate groups. • The Senior Vice President personally oversees annual reviews of equity policies alongside the VP of Diversity. • Diversity is incorporated in all performance reviews at all levels.
Erie Insurance Company	<ul style="list-style-type: none"> • Mandatory training every 2 years for all management and non-management employees.
Price Waterhouse	<ul style="list-style-type: none"> • A recognition and rewards program was created to reinforce and reward those who assist in the advancement of employment equity.