Policy on ableism and discrimination based on disability

Ontario
Human Rights Commission
Commission ontarienne des droits de la personne

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Executive summary

In Canada and across the world, people with disabilities have long experienced abuse, neglect, exclusion, marginalization and discrimination. This negative treatment has included restrictive immigration policies preventing people with disabilities from entering the country; involuntary sterilization to prevent people with disabilities from having children; inappropriate and harmful institutionalization, seclusion and restraint; and major barriers to accessing educational opportunities, employment opportunities and fairly paid work.

This unfortunate part of Canada's history has continuing effects today. People with disabilities describe ongoing negative experiences as a result of societal structures and negative attitudes premised upon ableism. "Ableism" refers to attitudes in society that devalue and limit the potential of persons with disabilities. The Law Commission of Ontario has stated:

> [Ableism] may be defined as a belief system, analogous to racism, sexism or ageism, that sees persons with disabilities as being less worthy of respect and consideration, less able to contribute and participate, or of less inherent value than others. Ableism may be conscious or unconscious, and may be embedded in institutions, systems or the broader culture of a society. It can limit the opportunities of persons with disabilities and reduce their inclusion in the life of their communities.

Ableist attitudes are often based on the view that disability is an "anomaly to normalcy," rather than an inherent and expected variation in the human condition. Ableism may also be expressed in ongoing paternalistic and patronizing behaviour toward people with disabilities.

While there have been some significant gains for people with disabilities in recent years, serious barriers to equality continue to exist throughout society. Statistics Canada reports that Ontarians with disabilities continue to have lower educational achievement levels, a higher unemployment rate, are more likely to have low income status, and are less likely to live in adequate, affordable housing than people without disabilities. It is clear that people with disabilities continue to experience difficulties accessing employment, housing and various services throughout Ontario. "Disability" continues to be the most frequently cited ground of discrimination under the *Code* in human rights claims made to the Human Rights Tribunal of Ontario (HRTO).

A person's experience may be complicated further when discrimination based on a disability intersects with discrimination based on other *Code* grounds, such as race, sex, sexual orientation, age or another type of disability, *etc*. People with disabilities are also more likely to have low incomes than people without disabilities, and many people live in chronic poverty.

The Ontario *Human Rights Code* (*Code)* protects people in Ontario with disabilities from discrimination and harassment under the ground of "disability." This protection extends to five "social areas":

- When **receiving goods, services and using facilities**. "Services" is a broad category and can include privately or publicly-owned or operated services including insurance, schools, restaurants, policing, health care, shopping malls, *etc*.
- In **housing**, including private rental housing, co-operative housing, social housing and supportive or assisted housing.
- When entering into **contracts** with others, including the offer, acceptance, price or even rejection of a contract.
- In **employment**, including full-time and part-time work, volunteer work, student internships, special employment programs, probationary employment, and temporary or contract work.
- When joining or belonging to a **union, professional association or other vocational association**. This applies to membership in trade unions and self-governing professions, including the terms and conditions of membership, *etc.*

People with disabilities are a diverse group, and experience disability, impairment and societal barriers in many different ways. Disabilities are often "invisible" and episodic, with people sometimes experiencing periods of wellness and periods of disability. All people with disabilities have the same rights to equal opportunities under the *Code*, whether their disabilities are visible or not.

Organizations and institutions operating in Ontario have a legal duty to take steps to prevent and respond to breaches of the *Code*. Employers, housing providers, service providers and other responsible parties must make sure they maintain accessible, inclusive, discrimination and harassment-free environments that respect human rights.

The Ontario Human Rights Commission (OHRC) is an independent statutory body whose mission is to promote, protect and advance human rights across the province as set out in the *Code*. To do this, the OHRC identifies and monitors systemic human rights trends, develops policies, provides public education, does research, conducts public interest inquiries, and uses its legal powers to pursue human rights remedies that are in the public interest.

The OHRC's policies reflect its interpretation of the *Code,* and set out standards, guidelines and best practice examples for how individuals, service providers, housing providers, employers and others should act to ensure equality for all Ontarians. The OHRC's *Policy on ableism and discrimination based on disability* provides practical guidance on the legal rights and responsibilities set out in the *Code* as they relate to the ground of disability. In particular, the policy addresses:

- a person's rights under the *Code*, particularly at work, in rental housing, and when receiving services
- the right to be free from reprisal ("payback") for exercising one's rights under the *Code*

- different forms of discrimination (*e.g.* direct, indirect, subtle, "adverse effect," harassment, poisoned environment, systemic discrimination)
- the need for organizations to design their environments inclusively, with the needs of people with disabilities in mind
- the principles of accommodation (respect for dignity, individualization, integration and full participation)
- how the duty to accommodate applies to people with disabilities
- duties and responsibilities in the accommodation process (*e.g.* the duty to inquire about accommodation needs, medical information to be provided, confidentiality)
- the considerations in assessing whether the test for undue hardship has been met (costs, outside sources of funding, health and safety considerations)
- other possible limits on the duty to accommodate
- organizations' responsibilities to prevent and eliminate discrimination, and how they can create environments that are inclusive and free from discrimination.

The ultimate responsibility for maintaining an environment free from discrimination and harassment rests with employers, housing providers, service providers and other responsible parties covered by the *Code*. It is not acceptable to choose to stay unaware of discrimination or harassment of a person with a disability, whether or not a human rights claim has been made.

The OHRC's *Policy on ableism and discrimination based on disability* is intended to provide clear, user-friendly guidance on how to assess, handle and resolve human rights matters related to disability. All of society benefits when people with disabilities are encouraged and empowered to take part at all levels.

1. Introduction

> It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions… This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw…[People with disabilities]… have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms…[1]

In Canada and across the world, people with disabilities have long-experienced abuse, neglect, exclusion, marginalization and discrimination. For example, from the late 1800s, Canadian immigration laws prohibited people who were perceived to have intellectual or developmental disabilities from entering the country. Up until 1967, when the *Immigration Act* was amended, people with disabilities continued to be in the "undesirable" class of potential immigrants to Canada.[2] And, despite changes to the federal legislation, there are ongoing barriers for people with disabilities who wish to immigrate to Canada.[3]

People with disabilities were also subjected to involuntary sterilization. In the late 1920s and early 1930s, Alberta and British Columbia introduced sexual sterilization legislation. Alberta sterilized over 2,800 people with mental health and physical disabilities from 1929 until the law was repealed in 1972, with several hundred sterilizations occurring from the 1960s until 1972, often without the knowledge or consent of people or their parents.[4]

People with disabilities have also experienced a long history of inappropriate and harmful institutionalization, seclusion and restraint. Although most Canadian provinces began a process of deinstitutionalization from the 1960s onward, many people with disabilities continue to struggle to find adequate and suitable living opportunities in the community, due to under-resourced supportive living options, a chronic shortage of spaces in group homes, or a failure to recognize their ability to live independently.[5]

While there have been some significant gains[6] for people with disabilities in recent years, the historical disadvantage experienced by people with disabilities continues to be felt today, and serious barriers to equality continue to exist throughout society. "Disability" continues to be the most frequently cited ground of discrimination under the Ontario *Human Rights Code*[7] (the *Code*) in human rights claims made to the Human Rights Tribunal of Ontario (HRTO).[8] Statistics Canada reports that Ontarians with disabilities continue to have lower educational achievement levels, a higher unemployment rate, are more likely to have low income status, and are less likely to live in adequate, affordable housing than people without disabilities.[9] It is clear that people with disabilities continue to experience difficulties accessing employment, housing and various services throughout Ontario. For example, many people with disabilities are denied employment opportunities, often due to negative assumptions about their skill

level and competence. Where they are employed, people with disabilities continue to struggle in many instances for their right to workplace accommodation of needs related to their disability. And there are many examples of people with disabilities being denied fair wages in the employment opportunities that are available to them.[10]

In 2001, the Ontario Human Rights Commission (the OHRC) published its *Policy and Guidelines on Disability and the Duty to Accommodate* (the 2001 *Disability Policy*). That policy detailed a rigorous standard for interpreting "undue hardship" under the *Code*; it set out three principles of accommodation: respect for dignity, individualized accommodation, and integration and full participation; and it outlined the duties and responsibilities of everyone involved in the accommodation process. It also broke new ground when it advanced the position that an employer's duty to accommodate included a responsibility to consider alternative work arrangements for people with disabilities.[11] The policy received the Government of Ontario's Amethyst Award in 2002 for excellence in public service. It has been cited and followed by many human rights legal decision-makers[12] and has guided countless employers, housing providers and service-providers across Ontario in their day-to-day operations.

Since the release of the 2001 *Disability Policy*, there have been many important developments in the area of disability law and studies. There have been several important legal decisions, including from the Supreme Court of Canada, with respect to the ground of disability and the duty to accommodate. These decisions have assisted the OHRC in its evolving understanding of equality for people with disabilities. The *Policy on ableism and discrimination based on disability* (2016) updates the OHRC's 2001 *Disability Policy* to take into account current social science research, case law, legislation and international human rights obligations. It looks at how disability and the duty to accommodate play out across all of the social areas covered by the *Code*, with a particular emphasis on employment, services and housing.[13]

This policy will help organizations:

- understand their rights and obligations under the *Code*
- design their facilities, policies and procedures inclusively
- respond to accommodation requests
- address complaints related to disability
- find further resources.

Statistics Canada's *2012 Canadian Survey on Disability* provides a recent profile of Canadians with disabilities, aged 15 years and older.[14] According to the survey, 14% of Canadians reported that they have a disability that limits them in their daily activities (approximately 3.8 million Canadians). In Ontario, the prevalence of disability is slightly higher than the national average at 15.4%.[15] The average age of disability onset is in the early 40s, and the prevalence of disability increases steadily with advancing age.[16]

The *Code* protects people from discrimination and harassment under the ground of "disability" in the "social areas" of employment, services, goods, facilities, housing, contracts and membership in trade and vocational associations. This means that people with disabilities have the right to equal treatment, which includes the right to accessible workplaces, schools, public transit, health and social services, restaurants, shops and housing, among other areas. The Preamble to the *Code* emphasizes the importance of creating a climate of understanding and mutual respect for the dignity and worth of each person, so that each person can contribute fully to the development and well-being of the community.

2. What is disability?

Defining disability is a complex, evolving matter. The term "disability" covers a broad range and degree of conditions. A disability may have been present at birth, caused by an accident, or developed over time. Section 10 of the *Code* defines "disability" as:

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

"Disability" should be interpreted in broad terms.[17] It includes both present and past conditions, as well as a subjective component, namely, one based on perception of disability.[18] It is the OHRC's position that anticipated disabilities are also covered by the *Code.*[19] This would apply where a person does not currently have a disability, but they are treated adversely because of a perception that they will eventually develop a disability, become a burden, pose a risk, and/or require accommodation.[20] The focus should always be on the current abilities of a person and the situation's current risks rather than on limitations or risks that may or may not arise in the future.[21]

Although sections 10(a) to (e) of the *Code* set out various types of conditions, it is clear that they are merely illustrative and not exhaustive. It is also a principle of human rights law that the *Code* be given a broad, purposive and contextual interpretation to advance the goal of eliminating discrimination.

A disability may be the result of combinations of impairments and environmental barriers, such as attitudinal barriers, inaccessible information, an inaccessible built environment or other barriers that affect people's full participation in society.

The United Nations' *Convention on the Rights of Persons with Disabilities* (*CRPD*) recognizes that "disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others."[22]

This approach, often called the "social approach" to disability, or the "social model" of disability[23], is also reflected in Supreme Court of Canada decisions. In a landmark human rights case, the Court used an equality-based framework of disability that took into account evolving biomedical, social and technological developments, and emphasized human dignity, respect and the right to equality. The Court made it clear that disability must be interpreted to include its subjective component, as discrimination may be based as much on perceptions, myths and stereotypes, as on the existence of actual functional limitations. The Court said:

> [A] "handicap" may be the result of a physical limitation, an ailment, a social construct, a perceived limitation, or a combination of all these factors. Indeed, it is the combined effect of all these circumstances that determines whether the individual has a "handicap" for the purposes of the *Charter.*[24]

The focus should be on the effects of the distinction, preference or exclusion experienced by the person. In another case,[25] the Supreme Court of Canada confirmed that "social handicapping," that is, society's response to a real or perceived disability, should be the focus of the discrimination analysis.

> **Example:** A human rights tribunal found that a person with multiple physical disabilities was discriminated against when she was denied a first-floor apartment that would have accommodated her. Her physical disability prevented her from cleaning and maintaining her apartment. Her landlord assumed that this was due to mental health issues and that the building was not appropriate for her because of her physical and perceived mental health issues. He thought that she should instead live in a long-term care home. The HRTO rejected this assumption and said that the landlord imposed a "socially constructed" disability on her.[26]

The social model of disability articulated by the Supreme Court of Canada has been followed in many appellate court[27] and HRTO decisions.[28]

Disabilities may be temporary,[29] sporadic or permanent.

> **Example:** In one case, the HRTO stated, "I…disagree with the assertion that in order to constitute a disability, the condition must have an aspect of permanence and persistence." In that case, the HRTO found that injuries resulting from a slip and fall that took almost three weeks to heal, and a miscarriage, both constituted disabilities within the meaning of the *Code.*[30]

In many cases, they may not be visible to the average onlooker. People's experience of disability may result from bodily or mental impairments, or from limitations arising from impairments that affect people's ability to function in certain areas of living.[31] However, people may not experience any limitations even when they have a medical diagnosis or experience impairment.[32]

Human rights decision-makers and organizations should consider how people with disabilities define their own experiences and related needs, as part of understanding someone's disability for the purposes of the *Code*.[33] At the same time, when determining if someone has had their rights violated under the *Code*, a human rights decision-maker may find it reasonable for an employer, service or housing provider to seek out objective information about the person's disability-related needs. This could include information setting out the person's needs and limitations from a third party, such as a medical professional.[34]

2.1 Ableism, negative attitudes, stereotypes and stigma

An "ableist" belief system often underlies negative attitudes, stereotypes and stigma toward people with disabilities. "Ableism" refers to attitudes in society that devalue and limit the potential of persons with disabilities. According to the Law Commission of Ontario:

> [Ableism] may be defined as a belief system, analogous to racism, sexism or ageism, that sees persons with disabilities as being less worthy of respect and consideration, less able to contribute and participate, or of less inherent value than others. Ableism may be conscious or unconscious, and may be embedded in institutions, systems or the broader culture of a society. It can limit the opportunities of persons with disabilities and reduce their inclusion in the life of their communities.[35]

Ableist attitudes are often premised on the view that disability is an "anomaly to normalcy," rather than an inherent and expected variation in the human condition.[36] Many in the disability rights movement have pointed out that people without disabilities are merely "temporarily able-bodied." As one author writes,

> …[E]veryone is subject to the gradually disabling process of aging. The fact that we will all become disabled if we live long enough is a reality many people who consider themselves able-bodied are reluctant to admit."[37]

The view that disability is an abnormality has been used to rationalize the exclusion, neglect, abuse and exploitation of people with disabilities in various different contexts. It may also inform paternalistic and patronizing behaviour toward people with disabilities.[38]

Discrimination against people with disabilities is often linked to prejudicial attitudes,[39] negative stereotyping,[40] and the overall stigma[41] surrounding disability. All of these concepts are interrelated. For example, stereotyping, prejudice and stigma can lead to discrimination. The stigma surrounding disability can also be an effect of discrimination, ignorance, stereotyping and prejudice.

In its own consultations with people with disabilities, the Law Commission of Ontario reported:

> …many participants talked about the suspicion and often contempt with which persons with disabilities are treated when seeking services and supports. Services which are designed to assist persons with disabilities in meeting their basic needs or improving their autonomy, independence and participation may in practice be implemented through an adversarial mindset, which assumes that those seeking services are attempting "to game" the system, or obtain benefits to which they are not entitled. This is particularly the case for persons with disabilities who are also poor.[42]

People with disabilities may also be stereotyped as "child-like" and unable to make decisions in their own best interests, or perceived to be a "burden" on society. Where stigma, negative attitudes and stereotyping result in discrimination, they will contravene the *Code.*

> **Example:** In one case, a human rights tribunal found that the respondents willfully and recklessly discriminated against a woman who was blind when they cancelled an apartment viewing without notifying her, later refused to let her enter the unit, and generally treated her rudely. The tribunal found that the respondents discouraged the woman from renting the apartment, after learning she was blind and had a guide dog, and told her the area was "unsafe" for her.[43]

Organizations have a legal obligation under the *Code* to not discriminate against people with disabilities, and to eliminate discrimination when it happens. These obligations apply in situations where discrimination is direct and the result of a person's internal stereotypes or prejudices. They also apply when discrimination is indirect and may exist within and across institutions because of laws, policies and unconscious practices.

Stigma, negative attitudes and stereotypes can lead to inaccurate assessments of people's personal characteristics. They may also lead institutions to develop policies, procedures and decision-making practices that exclude or marginalize people with disabilities.

> **Example:** After coming back from a disability-related leave, an employee returned to modified duties. Even though his doctor cleared him to go back to work full-time, his employer placed him in a lower, part-time position at a lower pay rate. He was eventually terminated from his employment. The HRTO found that the employer violated the *Code* when it decided to place the employee in a lower-paying position based on its belief about his ability to perform in the workplace, and continued to refuse to provide full-time work, even though full-time work was supported by his doctor. The employer relied on "non-expert opinion" and "stereotypes." It incorrectly relied on assumptions that the employee could not withstand the pressures of his job, and that his performance would be unreliable because of his past medical condition.[44]

Organizations must take steps to make sure that negative attitudes, stereotypes and stigma do not result in discriminatory behaviour toward or treatment of people with disabilities.

2.2 Non-evident disabilities

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

> **Example:** People who are deaf, deafened or hard of hearing are often misperceived as having mental health disabilities, even where this is not the case.[45]

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

> **Example:** A woman with breast cancer chose not to tell her employer of her condition until she was preparing to start treatment and required flexibility in her work schedule to attend medical appointments.

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

2.3 Mental health disabilities and addictions

Although mental health disability is a form of non-evident disability, it raises particular issues that merit independent consideration. Section 10 of the *Code* expressly includes mental health disabilities. The courts have confirmed that addictions to drugs or alcohol are protected by the *Code.*[46] People with mental health disabilities and addictions face a high degree of stigmatization and significant barriers. Stigmatization can foster a climate that exacerbates stress, and may trigger or worsen the person's condition. It may also mean that someone who has a problem and needs help may not seek it, for fear of being labelled.

The distinct and serious issues faced by people with mental health disabilities and addictions prompted the OHRC to hold a province-wide consultation specifically on discrimination based on mental health. In 2012, the OHRC published its findings in a consultation report entitled *Minds That Matter*.[47] The OHRC relied on these findings, as well as on developments in the law, international trends and social science research to inform its *Policy on preventing discrimination based on mental health disabilities and addictions* (*Mental Health Policy*), which was released in 2014.[48]

The OHRC's *Mental Health Policy* provides user-friendly guidance to organizations on how to define, assess, handle and resolve human rights issues related to mental health and addiction disabilities. It also addresses:

- different forms of discrimination based on mental health disabilities and addictions
- rights at work, in rental housing, and when receiving services
- organizations' responsibilities to prevent and eliminate discrimination
- how to create environments that are inclusive and free from discrimination
- how the duty to accommodate applies to people with mental health or addiction disabilities.

For information specifically related to discrimination based on mental health disabilities and addictions, please refer to the OHRC's *Mental Health Policy*.

2.4 Evolving legal definition of disability

Human rights law is constantly developing, and certain conditions, characteristics or experiences that are disputed as disabilities today may come to be commonly accepted as such due to changes in the law reflecting medical, social or ideological advancements.

Conditions that were questioned in the past have now been accepted as disabilities within the meaning of the *Code.* For example, when the OHRC published its 2001 *Disability Policy*, environmental sensitivities[49] were just beginning to be recognized as a human rights issue. In Ontario, the HRTO has held in at least one case that environmental sensitivities can be a disability within the meaning of the *Code.*

> **Example:** A woman with multiple chemical sensitivities who was living in a multi-unit apartment building was made ill by exposure to fumes given off by chemicals used in paints and varnishes at the building. As a result, she was prevented from accessing areas where the fumes were present, including her own bedroom. Presenting medical documentation from her doctor, the woman asked her housing provider to accommodate her by using less toxic materials and by granting her a temporary unit transfer, but it refused to do so. The HRTO confirmed that multiple chemical sensitivities are a disability under the *Code*, and found that the housing provider violated the *Code* by failing to provide accommodation.[50]

Over time, new disabilities may emerge that take time to be widely recognized and well-understood. For example, in recent years, there have been reports of an increase in food-related anaphylaxis.[51] In Ontario, *Sabrina's Law* came into effect in January 2006.[52] This legislation requires every school board in Ontario to establish and maintain an anaphylaxis policy. It also requires school principals to develop an individual plan for each student at risk of anaphylaxis.[53] Human rights case law has recognized that anaphylaxis is a disability under the *Code*.[54] Therefore, employers, housing providers and service providers (including education providers, daycares, *etc*.) have a legal responsibility to accommodate people with potentially life threatening allergies, as they would any other person with a disability, to the point of undue hardship.

> **Example:** A school board develops a comprehensive food allergy policy that includes procedures for training staff in dealing safely with food allergies, including how to recognize symptoms of anaphylaxis and respond appropriately to possible emergencies. Local schools are required to hold information sessions for parents and students to raise awareness about life-threatening food allergies and the importance of including all students in school activities, including students with anaphylaxis.

In some cases, the law is still not clear as to whether certain conditions are disabilities within the meaning of the *Code.* For example, historically, human rights decision-makers have found that obesity is not a disability under the *Code* unless it is caused by bodily injury, birth defect or illness.[55] More recently, however, the HRTO found that extreme obesity can be a disability under the *Code.*[56] In 2014, the European Court of Justice ruled that morbid obesity can be considered a disability under the Equal Treatment in Employment Directive if the employee is prevented from fully taking part in professional life because of his or her weight.[57]

It is important to note that even where human rights law has not recognized a specific condition as a disability, the *Code*'s protections will be engaged if a person is perceived to have a disability,[58] or perceived to have functional limitations as a result.[59]

Organizations with responsibilities under the *Code* should be aware that new and emerging disabilities may not yet be well-understood. In general, the meaning of disability should be interpreted broadly. It may be more challenging for a person with a less-recognized disability to have their disability verified by their family doctor, for example. It may be necessary for an employer, housing provider or service provider, *etc.* to consult with a specialist with expertise in the disability in question. The focus should always be on the needs and limitations of the person requesting the accommodation, rather than on a specific diagnosis.

> **Example:** An employee experiences many symptoms, including extreme fatigue, nausea and headaches that interfere with her ability to do her job. She attempts to seek clarification of her disability from a medical professional but is having difficulty finding someone with expertise to do this. While she waits to be seen by a medical specialist who can diagnose her, her employer accommodates her by relying on what the employee and her physiotherapist say she needs to do the essential duties of her job. Once the employee is being treated by a specialist, the employer asks for further information from that person about the employee's limitations and need for accommodation, without asking for her diagnosis.

3. Legal framework

3.1 Ontario *Human Rights Code*

3.1.1 Protections

Under the *Code*, people with disabilities are protected from discrimination and harassment based on disability in five "social areas":

- When receiving **goods, services and using facilities** (section 1). "Services" is a broad category and can include privately or publicly-owned or operated services such as insurance, schools, restaurants, policing, health care, shopping malls, *etc*. Harassment based on disability is a form of discrimination, and is therefore also prohibited in services.[60]
- In **housing** (section 2). This includes private rental housing, co-operative housing, social housing, supportive or assisted housing, and condos.
- When entering into a **contract** with others. This includes the offer, acceptance, price or even rejecting a contract (section 3)
- In **employment** (section 5). Employment includes full-time and part-time work, volunteer work, student internships, special employment programs, probationary employment,[61] and temporary or contract work.

- When joining or belonging to a **union, professional association or other vocational association**. This applies to membership in trade unions and self-governing professions, including the terms and conditions of membership, *etc.* (section 6).

Section 9 of the *Code* prohibits both direct and indirect discrimination. Section 11 states that discrimination includes constructive or adverse effect discrimination, where a requirement, policy, standard, qualification, rule or factor that appears neutral excludes or disadvantages a group protected under the *Code*.[62]

People with disabilities are also covered by the *Code* under section 8 if they experience reprisal or are threatened with reprisal for trying to exercise their human rights.[63]

People are also protected from discrimination based on their association with someone with a disability (Section 12). This could apply to friends, family or others – for example, someone advocating on behalf of someone with a disability.[64]

A fundamental aspect of the *Code* is that it has primacy over all other provincial laws in Ontario, unless the law specifically states that it operates notwithstanding the *Code*. This means that where a law conflicts with the *Code*, the *Code* will prevail, unless the law says otherwise (section 47).[65]

3.1.2 Defences and exceptions

The *Code* includes specific defences and exceptions that allow behaviour that would otherwise be discriminatory. An organization that wishes to rely on these defences and exceptions must show it meets all of the requirements of the relevant section.

Where discrimination results from requirements, qualifications or factors that may appear neutral, but that have an adverse effect on people identified by *Code* grounds, section 11 allows the person or organization responsible to show that the requirement, qualification or factor is reasonable and *bona fide.* They must also show that the needs of the person or group affected cannot be accommodated without undue hardship.[66]

Section 14 of the *Code* protects "special programs" that are designed to address the historical disadvantage experienced by people identified by the *Code*. As a result, it is likely not discriminatory to implement programs designed specifically to assist people with disabilities, as long as an organization can show that the program is:

- designed to relieve hardship or economic disadvantage
- designed to help the disadvantaged group to achieve or try to achieve equal opportunity, or
- likely to help eliminate discrimination.

Section 17 sets out the duty to accommodate people with disabilities. It is not discriminatory to refuse a service, housing or a job because the person is incapable of fulfilling the essential requirements. However, a person will only be considered incapable if their disability-related needs cannot be accommodated without undue hardship.

Under section 18 of the *Code*, organizations such as charities, schools, social clubs, sororities or fraternities that want to limit their right of membership and involvement to people with disabilities can do this on the condition that they serve mostly people from this group.

> **Example:** Clients of a community centre set up a club that provides social, networking and education opportunities for youth with disabilities. They may restrict their membership to people of this group under section 18 of the *Code*.

Section 24(1)(a) states that a religious, philanthropic, educational, fraternal or social institution or organization that mostly serves the interests of people identified by certain *Code* grounds can give hiring preference to people from that group, as long as the qualification is reasonable and legitimate (*bona fide*), given the nature of the employment.

The *Code* also prohibits insurance services and employment benefit plans that discriminate based on disability, unless they meet the exceptions set out in sections 22 and 25.[67]

3.2 *Canadian Charter of Rights and Freedoms*

The *Canadian Charter of Rights and Freedoms* (*Charter*) guarantees people's civil, political and equality rights in the policies, practices and legislation of all levels of government. Certain rights may apply particularly to people with disabilities in certain circumstances, due to legislation and policies that focus on these groups. Human rights legislation in Canada is subject to and must be considered in light of the *Charter*.[68]

Section 15 guarantees the right to equal protection under the law and equal benefit of the law, without discrimination based on disability, among other grounds.

> **Example:** A woman with a vision disability was unable to access various federal government websites using screen reading technology, and was therefore unable to apply for jobs and access government information. The Federal Court of Appeal ruled that the inaccessibility of these websites violated the woman's equality rights under section 15 of the *Canadian Charter of Rights and Freedoms.*[69]

The equality rights guarantee in section 15 of the *Charter* is similar to the purpose of the *Code*. Governments must not infringe *Charter* rights unless violations can be justified under section 1, which considers whether the *Charter* violation is reasonable in the circumstances.

3.3 *Accessibility for Ontarians with Disabilities Act*

The *Accessibility for Ontarians with Disabilities Act, 2005* (*AODA*)[70] aims to address the right to equal opportunity and inclusion for people with disabilities. The *AODA*'s goal is to make Ontario fully accessible by 2025. It introduces a series of standards (customer service, transportation, built environment, employment and information and communications) that public and private organizations must implement within certain timelines.

The *AODA* is an important piece of legislation for improving accessibility in the lives of people with disabilities. It complements the Ontario *Human Rights Code*, which has primacy over the *AODA*. The development and implementation of standards under the *AODA* must have regard for the *Code*, related human rights principles, and case law.[71] Compliance with the *AODA* does not necessarily mean compliance with the *Code*. Responsible organizations must follow both. For example, even where an organization meets all of its obligations under the *AODA*, it will still be responsible for making sure that discrimination and harassment based on disability do not take place in its operations, that it responds to individual accommodation requests, *etc.*

3.4 *Convention on the Rights of Persons with Disabilities*

In 2010, Canada ratified the United Nations' *Convention on the Rights of Persons with Disabilities*, (*CRPD*), an international treaty designed to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."[72]

The *CRPD* moves away from considering people with disabilities as recipients of charity towards being holders of rights. It emphasizes non-discrimination, legal equality and inclusion. Countries that have ratified or signed their acceptance to the *CRPD* are known as "States Parties."

International treaties and conventions are not part of Canadian law unless they have been implemented through legislation.[73] However, the Supreme Court of Canada has stated that international law helps give meaning and context to Canadian law. The Court said that domestic law (which includes the *Code* and the *Charter*) should be interpreted to be consistent with Canada's international commitments.[74]

The *CRPD* is an important human rights tool that puts positive obligations on Canada to make sure that people with disabilities have equal opportunity in all areas of life. To meet the obligations under the *CRPD,* Canada and Ontario should make sure that adequate and appropriate community supports and accommodations are in place to allow for equal opportunities for people with disabilities, and should evaluate legislation, standards, programs and practices to make sure rights are respected.

The *CRPD* includes rights to:

- equality and non-discrimination (Article 5)
- accessibility (Article 9)
- equal recognition before the law (Article 12)
- access to justice (Article 13)
- liberty and security of the person (Article 14)
- the protection of the integrity of the person (Article 17)
- live independently and be included in the community (Article 19)
- accessible information (Article 21)
- privacy (Article 22)
- education (Article 24)
- health, habilitation and rehabilitation (Articles 25 and 26)
- work and employment (Article 27)
- an adequate standard of living and social protection (Article 28)
- participation in political and public life (Article 29)
- participation in cultural life, recreation, leisure and sport (Article 30).

Canada has not signed the Optional Protocol of the *CRPD*, which means that people cannot complain directly to the UN Committee on the Rights of Persons with Disabilities. However, there are reporting requirements for the *CRPD*. The Canadian Association of Statutory Human Rights Agencies (CASHRA) has called on all levels of government to fulfill their obligations.[75] This includes consulting and involving people with disabilities and representative organizations to monitor the *CRPD*'s implementation, identifying initiatives and developing plans to show how they will address *CRPD* rights and obligations.

4. Intersecting grounds

Discrimination may be unique or distinct when it occurs based on two or more *Code* grounds. Such discrimination is said to be "intersectional." The concept of intersectional discrimination recognizes that people's lives involve multiple interrelated identities, and that marginalization and exclusion based on *Code* grounds may exist because of how these identities intersect.

The *CRPD* recognizes "the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status."[76] It also recognizes that "women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation."[77]

> **Example:** Women with disabilities experience unique forms of discrimination. They may be singled out as targets for sexual harassment and sexual violence due to a perception that they are more vulnerable and unable to protect

> themselves.[78] They may also experience discrimination related to their right to reproductive freedom.[79] And they are more likely to be under-employed, unemployed and live in poverty.[80]

Discrimination based on a disability could intersect with discrimination based on other *Code* grounds, including:

- race, colour or ethnic background
- creed
- ancestry (including Indigenous ancestry)
- citizenship (including refugee or permanent resident status)
- gender identity and gender expression
- sex (including pregnancy)
- family status
- marital status (including people with a same sex partner)
- another type of disability, including mental, learning, cognitive and intellectual disabilities
- sexual orientation
- age
- receipt of public assistance (in housing)
- record of offences (in employment).

Stereotypes or treatment based on a person's socio-economic status may also intersect with discrimination based on disability. A person's experience with low income may be highly relevant to understanding the impact of discrimination on someone with a disability, and this may result in specific experiences of discrimination. This experience may be complicated further as a person ages.[81]

> People with disabilities who are aging may have different needs where rights and entitlements to public services and supports are concerned, because aging may perpetuate low socio-economic status. For example, aging people with intellectual disabilities who have lived with parents might find themselves without these supports as these parents themselves advance in age.[82]

As part of the duty to maintain environments that are free from discrimination and harassment, service providers (*e.g.* health care professionals, police services, legal services), employers and housing providers must take steps to design their programs, policies and environments inclusively, to take into account the needs of people from diverse backgrounds, with a range of unique identities.

> **Example:** Housing accommodation should address disability-related needs associated with aging. Housing design should integrate current needs and be flexible enough to accommodate future disabilities. This type of up-front, barrier-free design promotes "aging in place" and is more cost-effective than retrofitting inaccessible dwellings if or when disability develops.[83]

Organizations that provide services to the public should make sure their staff members have cultural competency skills.[84] The ability to interact comfortably and effectively with people from diverse cultural backgrounds is an important first step towards recognizing and meeting the human rights-related needs of different populations, including people with disabilities.

When interacting with people, organizations should not rely on preconceived notions, assumptions or stereotypes, but should use an individualized approach that recognizes the unique identity of each person and the fact that each person is uniquely situated to understand their own needs.

5. Establishing discrimination

The *Code* does not provide a definition of discrimination. Instead, the understanding of discrimination has evolved from case law. To establish *prima facie* discrimination (discrimination on its face) under the *Code*, a claimant must show that:

1) they have a characteristic protected from discrimination
2) they have experienced an adverse impact within a social area protected by the *Code*, and
3) the protected characteristic was a factor in the adverse impact.[85]

The claimant must show that discrimination occurred on a "balance of probabilities," that is, it is more reasonable and probable than not that discrimination took place. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct within the framework of the exemptions available under the *Code* (*e.g. bona fide* requirement defence). If it cannot be justified, discrimination will be found to have occurred.

Discrimination does not have to be intentional. Intent is irrelevant for establishing that discrimination occurred.

Discrimination is often hard to detect. Direct evidence pointing to discriminatory motives may not be available. Human rights decision-makers have recognized that cases may be shown through an analysis of all relevant factors, including evidence that is circumstantial. As well, human rights case law has established that a *Code* ground need only be one factor, of possibly several, in the decision or treatment for there to be a finding of discrimination.[86]

The analysis of whether substantive discrimination has taken place should be flexible and look at the full context of the impact of the distinction on the affected individual or group. The contextual factors and relevant considerations may vary slightly based on the type of discrimination claimed (direct, adverse effect, systemic, profiling, *etc.*), or the ground alleged. However, the legal test and threshold for discrimination do not change.

It is not necessary for language or comments related to a disability to be present in the interactions between the parties to show that discrimination has occurred. However, where such comments have been made, they can be further evidence that the disability was a factor in the person's treatment.

6. Forms of discrimination

6.1 Direct, indirect, subtle and adverse effect discrimination

Discrimination may take many different forms. For example, it may take place in a direct way. It can happen when individuals or organizations specifically exclude people with disabilities in housing, employment or services, withhold benefits that are available to others, or impose extra burdens that are not imposed on others, without a legitimate or *bona fide* reason. This discrimination is often based on negative attitudes, stereotypes and bias about people with disabilities.

Discrimination may also happen indirectly. It may be carried out through another person or organization.

> **Example:** A private school "indirectly" discriminates by instructing an admissions scout it has hired not to recruit students with disabilities who have costly accommodation requirements.[87]

The organization or person that sets out discriminatory conditions, and the organization or person that carries out this discrimination, can both be named in a human rights claim and held responsible.

Discrimination is often subtle. Discriminatory remarks are not often made directly, and people do not usually voice stereotypical views as a reason for their behaviour. Subtle forms of discrimination can usually only be detected after looking at all of the circumstances to determine if a pattern of behaviour exists. Individual acts themselves may be ambiguous or explained away, but when viewed as part of a larger picture, may lead to an inference that discrimination based on a *Code* ground was a factor in the treatment a person received. An inexplicable departure from usual practices may establish a claim of discrimination.[88] Criteria that are applied to some people but not others may be evidence of discrimination, if it can be shown that people and groups identified by the *Code* are being singled out for different treatment.

Sometimes seemingly neutral rules, standards, policies, practices or requirements have an "adverse effect" on people with disabilities.

> **Example:** An employer's policy of not hiring people who have "gaps" in their résumés because they have been out of the workforce for a period of time could adversely affect people who have had to take time off work for reasons related to a disability.

Many laws, requirements or standards are put in place without considering the unique needs or circumstances of people with disabilities. Organizations have a responsibility to understand where these may have a discriminatory effect, and to remove this effect where it occurs.

6.2 Harassment

The *Code* defines harassment as "engaging in a course[89] of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome."[90] The reference to comment or conduct "that is known or ought reasonably to be known to be unwelcome" establishes both a subjective and an objective test for harassment.

The subjective part is the harasser's own knowledge of how his or her behaviour is being received. The objective component considers, from the point of view of a "reasonable" person, how such behaviour would generally be received. Determining the point of view of a "reasonable" person must take into account the perspective of the person who is harassed.[91] In other words, the HRTO can conclude based on the evidence before it that an individual knew, or should have known, that his or her actions were unwelcome.[92]

Harassment is explicitly prohibited under the *Code* in employment and housing.[93] In employment, every employee has a right to be free from harassment in the workplace by the employer or agent of the employer or by another employee because of disability and other *Code* grounds.[94]

> **Example:** In one case, the Ontario Court of Appeal found that when a woman suddenly lost her hearing, her employer subjected her to a "campaign of abuse" that included "publically belittling, harassing and isolating [her] in ways relating to her disability." The Court also found that in addition to being denied any accommodation of her disability, the woman's employer also "took specific steps to increase the difficulties she faced as a result of her not being able to hear." The Court awarded damages for breach of the *Code*.[95]

The right to be free from harassment in the workplace also includes the "extended workplace," that is, events that occur outside of the physical workplace or regular work hours, but that have implications for the workplace, such as business trips, company parties or other company related functions. The issue is whether these events have work-related consequences for the person being harassed.[96]

In housing, people with disabilities have the right to be free from harassment in accommodation by the landlord or an agent of the landlord or by an occupant of the same building, because of disability and other *Code* grounds.

> **Example:** An Ontario human rights tribunal found that a landlord engaged in a vexatious course of conduct to control the life of a woman with cerebral palsy, as both a tenant and as a person. Among other things, the landlord entered the

> woman's apartment when she was not there, turned off the hallway light when she was partly down the stairs, and banged repeatedly on her ceiling. The landlord was also found to have made verbal slurs regarding the woman's disability.[97]

People also have the right to be free from harassment in services, in making contracts, and in membership in unions, trade or vocational associations. Sections 1, 3 and 6 of the *Code* guarantee the right to equal treatment in these social areas, without discrimination based on disability, among other *Code* grounds. Harassment based on disability, as a form of discrimination, is therefore prohibited in these areas.[98]

There is no requirement that a person must object to the harassment at the time for a violation of the *Code* to exist, or for a person to claim their rights under the *Code*.[99] A person with a disability who is the target of harassment may be in a vulnerable situation, and afraid of the consequences of speaking out. Housing providers, employers and service providers have an obligation to maintain an environment that is free of discrimination and harassment, whether or not anyone objects.[100]

It should be understood that some types of comments or behaviour are unwelcome based on the response of the person subjected to the behaviour, even when the person does not verbally object.[101] An example could be a person walking away in disgust after a co-worker has made a derogatory comment about her disability.

Some conduct or comments relating to disability may not, on their face, be offensive. However, they may still be "unwelcome" from the perspective of a particular person. If similar behaviour is repeated despite indications from the person that it is unwelcome, there may be a violation of the *Code*.

People may experience "a course of unwelcome conduct" based on a disability, a past or perceived disability, a person's accommodation needs, the treatment they are receiving (*e.g.* medication or therapy), or the side-effects of treatment. Harassment could include:

- slurs, name-calling or pejorative nicknames based on disability
- graffiti, images or cartoons depicting people with disabilities in a negative light
- comments ridiculing people because of disability-related characteristics
- intrusive questioning or remarks about someone's disability, medication, treatment or accommodation needs
- singling out a person for teasing or jokes related to disability
- inappropriately disclosing someone's disability to people who do not need to know
- repeatedly excluding people from the social environment, or "shunning"
- circulating offensive material about people with disabilities at an organization by email, text, the Internet, *etc.*

Harassment based on *Code* grounds is occurring increasingly through cyber-technology, including cell phone text messaging, social networking sites, blogs and email.[102] While there are sometimes complex jurisdictional issues around the legal regulation of cyber-harassment, organizations may be liable for a poisoned environment caused when online communications containing comment or conduct that would amount to harassment are accessed through technology operated by the organization, or by private electronic devices used on the organization's premises.[103]

Harassment may take different forms depending on whether the affected person identifies with more than one *Code* ground.

> **Example:** A doctor makes repeated comments to a female patient with epilepsy about the fact that she's not married. He expresses his view that she would be "much better off" if she had a man at home to take care of her, and to support her so that she wouldn't have to work. The doctor's behaviour may amount to harassment based on both disability and sex.

6.3 Poisoned environment

A poisoned environment is a form of discrimination. In employment, human rights tribunals have held that the atmosphere of a workplace is a condition of employment as much as hours of work or rate of pay. A "term or condition of employment" includes the emotional and psychological circumstances of the workplace.[104] A poisoned environment can also occur in housing and services.

A poisoned environment may be created when unwelcome conduct or comments are pervasive within the organization, which may result in a hostile or oppressive atmosphere for one or more people from a *Code*-protected group. This can happen when a person or group is exposed to ongoing harassment. However, a poisoned environment is based on the nature of the comments or conduct and the impact of these on an individual rather than just on the number of times the behaviour occurs. Sometimes a single remark or action can be so severe or substantial that it results in a poisoned environment.[105]

> **Example:** A man with chronic back pain requested time off work to recover from an especially bad flare-up. His manager was clearly unhappy with the request and refused to help the man with the paperwork required for a short-term disability leave. The manager expressed his view at a staff meeting that the man was "faking" his condition to get time off of work. This behaviour may amount to a poisoned work environment based on disability.

A consequence of creating a poisoned environment is that certain people are subjected to terms and conditions of employment, tenancy or services that are quite different from those experienced by people who are not subjected to those comments or conduct. This gives rise to a denial of equality under the *Code.*

The comments or actions of any person, regardless of his or her position of authority or status, may create a poisoned environment. Therefore, a co-worker, supervisor, co-tenant, member of the Board of Directors, service provider, fellow student, *etc*. can all engage in conduct that poisons the environment of a person with a disability.

Behaviour need not be directed at any one person to create a poisoned environment. A person can experience a poisoned environment even if he or she is not a member of the group that is the target. Further, not addressing discrimination and harassment may in itself cause a poisoned environment.[106]

Organizations have a duty to maintain a non-discriminatory environment in services, housing and employment, to be aware of a poisoned environment that exists, and to take steps to respond and eliminate it.

Management who know, or ought to know, of a poisoned atmosphere but allow it to continue are discriminating against the affected tenants, employees or service users even if they are not themselves actively engaged in producing that atmosphere.[107]

> **Example:** The HRTO found that several members of a non-profit housing cooperative were subjected to "egregious and persistent" harassment and a poisoned environment when an unknown person posted "18 vulgar and incredibly vicious messages" within the co-op that related to disability and other grounds protected by the *Code*. The HRTO found that while the co-op was not responsible for the harassment, it was responsible for failing to address the harassment adequately. In particular, the co-op "did not take the issue seriously, did not act with urgency and completely failed to communicate with the [co-op members]."[108]

6.4 Systemic discrimination

Discrimination based on disability exists not just in individual behaviour, but can also be systemic or institutionalized. As one author notes, "…the philosophical and ideological foundations upon which discrimination against disabled people is justified are well entrenched within the core institutions of society."[109]

Systemic or institutional discrimination is one of the more complex ways that discrimination happens.[110] Organizations and institutions have a positive obligation to make sure that they are not engaging in systemic or institutional discrimination.

Systemic or institutional discrimination consists of attitudes, patterns of behaviour, policies or practices that are part of the social or administrative structures of an organization or sector, and that create or perpetuate a position of relative disadvantage for people with disabilities. The attitudes, behaviour, policies or practices appear neutral on the surface but nevertheless have an "adverse effect" or exclusionary impact on people with disabilities.

Systemic discrimination can also overlap with other types of discrimination. For example, a policy that has an adverse discriminatory effect can be compounded by the discriminatory attitudes of the person who is administering it.

> **Example:** A municipality's business improvement association rolls out a program whereby people ("ambassadors") are hired to actively dissuade people from sleeping on public property and panhandling in public parks, alleys and sidewalks. In the data collected by the ambassadors, the words "crazy," "deaf" and "native" are used to describe some of the individuals that were asked to leave these areas. A court ruled that the program disproportionately affected people with physical and mental disabilities and people with Aboriginal ancestry.[111]

Systemic discrimination is often embedded in an institution or sector, and may be invisible to the people who do not experience it, and even to the people who may be affected by it. It may be "reinforced by the very exclusion of the disadvantaged group" because the exclusion fosters the false belief that it is the result of "natural" forces (for example, that people with disabilities are just not as capable as others of being employed).[112] To combat systemic discrimination, it is essential for an organization to create a climate where negative practices and attitudes can be challenged and discouraged, and where the diverse needs of people are considered in all aspects of its operations.

> **Example:** In designing its rental housing buildings, a property management company hires a design expert to ensure that all physical structures are built according to the principles of inclusive design. This step ensures that the rental units are accessible to people with physical disabilities as well as to families with small children and older people.

It may not be necessary for multiple people to make complaints about an institution's policies or practices for their impact to be understood as causing systemic discrimination. Often, it can be inferred from the evidence in one person's case that many people from a *Code*-protected group will be negatively affected.

For detailed information on how to identify systemic discrimination, see section 4.1 of the OHRC's *Policy and guidelines on racism and racial discrimination*.[113]

7. Reprisal

Section 8 of the *Code* protects people from reprisal or threats of reprisal.[114] A reprisal is an action, or threat, that is intended as retaliation for claiming or enforcing a right under the *Code*.

People with disabilities may try to enforce their *Code* rights by objecting to discrimination, filing a grievance against an employer, making an internal discrimination complaint to a service provider, housing provider or to their employer, or making an application at the

HRTO. However, there is no strict requirement that someone who alleges reprisal must have already made an official complaint or application under the *Code*.[115] Also, to claim reprisal, a person does not have to show that their rights were actually infringed.[116]

The following will establish that someone experienced reprisal based on a *Code* ground:

- an action was taken against, or a threat was made to, the claimant
- the alleged action or threat was related to the claimant having claimed, or trying to enforce a *Code* right, and
- there was an intention on the part of the respondent to retaliate for the claim or the attempt to enforce the right.[117]

  Example: The HRTO found that a man with a visual disability experienced reprisal when his employer abruptly terminated his employment in part due to dissatisfaction that the man had pursued his rights under the *Code* (he had tried to get accommodation for his disability-related needs and had attempted to deal with alleged harassment by the personal respondent), and the employer's perception that the man was unhappy with accommodations the employer had provided.[118]

People associated with persons who have complained about discrimination are also protected from discrimination and reprisal.[119]

8. Duty to accommodate

Under the *Code*, employers and unions, housing providers and service providers have a legal duty to accommodate the needs of people with disabilities who are adversely affected by a requirement, rule or standard. Accommodation is necessary to ensure that people with disabilities have equal opportunities, access and benefits. Employment, housing, services and facilities should be designed inclusively and must be adapted to accommodate the needs of a person with a disability in a way that promotes integration and full participation.

In the context of employment, the Supreme Court of Canada has described the goals and purposes of accommodation:

> ... the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.
>
> **...**
>
> The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.[120]

Requirements under the *Convention on the Rights of Persons with Disabilities* provide that States Parties, including Canada, must take steps to make sure that people with disabilities are provided with accommodation (for example, to ensure equal access to justice, education and employment).[121]

The duty to accommodate has both a substantive and a procedural component. The procedure to assess an accommodation (the process) is as important as the substantive content of the accommodation (the accommodation provided).[122] In a case involving the accommodation of a mental health disability in the workplace, the court said: "a failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the 'procedural' duty to accommodate."[123]

In Ontario, it is clear that a failure in the procedural duty to accommodate can lead to a finding of a breach of the *Code* even if there was no substantive accommodation that could have been provided short of undue hardship. Failure to perform either component of the duty is a failure to carry out the duty to accommodate.[124]

Moreover, an organization will not be able to argue persuasively that providing accommodation would cause undue hardship if it has not taken steps to explore accommodation solutions, and otherwise fulfil the procedural component of the duty to accommodate.[125]

> **Example:** In one case, a human rights tribunal upheld a claim of discrimination against a housing co-op when it failed to investigate what was required to accommodate a woman and her children who were experiencing asthma due to mould allergies in their apartment unit. Instead of accepting that the woman had a legitimate problem, the co-op was adversarial and treated her as if she was a "loony tune." The co-op also did not respond to her legitimate request to be moved to another unit. Instead, it chose not to communicate with her after it suggested that her family move out, except to send a threatening letter from the co-op's lawyers.[126]

8.1 Principles of accommodation

The duty to accommodate is informed by three principles: respect for dignity, individualization, as well as integration and full participation.

8.1.1 Respect for dignity

The *Convention on the Rights of Persons with Disabilities* states "…discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person."[127]

The duty to accommodate people with disabilities means accommodation must be provided in the way that most respects the dignity of the person, if doing so does not cause undue hardship. Human dignity encompasses individual self-respect, self-worth and inherent worth as a human being. It includes physical and psychological integrity and empowerment. It is harmed when people are marginalized, stigmatized, ignored or devalued. Privacy, confidentiality, comfort, individuality and self-esteem are all important factors.

Respect and support for a person's autonomy is also crucial. It reflects a person's right to self-determination, to be treated without paternalism, and means subjecting people to minimal interference in their choices. Consideration needs to be given to how accommodation is provided and the person's own participation in the process.

Respect for dignity includes being considered as a whole person, not merely in relation to one's disability. It includes respecting and valuing the perspectives of people with disabilities, particularly when people speak about their own experiences.

Housing providers, service providers and employers should consider different ways of accommodating people with disabilities along a continuum, ranging from ways that most respect dignity and other human rights values, to those that least respect those values.

> **Example:** An accommodation that shows little respect for the dignity of a person with a disability is an accessible entrance over a loading dock or through a service area or garbage room. People who use mobility devices should have the same opportunity as others to enter a building in a pleasant and convenient manner.

8.1.2 Individualization

There is no set formula for accommodating people identified by *Code* grounds. Each person's needs are unique and must be considered afresh when an accommodation request is made. People sharing the same condition often experience it in very different ways, with different symptoms, limitations and prognoses. In terms of accommodation, what might work for one person may not work for another.[128]

> **Example:** The Supreme Court of Canada found that a workplace attendance standard that defined a maximum period for employee absences was *prima facie* discriminatory in part because it did not take into account the individualized nature of the accommodation process.[129]

Accommodations may need to be re-visited over time to make sure that they continue to meet a person's needs appropriately.

8.1.3 Integration and full participation

Accommodations should be developed and implemented with a view to maximizing a person's integration and full participation. Achieving integration and full participation requires barrier-free and inclusive design, as well as removing existing barriers. Where barriers continue to exist because it is impossible to remove them at a given point in time, then accommodations should be provided, up to the point of undue hardship.

> **Example:** A children's swimming program at a community centre assigns an additional instructor to a class that includes a boy who has autism, at his parents' request. This allows the boy to get the extra support he needs to access the service within the regular program.

Employment, housing, services and facilities should be built, and must be adapted, to accommodate the needs of a person with a disability in a way that promotes their integration and full participation.

It is well-established in human rights law that equality may sometimes require different treatment that does not offend the person's dignity. In some circumstances, the best way to ensure the equality of people with disabilities may be to provide separate or specialized services. However, it should be kept in mind that segregated treatment in services, employment or housing for people with disabilities is less dignified and is unacceptable, unless it can be shown that integrated treatment would pose undue hardship or that segregation is the only way to achieve equality.[130]

8.2 Inclusive design

Ensuring integration and full participation means designing society and structures for inclusiveness. Inclusive or "universal" design[131] emphasizes barrier-free environments and equal participation of persons with disabilities with varying levels of ability. It is a preferred approach to removing barriers or making "one-off" accommodations, which assume that existing structures may only need slight modifications to make them acceptable.

The right to equality can be breached by a failure to address the needs of disadvantaged groups. As the Supreme Court of Canada has observed:

> [T]he principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field.[132]

Effective inclusive design will minimize the need for people to ask for individualized accommodation. As the Law Commission of Ontario has said:

> The concept of universal design, which requires those who develop or provide laws, policies, programs or services to take into account diversity from the outset, is connected to the principle of autonomy and independence in that, when properly implemented, universal design removes from persons with disabilities

> the burden of navigating onerous accommodation processes and negotiating the accommodations and supports that they need in order to live autonomously and independently. In this way, the principle of autonomy and independence is closely linked to that of participation and inclusion."[133]

The Supreme Court has noted the need to "fine-tune" society so that structures and assumptions do not exclude persons with disabilities from taking part in society.[134] It has affirmed that standards should be designed to reflect all members of society, to the extent that this is reasonably possible.[135] Housing providers, service providers, employers and others need to build in conceptions of equality to standards or requirements.[136] This proactive approach is more effective because it emphasizes accessibility and inclusion from the start.

Organizations, including government, should use the principles of inclusive design when they are developing and building policies, programs, procedures, standards, requirements and facilities.

> **Example:** A municipal community centre installs visual fire alarms in all of its buildings to ensure that people who are deaf, deafened or hard of hearing are able to identify emergency situations.

> **Example:** Voters and candidates with disabilities have the right to accommodation during elections.[137] Leading up to a provincial by-election, the election office procures only accessible facilities for polling stations.[138] Accessibility standards[139] are specified in facility rental agreements and accessible voting equipment and services are available so that people with disabilities can vote independently on election day. Local riding associations follow similar accessibility standards when selecting locations for all-candidate debates and all parties agree to share the costs of sign language interpreters and captioning to make sure voters and candidates with hearing disabilities can participate equally.[140]

New barriers should never be created when designing new structures or revising old ones.[141] Organizations that knowingly create new barriers for people with disabilities, or take steps that perpetuate existing barriers, may violate the *Code*. Design plans should incorporate current accessibility standards such as the Principles of Universal Design.[142] This type of planning decreases the need to remove barriers and provide accommodations at a later date.

> **Example:** The entrance to a convenience store included four steps up to the front door, the store's only public entrance. As a result, people who use wheelchairs, scooters, strollers and people who have other types of mobility disabilities could not access the store. Despite a major renovation to the building that included significant changes to its store-front, the owner neglected to install a ramp or an automatic door-opener to make the premises physically accessible to everyone.

> **Example:** A television production company implements a scent-free policy throughout its workplace. Wherever possible, it avoids the use of chemical agents and makes conscious efforts to seek out less toxic materials in its business operations. It conducts training on environmental sensitivities for its managers and staff, and informs its clients about its policy.

The *Accessibility for Ontarians with Disabilities Act*[143] provides a mechanism for developing, implementing and enforcing accessibility standards with the goal of a fully accessible province by 2025. Standards have already been passed into regulation for customer service, employment, information and communication, transportation and public spaces. Changes have also been made to the accessibility provisions of the *Building Code Regulation*.[144] Under the *AODA*, government public and private sector employers, service providers and landlords are required to comply with accessibility standards in varying degrees over time relative to an organization's size and sector. If accessibility standards under the *AODA* fall short of requirements under the *Code* in a given situation, the requirements of the *Code* will prevail.[145]

Along with the expectation to prevent barriers at the design stage through inclusive design, organizations should be aware of systemic barriers in systems and structures that already exist. They should actively identify and seek to remove these existing barriers.

> **Example:** A school board reviews its website to identify possible barriers for people with disabilities. It unlocks several design elements so that people with low vision can increase the font size on their desktops and "pinch" or zoom in closer on their mobile devices. It adds descriptive text tags to logos and images for users with very limited or no vision. It also modifies the presentation of the website's content to ensure high colour contrast and clear "focus order." This allows people with low vision and people who use assistive technologies to more easily access the information and navigate through content.

Organizations will likely find that inclusive design choices and barrier removal make good business sense and will benefit large numbers of people. Features installed to ensure that services or residences are accessible to people with disabilities also have the potential to meet people's needs as they age, and allow people to "age in place."[146] Offering a range of alternative communication methods when providing services will benefit many people with different needs, including people with speech and language disabilities, and people who identify as deaf, deafened or hard of hearing.[147]

8.3 Appropriate accommodation

In addition to designing inclusively and removing barriers, organizations must respond to individual requests for accommodation. The duty to accommodate requires that the most appropriate accommodation be determined and provided, unless this causes undue

hardship. Accommodation is considered appropriate if it results in equal opportunity to enjoy the same level of benefits and privileges experienced by others or if it is proposed or adopted for the purpose of achieving equal opportunity, and meets the individual's disability-related needs. The most appropriate accommodation is one that most:

- respects dignity
- responds to a person's individualized needs
- allows for integration and full participation.

Accommodation is a process and is a matter of degree, rather than an all-or-nothing proposition, and can be seen as a continuum. The highest point in the continuum of accommodation must be achieved, short of undue hardship.[148] At one end of this continuum is full accommodation that most respects the person's dignity and promotes confidentiality. Alternative accommodation (which would be less than "ideal") might be next on the continuum when the most appropriate accommodation is not feasible. An alternative (or "next-best") accommodation may be implemented in the interim while the most appropriate accommodation is being phased in or put in place at a later date when resources have been put aside.

Determining the "most appropriate" accommodation is a separate analysis from determining whether the accommodation would result in undue hardship. If a particular accommodation measure would cause undue hardship, the next-best accommodation must be sought.

At the same time, human rights case law makes it clear that the purpose of the *Code* is to accommodate a person's needs, not their preferences.[149] If there is a choice between two accommodations that respond equally to the person's needs in a dignified way, then the accommodation provider is entitled to select the one that is less expensive or less disruptive to the organization.[150]

8.3.1 Essential duties and requirements

Section 17 of the *Code* says that the right to be free from discrimination is not infringed if the person with a disability is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right.

In employment, essential duties are the "vital" or "indispensable" aspects of someone's job. In housing, the essential duties or requirements of being a tenant may include paying rent, maintaining one's unit so it does not violate health and safety laws, and allowing other people to reasonably enjoy their premises. In the case of services, the "essential duties or requirements" of using a service will vary depending on the circumstances.

Section 17 means that someone cannot be judged incapable of performing the essential duties of a job, or the essential requirements of being a tenant or taking part in a service, unless it can be shown that the person's needs cannot be accommodated

without undue hardship. An organization should not conclude that a person is unable to perform the essential duties without actually giving the person an opportunity to demonstrate their ability.

> **Example:** A doctor enrolled in a residency program required accommodation of his ADHD and other disabilities to complete his rotations within various teaching hospitals and community practices. A human rights tribunal found that he was discriminated against by the university offering the program when the university decided, based on an "impressionistic conclusion", that providing the accommodation would fundamentally alter the program or lower its professional standards. There must be a substantive factual foundation to support a conclusion that a person cannot meet an essential requirement of a program.[151]

> **Example:** After coming back from a disability-related leave, a man returned to modified duties. Even though his doctor cleared him to go back to work full-time, his employer placed him in a lower, part-time position at a lower pay rate. He was eventually terminated from his employment. The HRTO found that the employer failed to meet both its procedural and substantive duty to accommodate. The employer violated the *Code* when it based its decision to place the employee in a lower-paying position on its belief about the applicant's ability to perform in the workplace, and continued to refuse to provide full-time work, even though this was supported by the employee's doctor. The employer relied on its "non-expert opinion" and "stereotypes." It incorrectly relied on assumptions that the employee could not withstand the pressures of his job, and that his performance would be unreliable because of his past medical condition.[152]

It is not enough for the organization to assume that a person cannot perform an essential requirement of a job, tenancy, service, *etc.* Rather, there must be an objective determination of that fact.[153] To this end, an individualized assessment will be necessary.[154]

The duty to accommodate does not require exempting a person from performing the essential duties of the job,[155] requirements of the service, *etc.* In the context of employment, the duty to accommodate does not require an employer to fundamentally change the working conditions of employees, assign the essential duties of an employee with a disability to other employees or change the essential duties and requirements of a position.[156] In these cases, a next-best solution, such as alternative work, may need to be found.

> **Example:** A delivery truck driver's duties included loading skids of product onto a truck, and unloading them at his destination. He worked for a small operation whose staff consisted of the owner and his wife, a warehouse employee and the delivery truck driver. Due to a back injury, the driver was not able to load and unload the truck, an essential duty of his job. He requested light duties, preferably office work, or relief from loading and unloading the truck. The employer denied this request because there were no light duties available, and he could not hire an

additional person to help the driver. The HRTO found that the duty to accommodate does not require an employer to assign the essential duties of an employee with a disability to other employees or to hire another employee to perform them in the employee's place. An employer is also not required to change the essential duties and requirements of a position so that an employee can meet them.[157]

8.3.2 Employment-specific accommodation issues

8.3.2.1 Alternative work

There is a duty to accommodate a person in their pre-disability job wherever possible. However, it is recognized that this may not always be feasible. Human rights case law recognizes that employers have a duty to consider temporary and permanent alternative work for people who can no longer remain in their position even with accommodation.[158] This duty includes diligently investigating positions and proposing job options[159] that are within the person's functional limitations.[160]

Accommodation may include job restructuring, job bundling,[161] reassignment to open positions, or retraining for alternative positions if that would not constitute undue hardship for the employer. Employers should canvass available posts that allow the employee to maximize his or her skills and abilities.[162]

Temporary alternative work

The term "alternative work" means different work or work that does not necessarily involve similar skills, responsibilities and compensation.[163] Temporary alternative work may be an appropriate accommodation either in a return to work context, or in a situation where a disability renders an employee temporarily unable to accomplish the pre-disability job. Temporary alternative work can be an appropriate accommodation to assist a person where the nature of the disability and its limitations are temporary or episodic.

Permanent alternative work

When an employee asks to be reinstated in a previous position, the employer must make the appropriate inquiries to assess whether the employee is fully able to carry out the essential functions of the job. The returning employee must be given an opportunity to prove his or her ability to perform the pre-disability job.[164] Where the employee can no longer perform the pre-disability job, with or without accommodation, the employer should consider permanent alternative work.[165]

The duty to accommodate may include some workplace reorganization.[166] For example, it may require employers to consider placing an employee with a disability into a vacant position without requiring that person to compete for the position.[167] The vacant position must be vacant within a reasonable amount of time, but the employer is not required to

"promote" the employee. To the greatest extent possible, the vacant position must be equivalent to the current one. When reassignment takes place, the person must be qualified for the reassigned position.

> **Example:** An employee with a disability returns from a disability leave and is considered for alternative work. There are two other positions available at the company. He is generally qualified for one of these positions, but does not know how to use a computer program that is required to do the essential duties of this job. The employer sends the person on a training course to learn the computer program. The employee is then qualified for the position.

The duty to accommodate does not require the employer to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration.[168] The duty to accommodate does not require an employer to provide "make work" or "to create a job that is not productive or that, in the employer's view, does not need to be done."[169] Nor is an employer required to employ two employees to do the job of one.[170] In the final analysis, the employee must be able to perform a useful and productive job for the employer.[171]

8.3.2.2 Return to work

Accommodating a person who has been absent from work may involve any of the above forms of accommodation but also raises unique issues. People who return to work after an absence related to a *Code* ground are protected by the *Code.*[172] They generally have the right to return to their original job (the pre-disability job). Both employers and unions must co-operate in accommodating employees who are returning to work. Accommodation is a fundamental and integral part of the right to equal treatment in the return to work context.[173]

> **Example:** In one case, a woman who had been off for several months for a series of surgeries informed her employer that she planned to return to work. The HRTO found that her employer discriminated against her when it required her to provide a "clean bill of health," tried to require her to sign a letter agreeing to a finite cap on future medical leave, and asked her to complete a retraining period before it would consider whether she could return to work. The HRTO affirmed that the woman was entitled to her previous job. The employer acted in a discriminatory way when it merely offered to consider rehiring her.[174]

The right of people with disabilities to return to work exists if the worker can fulfil the essential duties of the job after accommodation short of undue hardship.[175] If a person cannot fulfil the essential duties of the pre-disability job, despite the employer's effort to accommodate short of undue hardship, the employer still has an obligation to canvass alternative work possibilities, as outlined above. Ultimately, as stated above, the person with a disability must be able to perform a useful and productive job for the employer.

Under the *Code,* there is no fixed rule as to how long an employee with a disability may be absent before the duty to accommodate has been met. This will depend on the ability of the employee to perform the essential duties of the job considering the unique circumstances of every absence and the nature of the employee's condition, as well as circumstances in the workplace.[176] Also important is the predictability of the absence, in terms of when it will end, if it may recur and the frequency of the absence. The employee's prognosis and length of absence are also important considerations. It is more likely that the duty to accommodate will continue with a better prognosis, regardless of the length of absence.

The duty to accommodate does not necessarily guarantee a limitless right to return to work.[177] On the other hand, a return to work program that relies on arbitrarily selected cut-offs or that requires an inflexible date of return may be challenged as a violation of the *Code*.

> **Example:** In a case that dealt with a modified work program that featured a "90-day" rule that deemed temporary restrictions of more than 90 days to be permanent, the HRTO stated: "A general employment-related human rights principle is that when an employee is temporarily unable to perform a job because of disability, the employer is obliged to keep the employee's job available so that the employee can return to it when the disability improves to the point the employee can return to the job. This is a form of accommodation of the person's disability related needs. The obligation to keep the employee's job available does not extend indefinitely, and is limited by undue hardship involved in keeping the job available, but it generally extends for more than three months."[178]

Ultimately, the test of undue hardship is the relevant standard for assessing return to work programs.

8.4 The legal test

Section 11 of the *Code* prohibits discrimination that results from requirements, qualifications or factors that may appear neutral but that have an adverse effect on people identified by *Code* grounds. Section 11 allows an organization to show that a requirement, qualification or factor that results in discrimination is nevertheless reasonable and *bona fide* (legitimate). However, to do this, the organization must show that the needs of the person cannot be accommodated without undue hardship.[179]

The Supreme Court of Canada has set out a framework for examining whether the duty to accommodate has been met.[180] If *prima facie* discrimination (or discrimination on its face) is found to exist, a respondent must establish on a balance of probabilities that the standard, factor, requirement or rule:

1. was adopted for a purpose or goal that is rationally connected to the function being performed (such as a job, being a tenant, or participating in the service)

2. was adopted in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal, and

3. is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.[181]

As a result of this test, the rule or standard itself must be inclusive of as many people as possible and must accommodate individual differences up to the point of undue hardship. This makes sure that each person is assessed according to their own personal abilities.[182] The ultimate issue is whether the organization or individual providing accommodation has shown that they have done so up to the point of undue hardship.

The following non-exhaustive factors should be considered during the analysis:[183]

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

Similarly, as mentioned above, section 17 of the *Code* also creates an obligation to accommodate specifically under the ground of disability.

8.5 Forms of accommodation

Many different methods and techniques will respond to the unique needs of people with disabilities. Accommodations may include modifying or changing an organization's:

- buildings, facilities and services
- policies and processes
- procurement and third-party contracts
- performance standards, conditions and requirements[184]
- decision-making practices
- work, housing or service culture
- methods of communication.

Depending on a person's individual needs, examples of accommodation may include:

Employment

- allowing a flexible work schedule[185]
- modifying job duties[186]
- modifying policies
- making changes to the building (for example, installing ramps, hand rails, automatic door openers, wider doorways, *etc.*)
- modifying workstations (making ergonomic changes, supplying a specialized chair, back support, *etc.*)
- providing specialized adaptation or assistive devices for computers, accessible technology
- providing alternative ways of communicating with the employee
- additional training
- allowing short-term and long-term disability leave
- job bundling and unbundling[187]
- alternative work.[188]

Services

- providing multiple ways of contacting a service including by phone, in person and by regular and electronic mail
- providing extra time to a service user
- providing more breaks to a service user, where appropriate
- making attendance requirements flexible, where possible, if non-attendance can be shown to be linked to a disability
- modifying rules around non-compliance with deadlines, if non-compliance can be shown to be linked to a disability[189]
- modifying "no pets" policies to allow guide dogs[190] and other service animals[191]
- considering someone's disability as a mitigating factor when addressing behaviour that would otherwise warrant imposing sanctions.[192]

Housing

- helping someone fill out application forms (*e.g.* for social or supportive housing)
- adjusting tenant selection criteria (such as using a guarantor when other information, such as credit history or rental history, is not available[193])
- modifying deadlines (such as deadlines to report income changes in social and supportive housing)
- modifying ways that information is communicated to tenants
- establishing a list of contact supports to call in emergency situations
- making structural modifications to units (for example, installing ramps, automatic door openers, wider doorways, *etc.*)
- working with outside professionals to address someone's needs, if agreed to by the tenant
- considering someone's disability as a mitigating factor when addressing behaviour that would otherwise warrant imposing sanctions[194]
- allowing transfers between units.[195]

Most accommodations are not expensive to provide, and if instituted widely, will benefit more than the person requesting the accommodation.

> **Example:** A tenant in a rental unit develops arthritis. She requests that doorknobs in her suite and in common areas such as the laundry room be changed from round knobs that are difficult to grip to handles that are suitable for people with arthritis. The landlord willingly makes this change as it is not an undue hardship to do so. It will also benefit other tenants with disabilities in the building, as well as people who are aging.

Accommodation should be a non-coercive, co-operative process that all responsible parties take part in. A person's co-workers, as well as other tenants and service users, may have a role to play in helping with an accommodation. In these cases, it may be necessary for others to know that a person requires an accommodation to facilitate the accommodation. However, care must be taken to protect the person's privacy, to not reveal any more information than is necessary, to make sure that they are not "singled out," and that their dignity is respected.[196]

An accommodation provider should take steps to resolve any tension or conflict that may occur as a result of resentment on the part of others who are expected to help implement an accommodation. In some situations, tension may be linked to a lack of awareness about the nature of the person's disability or needs and the requirements of the *Code*.

Keeping in mind that everyone experiences disability differently, accommodation providers are also required to educate themselves about the nature and impact of disabilities as part of the procedural duty to accommodate,[197] and to dispel any misperceptions or stereotypes that employees, other tenants or service staff or users may have about people with disabilities[198] that could lead to inequitable treatment. Resolving these issues must be done in a way that most respects the person's dignity and privacy. One key approach to doing this is to implement anti-harassment, accommodation and sensitivity training. Otherwise, tension and conflict could lead to harassment or a poisoned environment for the person with the disability.

8.6 Duties and responsibilities in the accommodation process

The accommodation process is a shared responsibility. Everyone involved should co-operatively engage in the process, share information and consider potential accommodation solutions. The person with a disability is required to:

- make accommodation needs known to the best of their ability, preferably in writing, so that the person responsible for accommodation can make the requested accommodation[199]
- answer questions or provide information about relevant restrictions or limitations, including information from health care professionals[200]
- take part in discussions about possible accommodation solutions

- co-operate with any experts whose assistance is required to manage the accommodation process or when information is needed that is unavailable to the person with a disability
- meet agreed-upon performance standards and requirements, such as job standards, once accommodation is provided[201]
- work with the accommodation provider on an ongoing basis to manage the accommodation process.

The accommodation provider is required to:

- be alert to the possibility that a person may need an accommodation even if they have not made a specific or formal request[202]
- accept the person's request for accommodation in good faith, unless there are legitimate reasons for acting otherwise
- get expert opinion or advice where needed (but not as a routine matter)
- take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated,[203] and canvass various forms of possible accommodation and alternative solutions[204]
- keep a record of the accommodation request and action taken
- communicate regularly and effectively with the person, providing updates on the status of the accommodation and planned next steps[205]
- maintain confidentiality
- limit requests for information to those reasonably related to the nature of the limitation or restriction, to be able to respond to the accommodation request
- consult with the person to determine the most appropriate accommodation
- implement accommodations in a timely way,[206] to the point of undue hardship
- bear the cost of any required medical information or documentation (for example, the accommodation provider should pay for doctors' notes, assessments, letters setting out accommodation needs, *etc*.)[207]
- bear the cost of required accommodation.

Although the person seeking accommodation has a duty to assist in securing appropriate accommodation that will meet their needs, they are not responsible for originating a solution[208] or leading the accommodation process. They are also not required to discuss their disability-related needs with anyone other than the people directly involved in the accommodation process.[209] It is ultimately the accommodation provider's responsibility to implement solutions, with the co-operation of the person seeking accommodation. After accommodation is provided, the person receiving the accommodation is expected to fulfil the essential duties or requirements of the job, tenancy, or taking part in a service.

Contracting with a disability management company does not absolve an employer of responsibilities or liability if the accommodation process is not managed properly.[210]

In employment, unions and professional associations are required to take an active role as partners in the accommodation process, share joint responsibility with the employer to facilitate accommodation, and support accommodation measures regardless of collective agreements, unless to do so would create undue hardship.[211]

If the accommodation is required to allow the person to be able to take part in the organization without impediment due to disability, the organization must arrange and cover the cost of the accommodation needed,[212] unless this would cause undue hardship.

Where a person requires assistance for their disability beyond what is required to access housing, employment or services equally, such as an assistive device for daily living, the organization would not generally be required to arrange or pay for it, but is expected to allow the person to access this type of accommodation without impediment.

Accommodating someone with a disability may be hindered by a lack of appropriate disability support services in the community to identify someone's disability-related needs and limitations, or to assist with an accommodation. Waiting lists for specialists' assessments, for example, can be extremely long. In these cases, accommodation providers should use the best information they have available to make the accommodation, or provide interim accommodation, taking into consideration how the person identifies their own needs, pending the assessment.

8.6.1 Duty to inquire about accommodation needs

In general, the duty to accommodate a disability exists for needs that are known or ought to be known. Organizations and persons responsible for accommodation are not, as a rule, expected to accommodate disabilities they are unaware of. However, in some circumstances, the nature of certain disabilities may leave people unable to identify that they have a disability, or that they have accommodation needs.[213]

> **Example:** A forklift operator is prescribed medication to treat seizures. Shortly afterward he begins to experience memory lapses, including while on the job, and at one point has difficulty recalling the established protocol for the safe operation of his machinery. His manager notices his uncharacteristic behaviour. Rather than taking disciplinary action, the manager sets up a meeting and asks the employee if there have been any recent changes in his life that could be affecting his behaviour. The employee is able to correlate his memory problems to when he began to take his anti-seizure medication. In consultation with his doctor, he switches to a new medicine and the problem resolves itself.

Accommodation providers must attempt to help a person who is clearly unwell or perceived to have a disability by inquiring further to see if the person has needs related to a disability and offering assistance and accommodation.[214] Even if an employer has not been formally advised of a disability, the perception of such a disability will engage the protection of the *Code*.

> **Example:** The HRTO found that an employer discriminated against a male employee with a visual impairment when it failed to inquire into whether he needed accommodation even after it became aware that he was experiencing difficulties on the job due to his disability. Even though the man did not formally request accommodation, the HRTO stated "…the procedural duty to accommodate indicates that an employer cannot passively wait for an employee to request accommodation where it is aware of facts that indicate that the employee may be having difficulties because of disability; there is a duty to take the initiative to inquire in these circumstances."[215]

Where an organization is aware, or reasonably ought to be aware, that there may be a relationship between a disability and someone's job performance, or their abilities to fulfil their duties as a tenant or service user, the organization has a "duty to inquire" into that possible relationship before making a decision that would affect the person adversely.[216] This includes providing a meaningful opportunity to the employee, tenant or service user to identify a disability and request accommodation. A severe change in a person's behaviour could signal that the situation warrants further examination.

Where a person exhibits inappropriate behaviour due to a disability, employers, housing providers and service providers have a duty to assess each person individually before imposing measures that may affect the person negatively. Such measures might include prematurely starting eviction proceedings, revoking subsidies, withdrawing services or imposing discipline in employment. Before sanctioning a person for misconduct or "unacceptable behaviour," an organization must first consider whether the actions of the person are caused by a disability, especially where the organization is aware or perceives that the person has a disability.[217] The person's disability must be considered in determining what, if any, sanctions are appropriate, unless this causes undue hardship.

> **Example:** A boy in Grade 2 regularly interrupts his classmates and disrupts the teacher's lessons. When repeated reminders do not improve the problem, the teacher considers her options. Before escalating the situation, she contacts his parents to make further inquiries. Together, they arrange for an educational assessment which reveals that the boy has autism spectrum disorder. They are then able to take steps to put the appropriate supports in place to help him succeed at school.

Where the behaviour is not related to a disability, sanctions or discipline will generally apply, as usual.[218]

Accommodation providers should always inform employees, service users and tenants that a disability-related assessment (such as a medical assessment) or accommodation can be provided as an option to address job performance issues or issues relating to fulfilling one's duties as a tenant or a service user.

In employment, for example, an accommodation provider may be able to ask for medical documentation to confirm fitness to work, if there is sufficient objective evidence that there are legitimate reasons to be concerned.

Once disability-related needs are known, the legal onus shifts to those with the duty to accommodate.[219] For example, support or referral through employee assistance programs (EAPs) could be the solution for an underlying disability.

8.7 Medical information to be provided

The provision of medical information by people with disabilities – the type, the scope and to whom – has implications for the privacy of employees, tenants and service users.[220] At the same time, organizations must have enough information to allow them to meet their duty to accommodate.

As stated above, the person seeking accommodation is generally required to advise the accommodation provider that they have a disability, and the accommodation provider is required to take requests for accommodation in good faith.[221] A person with a disability does not have to meet an onerous standard for initially communicating that a disability exists to trigger the organization's duty to accommodate. Organizations should limit requests for information to those reasonably related to the nature of the limitation or restriction, to assess needs and make the accommodation.

The type of information that accommodation seekers may generally be expected to provide to support an accommodation includes:

- that the person has a disability
- the limitations or needs associated with the disability
- whether the person can perform the essential duties or requirements of the job[222], of being a tenant, or of being a service user, with or without accommodation
- the type of accommodation(s) that may be needed to allow the person to fulfill the essential duties or requirements of the job, of being a tenant, or of being a service user, *etc.*
- in employment, regular updates about when the person expects to come back to work, if they are on leave.

  Example: A tenant tells his landlord that he has been hospitalized due to a disability and cannot make his rent payment on time. Knowing that the person is in hospital, the landlord does not require confirmation that the tenant has a disability, but asks for information to indicate that his need is temporary in nature, and that he will be able to pay his rent once released in a few weeks' time. The person provides this information, and the landlord makes an allowance for the late payment.

> **Example:** In one case, a housing co-op sought to evict an occupant for failing to perform the two hours of volunteer work each month required by the co-op's by-law, despite the fact that she had provided a doctor's note that she was incapable of performing the volunteer work for medical reasons. Even with the note, the co-op sought further medical details of her condition, which she refused to provide. The Ontario Divisional Court stated that the co-op had a duty to respect the rights of its occupants under the Ontario *Human Rights Code* and to accommodate the needs of an occupant with a disability, to the point of undue hardship.[223]

Where there is a reasonable basis to question the legitimacy of a person's request for accommodation or the adequacy of the information provided, the accommodation provider may request confirmation or additional information from a qualified health care professional to get the needed information.

Where more information about a person's disability is needed, the information requested must be the least intrusive of the person's privacy while still giving the accommodation provider enough information to make the accommodation.

In the rare case where an accommodation provider can show that it legitimately needs more information about the person's disability to make the accommodation (as opposed to just the needs related to the disability), it could ask for the nature of the person's illness, condition or disability[224] (for example, is it a mental health disability, a physical disability, a learning disability?), as opposed to a medical diagnosis.

Organizations are not expected to diagnose illness or "second-guess" the health status of a person with a disability. An accommodation provider is not entitled to substitute its own opinion for that of medical documentation provided by a doctor.[225] Similarly, an organization must not ask for more confidential medical information than necessary because it doubts the person's disclosure of their disability based on its own impressionistic view of what a specific disability should "look like."[226]

> **Example:** An employee tells his manager that he has Crohn's Disease and requests time off work to recover from an upcoming surgery related to his condition. Although the employee provides medical documentation from his family doctor stating that he has a disability for which he will require 4 – 6 weeks off to recover from surgery, his manager questions the legitimacy of the request, saying "I have no one to replace you, and besides, my uncle has had Crohn's Disease for years and he has never had to have surgery." He insists on the employee providing confirmation from his surgeon as well before he will consider providing the requested accommodation. This could be a violation of the employee's rights under the *Code.*

Generally, the accommodation provider does not have the right to know a person's confidential medical information, such as the cause of the disability, diagnosis, symptoms or treatment,[227] unless these clearly relate to the accommodation being sought, or the person's needs are complex, challenging or unclear and more information

is needed.[228] In rare situations where a person's accommodation needs are complex, challenging or unclear, the person may be asked to co-operate by providing more information, up to and including a diagnosis.[229] In such situations, the accommodation provider must be able to clearly justify why the information is needed.

However, wherever possible, an accommodation provider must make genuine efforts to provide needed accommodations without requiring a person to disclose a diagnosis, or otherwise provide medical information that is not absolutely necessary.

> **Example:** A woman living with HIV provides medical verification that she has a disability to her university's office for students with disabilities. The office helps her to set up a schedule that avoids early morning classes, due to the insomnia and fatigue she experiences as a side effect of her medication. Neither the office nor the woman's professors need to know the exact nature of her disability to make this accommodation.

Where someone's needs are unclear, they may be asked to attend an independent medical examination (IME). However, there must be an objective basis for concluding that the initial medical evidence provided is inaccurate or inadequate. The IME should not be used to "second-guess" a person's request for accommodation.[230] Requests for medical examinations must be warranted, take into account a person's particular disability-related needs, and respect individual privacy to the greatest extent possible.[231]

> **Example:** A woman is employed as a railroad engineer, which is a "safety sensitive" position. After being hospitalized for a serious concussion resulting from a car accident, she is cleared by her doctor to go back to work. However, upon returning, she is evaluated and her supervisor notices that she cannot focus well, her reaction time is slow, and she makes repeated mistakes. In this case, the employer may be justified in asking the employee to attend an independent medical examination.[232]

No one can be made to attend an independent medical examination, but failure to respond to reasonable requests may delay the accommodation until such information is provided, and may ultimately frustrate the accommodation process.

Mere assertions of symptoms, such as statements that the person experiences "stress," "pain" or "feels unwell" – things that many people commonly experience – may not be enough to establish a disability within the meaning and protection of human rights legislation.[233] If choosing to disclose such information in writing, individuals and doctors should make it clear that these symptoms relate to a disability.

> **Example:** A man provides a doctor's note to his employer stating that he has been feeling "under the weather" and needs a leave of absence. The employer is entitled to ask for more information to ascertain whether his condition is linked to

a disability. If it is, the employer may ask about the person's restrictions, the expected date of return to work, and whether or not the person could still be present at work with an accommodation.

However, where these types of assertions exist alongside other indicators that the person is experiencing health problems, and where an employer, housing provider or service provider perceives that a person may have a disability, the *Code*'s protection will be triggered.

Where a person provides disability-related information that an accommodation provider deems "insufficient" to enable it to provide accommodation, the accommodation provider cannot use its own failure to ask for additional information to deny the accommodation or to otherwise subject a person to negative treatment (for example, termination of employment, denial of service, *etc.*).[234]

If the person does not agree to provide additional medical information, and the accommodation provider can show that this information is needed, it may be the case that the person seeking accommodation could be found to not have taken part in the accommodation process and the accommodation provider would likely be relieved of further responsibility.[235]

In some cases, there may be conflicting information provided by two medical experts. For example, a person's own doctor or specialist may outline different accommodation needs than an independent medical examiner's report. Deciding which report to follow will depend on the facts of the particular situation and certain factors, such as which expert has more relevant experience, the degree of interaction with the person, and the methods used for the assessment(s), among others.[236]

8.8 Confidentiality

Documentation supporting the need for a particular accommodation should be provided only to the people who need to be aware of the information. For example, in employment, it may be preferable in some circumstances for information to be provided to the company's health department or human resources staff rather than directly to a supervisor, to further protect confidentiality.

> **Example:** A woman with the beginning stages of multiple sclerosis provides medical documentation to her human resources department and asks for accommodation. The human resources department agrees to help facilitate a flexible schedule, rest periods to manage periods of fatigue, and time off to attend medical appointments. It may not be necessary for the woman to discuss her medical situation in detail with anyone else (*e.g.* her manager or supervisor) since the HR department has the required information to ensure that she has the accommodations she needs to remain productive at work.

A person's medical information should be kept separately from their personnel file, or any file associated with their tenancy or use of a service.

In cases where there are compelling circumstances affecting the health and safety of an individual, it may be necessary to disclose information about a person's health to others. This should be done in accordance with privacy laws. More information about privacy laws and how they apply to public and private housing providers, employers and service providers can be found at the Office of the Information and Privacy Commissioner of Ontario and the Office of the Privacy Commissioner of Canada.[237]

9. Undue hardship

Organizations covered by the *Code* have a duty to accommodate to the point of undue hardship. Some degree of hardship may be expected – it is only if the hardship is "undue" that the accommodation will not need to be provided.[238]

In many cases, it will not be difficult to accommodate a person's disability. Accommodation may simply involve making policies, rules and requirements more flexible. While doing this may involve some administrative inconvenience, inconvenience by itself is not a factor for assessing undue hardship.

The *Code* prescribes only three considerations when assessing whether an accommodation would cause undue hardship:

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

No other considerations can be properly taken into account under Ontario law.[239] Therefore, factors such as business inconvenience,[240] employee morale[241] and customer and third-party preferences[242] are not valid considerations in assessing whether an accommodation would cause undue hardship. [243]

To claim the undue hardship defence, the organization responsible for making the accommodation has the onus of proof.[244] It is not up to the person with a disability to prove that an accommodation can be accomplished without undue hardship.

The nature of the evidence required to prove undue hardship must be objective, real, direct and, in the case of cost, quantifiable. The organization responsible for accommodation must provide facts, figures and scientific data or opinion to support a claim that the proposed accommodation in fact causes undue hardship. A mere statement, without supporting evidence, that the cost or risk is "too high" based on speculation or stereotypes will not be sufficient.[245]

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.

9.1 Collective agreements

The *Code* also prevails over collective agreements.[246] Collective agreements or other contractual arrangements cannot act as a bar to providing accommodation.[247] To allow otherwise would be to permit the parties to contract out of the provisions of the *Code* under the umbrella of a private agreement,[248] and would run counter to the purposes of the *Code*.[249]

Accordingly, subject to the undue hardship standard, the terms of a collective agreement or other contractual arrangement cannot justify discrimination that is prohibited by the *Code*. Where respondents attempt to argue undue hardship based on factors that are not specifically listed in the *Code*, decision-makers should treat these arguments with skepticism.[250]

Employers and unions are responsible for accommodating employees. They are jointly responsible for negotiating collective agreements that comply with human rights laws. They must build conceptions of equality into collective agreements[251] and where they do not, it will be more challenging to argue that the collective agreement prevents them from making an accommodation. A union may cause or contribute to discrimination by participating in the formulation of a work rule, for example in a collective agreement, that has a discriminatory effect.[252]

> **Example:** When a union and employer are negotiating a collective agreement, the principle of seniority is maintained as a general principle. However, the collective agreement cites obligations under the Ontario *Human Rights Code* and accounts for situations where accommodating employees with disabilities may override other provisions of the collective agreement.

If an employer and a union cannot reach an agreement on how to resolve an accommodation issue, the employer may need to make the accommodation in spite of the collective agreement. If the union opposes the accommodation, or does not co-operate in the accommodation process, it may be named as a respondent in a complaint filed with the HRTO.[253]

In exceptional circumstances, where an accommodation measure requires significant interference with the rights of other employees, and there are no other accommodation options available, accommodation may not be required. The HRTO has stated that

substantial interference with the rights of other employees can be relevant to assessing undue hardship.[254] In these situations, the employer and the union should be prepared to show that there were no other viable accommodation options available.[255]

Ultimately, the same kind of flexible arrangements that would be considered in a non-union environment should be considered in a unionized one, even if they fall outside a collective agreement. In other words, unionized environments should be held to the same standard as non-unionized ones.

9.2 Elements of the undue hardship defence

9.2.1 Costs

The Supreme Court of Canada has said "one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment."[256] The cost standard is therefore a high one.

Costs will amount to undue hardship if they are:

- quantifiable
- shown to be related to the accommodation, and
- so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its viability[257]

The costs that remain after all benefits, deductions and other factors have been considered will determine undue hardship. All projected costs that can be quantified and shown to be related to the proposed accommodation will be taken into account.[258] [259] However, mere speculation (for example, about financial losses that may follow the accommodation of a person with a disability) will not generally be persuasive.[260]

9.2.2 Outside sources of funding

To offset costs, an organization has an obligation to consider any outside sources of funding it can obtain to make the accommodation. Government programs, for example, may help to alleviate accommodation costs.[261]

A person seeking accommodation is also expected to avail themselves of any available outside sources of funding to help cover expenses related to their own accommodation.[262] Resources, such as government services or programs, might be available to accommodate the needs of people with disabilities that could also aid them at work, in their apartment or while accessing a service.

> **Example:** A tenant in a supportive housing building requires modifications to her unit to allow her to move freely in her wheelchair. To make the accommodation, the supportive housing provider applies for funds through its funder and the woman accesses a government-funded accessibility grant for people with disabilities to help alleviate the costs.

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

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

Before being able to claim that it would be an undue hardship based on costs to accommodate someone with a disability, an organization would have to show that they took advantage of any available government funding (or other) program to help with such costs.

9.2.3 Health and safety

If an accommodation is likely to cause significant health and safety risks, this could be considered "undue hardship."[263] Employers, housing providers and service organizations have an obligation to protect the health and safety of all their employees, clients and tenants, including people with disabilities, as part of doing business safely, and as part of fulfilling their legal requirements under Ontario's health and safety laws. The *Code* recognizes that the right to be free from discrimination must be balanced with health and safety considerations.

Organizations have a responsibility to take precautions to ensure that the health and safety risks in their facilities or services are no greater for persons with disabilities than for others. Where a health and safety requirement creates a barrier for a person with a disability, the organization should assess whether the requirement can be waived or modified.[264] Relevant questions to ask include:

- Is the person seeking accommodation willing to assume the risk in circumstances where the risk is solely to their own health or safety?
- Would changing or waiving a requirement or providing any other type of accommodation be reasonably likely to result in a serious risk to the health or safety of other employees, tenants, staff or other service users?
- What other types of risks are assumed within the organization, and what types of risks are tolerated within society as a whole?

The onus is on the accommodation provider to establish that it cannot accommodate a person due to dangers related to health and safety.[265]

Assessment of whether an accommodation would cause undue hardship based on health and safety must reflect an accurate understanding of risk based on objective evidence rather than stereotypical views. Undue hardship cannot be established by relying on impressionistic or anecdotal evidence, or after-the-fact justifications.[266] Anticipated hardships caused by proposed accommodations should not be sustained if based only on speculative or unsubstantiated concern that certain adverse consequences "might" or "could" result if the person is accommodated.[267]

> **Example**: A long-term care home canvasses ways to facilitate the use by some of its residents of motorized wheelchairs inside the building's common living areas. In response to historical concerns that such use may raise safety issues, a staff team develops a plan to assess the actual risk and to explore ways to reduce risk. It then drafts a proposal of rules and regulations to be followed by all residents and staff to ensure safety.[268]

In evaluating the seriousness or significance of risk, the following factors may 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 often?
- The scope of the risk: who will be affected if it occurs?

If the potential harm is minor and not very likely to occur, the risk should not be considered serious. If there is a risk to public safety, consideration will be given to the increased numbers of people potentially affected and the likelihood that a harmful event may happen.

> **Example:** The HRTO found that requiring a transit provider in a major city to consistently and clearly announce its transit stops to facilitate access to patrons with visual disabilities was not an undue hardship on the basis of health and safety. It rejected the transit operator's argument that it would be dangerous to have the drivers announce the stops when they have many other duties to perform.[269]

Organizations must try to mitigate risks where they exist. The amount of risk that exists *after* accommodations have been explored and precautions have been taken to reduce the risk (short of undue hardship based on cost) will determine whether there is undue hardship.

Where policies or procedures implemented in the name of minimizing risk intrude on the dignity and equality of people with disabilities, the responsible organization will need to show that the policy, procedure, *etc.* is a *bona fide* and reasonable requirement.[270]

Where a person's conduct is objectively disruptive due to disability and causes a risk, employers, housing providers and service providers must consider a range of strategies to address the behaviour. Strategies will include assessing, and where necessary, reassessing and modifying any accommodations that are already in place for the person, and/or providing or arranging for additional supports.

The dignity of the person must be considered when addressing health and safety risks. Even where behaviour is correctly assessed to pose a risk, organizations should apply a proportionate response. If a real risk exists, the least intrusive means to address the risk must be used.

High probability of substantial harm to anyone will constitute an undue hardship. In some cases, it may be undue hardship to attempt to mitigate risk, such as where the risk is imminent and severe.[271]

9.3 Minimizing undue hardship

Organizations must consider strategies to avoid undue hardship and meet their duty to accommodate under the *Code.* For example, making reasonable changes to business practices or obtaining grants or subsidies can offset the expense of accommodation.[272]

The costs of accommodation must be distributed as widely as possible within the organization so that no single department, employee, customer or subsidiary is burdened with the expense. The appropriate basis for evaluating the cost is based on the budget of the organization as a whole, not the branch or unit where the person with a disability works or has made an application.[273]

Organizations and others responsible for accommodation are expected to consider whether accommodating the needs of a person with a disability may improve productivity, efficiency or effectiveness, expand the business, or improve the value of the business or property.

> **Example:** An accommodation that affects a significant number of people with disabilities, such as the installation of an elevator and automatic door-opener, could open up a new market for a storekeeper or a service provider. By installing an elevator, several more people will be able to access a store, including families with children in strollers.

Creative design solutions, as part of a broader inclusive design strategy or in response to the needs of one person, can often avoid expensive capital outlay. This may involve specifically tailoring design features to a person's functional capabilities.

Where undue hardship is claimed, cost and risk estimates should be carefully examined to make sure they are not excessive in relation to the stated objective. If they are, an organization should determine if a less expensive or lower risk alternative exists that

could accomplish the accommodation (either as an interim measure to a phased-in solution or permanently) while still fully respecting the dignity of the person with a disability.

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

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

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

Some accommodations will benefit large numbers of people with disabilities, yet the cost may prevent them from being accomplished. Hardship may be reduced by spreading the cost over several years.

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

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

Another method of reducing the impact of the cost of an accommodation is to establish a reserve fund the person or organization responsible for accommodation pays into under specified conditions. One of the obvious conditions should be that the reserve fund is to be used only to pay for accommodation costs in the future. Accommodations could gradually be accomplished by expenditures out of the reserve fund or could eventually be accomplished once enough funds had been set aside.[274] Both phasing in and establishing a reserve fund are to be considered only after the organization responsible for accommodation has shown that the most appropriate accommodation could not be accomplished immediately. Phasing in, wherever possible, is to be preferred to establishing a reserve fund.

After all costs, benefits, deductions, outside sources of funding and other factors have been considered, the next step is to determine whether the remaining (net) cost will alter the essential nature or affect the viability of the organization responsible for making the accommodation. The organization would need to show how it would be altered or its viability affected. It will not be acceptable for the organization to merely state, without

evidence to support the statement, that the company operates on low margins and would go out of business if required to undertake the required accommodation. If undue hardship can be shown, the person with a disability should be given the option of providing or paying for that portion of the accommodation that results in undue hardship.

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

10. Other limits on the duty to accommodate

While the *Code* specifies that there are only three factors that will be considered when determining whether the test for undue hardship has been met (cost, outside sources of funding and health and safety issues), in some cases, courts and tribunals have recognized that even where these three factors are not at issue, there is not a limitless right to accommodation.[275] There may be other narrow circumstances where it may not be possible to accommodate a person's disability.

However, an organization must not jump to the conclusion that accommodation is not possible or required. It must still meet its procedural duty to accommodate by examining issues on a case-by-case basis, and seeking out next-best solutions, such as phased-in or interim accommodation. The onus will be on an organization to show the steps they have taken and the concrete reasons why accommodation is not possible. Situations where the duty to accommodate might be limited may include:

1. No accommodation is available that allows the person to fulfil the essential requirements of the job, tenancy, service, etc.

There may be limited circumstances where a measure identified as a potential accommodation, that would not otherwise constitute an undue hardship based on cost and health and safety, is still not required. This is because the measure would fundamentally alter the nature of the employment, housing, service, contract, *etc.*, or because it would still not allow the person to "fulfill the essential duties attending the exercise of the right."[276] This may be the case even after the organization has been inclusively designed, barriers to participation have been removed, and accommodation options examined. Or, after accommodation has been tried and exhausted, there may be no further accommodation available that will help the person to complete the essential requirements of the housing, services, employment, *etc*. In such instances, the organization may have fulfilled its duty to accommodate.

In extreme situations – for example, where disability-related absences have spanned several years or more – human rights case law has established limits on the duty to accommodate. In such situations, it has been held that "the duty to accommodate is neither absolute nor unlimited,"[277] and does not guarantee an indefinite leave of absence.[278]

In employment, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration. Human rights case law establishes that potential accommodations that would fundamentally alter the nature of the employment relationship need not be provided.

> **Example:** In one case, an employee argued that the duty to accommodate requires an employer to refrain from collecting an overpayment of wages, in circumstances where attempts to collect have a negative impact on the employee by reason of his/her disability. The HRTO said that the duty to accommodate does not require this as it "flies in the face of the well-established principle that the duty to accommodate does not require pay for no work in exchange."[279]
>
> **Example:** In another case, the HRTO considered whether the employer's decision not to continue allowing an injured worker to remain in a modified position on a part-time basis, instead placing her on an unpaid medical leave, was discriminatory. The respondent argued that its obligation to the applicant did not extend to permanently creating or bundling a set of tasks that did not result in a job that was useful to the respondent's operations. Without finding undue hardship, HRTO agreed that this was not a necessary accommodation as the duty to accommodate does not require the employer to allow the employee to perform only some of the essential duties of the job. It stated that the duty to accommodate does not require an employer to permanently assign the essential duties of an employee with a disability to other employees or to hire another employee to perform them in the employee's place.[280]

There may be cases where the characteristics of an illness – for example, very lengthy absences or a very poor prognosis – are such that the proper operation of the business is hampered excessively, or where an employee remains unable to work for the reasonably foreseeable future, even though the employer has tried to accommodate him or her. The employer's duty to accommodate may end where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future, even with accommodation.[281]

Therefore, not every accommodation will be required even where providing it might not constitute an undue hardship in terms of cost and health and safety. While the cases above were decided in the context of employment, it is likely that the same legal principles would apply in the social areas of housing, services, *etc.* if the accommodation would fundamentally alter the nature of the housing or service.

2. Where a person does not participate in the accommodation process

The duty to accommodate is a multi-party, collaborative process. All responsible parties are expected to work co-operatively to develop accommodation solutions.[282] In some cases, an organization may have fulfilled its procedural and substantive duty to accommodate, because the person requesting accommodation may not have taken part in the process. For example, a person may be considered to have not taken part if they refuse to comply with reasonable requests for information necessary to show and/or meet their accommodation needs, or where they refuse to take part in developing accommodation solutions. [283]

Before concluding that a person has not co-operated, accommodation providers should consider if there are any disability or *Code*-related factors that may prevent the person from taking part in the process. These factors may then need to be accommodated. The accommodation provider should also consider whether an accommodation plan needs to be adjusted because it is not working.

It may be challenging for organizations when they perceive that a person has a disability and needs an accommodation, but the person denies that he or she has a disability. In these cases, organizations should still attempt to start the accommodation process, and continue to offer accommodation, as appropriate. However, there will be a limit to the extent that an organization can accommodate someone's disability in the absence of the person's participation.

> **Example:** A teacher begins to experience tremors, speech difficulties and balance issues. He contacts his school board and asks to be accommodated with a leave of absence. The school board asks him for medical documentation to support the request, but the man refuses. The school board explains that they require medical information that sets out the man's disability-related needs so that they can accommodate him effectively. The man refuses to see a doctor and refuses to provide any medical documentation. Without the man's participation and cooperation, the duty to accommodate may come to an end.

3. Balancing the duty to accommodate with the rights of other people

Generally, when a person makes an accommodation request, the organization or institution responsible for accommodation will be able to provide the accommodation without it affecting the legal rights of other people.

Sometimes, however, a request for accommodation may turn out to be a "competing human rights" situation. This will be the case if, while dealing with an accommodation request, it turns out that the legal rights of another person or group might also be affected.

This complicates the normal approach to resolving a human rights dispute where only one side claims a human rights violation. In some cases, only one party is making a human rights claim, but the claim conflicts with the human rights of another party or parties.

> **Example:** A medical service provider has a serious allergy to dogs and refuses to treat a woman who is blind and uses a guide dog. The woman is told to make another appointment with a different service provider. However, the second medical office is small and it will take at least a month to get another appointment.[284]

Organizations and institutions operating in Ontario have a legal duty to take steps to prevent and respond to situations involving competing rights. The OHRC's *Policy on competing human rights*[285] sets out a framework for analyzing and addressing competing human rights situations. It also provides concrete steps on how organizations can proactively take steps to reduce the potential for human rights conflict and competing rights situations.

Claims that affect business operations alone are properly considered within the scope of the duty to accommodate (that is, whether an accommodation is appropriate or amounts to an undue hardship) and are not competing human rights claims.

> **Example:** An employee claims she is being discriminated against when her employer denies her request for modified work hours to allow her to attend required medical appointments related to a disability. Her request does not appear to affect the legal rights of others. Therefore, this situation is not a competing rights claim, but rather is one involving a request for human rights accommodation. The employer might try to argue undue hardship based on financial impact for his business, which could limit his duty to accommodate.

Organizations must distinguish between claims that solely affect business operations and therefore fall within the duty to accommodate, from competing claims that affect the rights of other individuals and groups.

11. Preventing and responding to discrimination

The ultimate responsibility for maintaining an environment free from discrimination and harassment rests with employers, housing providers, service providers and other responsible parties covered by the *Code*. It is not acceptable to choose to stay unaware of discrimination or harassment of a person with a disability, whether or not a human rights claim has been made.

Organizations and institutions operating in Ontario have a legal duty to take steps to prevent and respond to breaches of the *Code*. Employers, housing providers, service providers and other responsible parties must make sure they maintain accessible, inclusive, discrimination-free and harassment-free environments that respect human rights.

Employers, housing providers, service providers and other responsible parties violate the *Code* where they directly or indirectly, intentionally or unintentionally infringe the *Code,* or where they authorize, condone or adopt behaviour that is contrary to the *Code*.

Under section 46.3 of the *Code*, a corporation, trade union or occupational association, unincorporated association or employers' organization will be held responsible for discrimination, including acts or omissions, committed by employees or agents in the course of their employment. This is known as vicarious liability. Simply put, it is the OHRC's position that an organization is responsible for discrimination that occurs through the acts of its employees or agents, whether or not it had any knowledge of, participation in, or control over these actions.

> **Example:** Staff in a group home refuse to investigate a tenant's allegation that another tenant is discriminating against her based on her sex and disability. The organization operating the group home would be responsible and potentially liable for condoning discrimination and not responding to this allegation.

Vicarious liability does not apply to breaches of the sections of the *Code* dealing with harassment. However, since the existence of a poisoned environment is a form of discrimination, when harassment amounts to or results in a poisoned environment, vicarious liability is restored.[286] Further, in these cases the "organic theory of corporate liability" may apply. This means that an organization may be liable for acts of harassment carried out by its employees if it can be proven that management was aware of the harassment, or the harasser is shown to be part of the management or "directing mind" of the organization.[287]

The decisions, acts or omissions of an employee will engage the liability of the organization in harassment cases where:

- the employee who is part of the "directing mind" engages in harassment or inappropriate behaviour that is contrary to the *Code*, or
- the employee who is part of the "directing mind" does not respond adequately to harassment or inappropriate behaviour he or she is aware of, or ought reasonably to be aware of.

In general, managers and central decision-makers in an organization are part of the "directing mind." In employment, employees with only supervisory authority may also be part of the "directing mind" if they function, or are seen to function, as representatives of the organization. Even non-supervisors may be considered to be part of the "directing mind" if they have *de facto* supervisory authority or have significant responsibility for the guidance of others. For example, a member of the bargaining unit who is a lead hand may be considered to be part of the "directing mind" of an organization.

There is also a clear human rights duty not to condone or further a discriminatory act that has already happened. To do so would extend or continue the life of the initial discriminatory act. This duty extends to people who, while not the main actors, are drawn into a discriminatory situation through contractual relations or in other ways.[288]

Depending on the circumstances, employers, housing providers, service providers and other responsible parties may be held liable for failing to respond to the actions of third parties (such as service users or customers, contractors, *etc.*) who engage in discriminatory or harassing behaviour.[289]

Multiple organizations may be held jointly liable where they all contribute to discrimination. For example, a union may be held jointly liable with an employer where it has contributed towards discriminatory workplace policies or actions – for example, by negotiating discriminatory terms in a collective agreement, or blocking an appropriate accommodation, or failing to take steps to address a harassing or poisoned workplace environment.[290]

Human rights decision-makers often find organizations liable, and assess damages, based on the organization's failure to respond appropriately to address discrimination and harassment. [291]

> **Example:** A man with cerebral palsy alleged that he was subjected on two occasions to insults and negative treatment by staff and other customers at a bar in his neighbourhood who believed he was drunk. He brought the issue to the attention of the bar manager and explained that his disability caused him to slur his words, regardless of how much alcohol he had consumed. The manager told him it wasn't "a big deal" and that he should "lighten up" about it. The situation worsened and the man stopped going to the bar. By not investigating and addressing the man's complaints of harassment, the bar failed to uphold its legal obligations and could be liable under the *Code.*

An organization may respond to complaints about individual instances of discrimination or harassment, but they may still be found to have not responded appropriately if the underlying problem is not resolved. There may be a poisoned environment, or an organizational culture that condones discrimination, despite punishing the individual perpetrators. In these cases, organizations must take further steps, such as training and education, to better address the problem.

Some things to consider when deciding whether an organization has met its duty to respond to a human rights claim include:

- procedures in place at the time to deal with discrimination and harassment
- the promptness of the organization's response to the complaint
- how seriously the complaint was treated
- resources made available to deal with the complaint
- whether the organization provided a healthy environment for the person who complained
- how well the action taken was communicated to the person who complained.[292]

The following steps are some ways that organizations can prevent and eliminate discrimination against people with disabilities in their organizations. Organizations should develop strategies to prevent discrimination based on all *Code* grounds, but should give specific consideration to people with disabilities.

A complete strategy to prevent and address human rights issues should include:

- a barrier prevention, review and removal plan
- anti-harassment and anti-discrimination policies
- an education and training program
- an internal complaints procedure
- an accommodation policy and procedure.

In its publication entitled, *A policy primer: Guide to developing human rights policies and procedures*,[293] the OHRC provides more information to help organizations meet their human rights obligations and take proactive steps to make sure their environments are free from discrimination and harassment.

Here are some things organizations should consider with respect to people with disabilities when implementing barrier prevention, review and removal plans, developing human rights policies and procedures, and in education and training programs.

11.1 Barrier prevention and removal

Ensuring full accessibility means making sure that barriers to employment, services and housing for people with disabilities are not embedded into new organizations, facilities, services or programs. It also means identifying and removing barriers where they already exist. A barrier removal process should include reviewing an organization's physical accessibility, policies, practices, decision-making processes and overall culture.

Under the *Accessibility for Ontarians with Disabilities Act*, employers, service providers, many housing providers and the government are required to comply with accessibility standards for people with disabilities. Part of complying with the standards means that government, large organizations and designated public sector organizations have to develop accessibility plans to prevent and remove barriers to accessibility.

When designing inclusively and removing barriers, organizations should consult with people with disabilities to gain a greater understanding of people's diverse needs, and how to most effectively meet them. It is important that people with disabilities have the opportunity to provide input into information-gathering processes and are consulted about the barriers that affect them.

> **Example:** A large employer reviews its operations to identify barriers for people with disabilities. As part of this, it conducts a written survey and follow-up interviews of employees and customers to solicit their feedback on how well the company is doing on specific accessibility issues and areas where it could improve.

When identifying barriers, organizations should take into account that discrimination based on disability may intersect with discrimination based on other *Code* grounds, including race, sex, sexual orientation, *etc.* As well, someone may experience different barriers based on their level of income. Compared to other service users, someone who has a physical disability, has low income, is a newcomer to Canada and speaks English as a second language may experience unique barriers when trying to access a service. When collecting information about barriers, organizations should include ways for people to tell the organization about all of the circumstances that may prevent them from taking part equally.

11.2 Data collection and monitoring

Collecting data – both quantitative and qualitative – can help an organization understand the barriers that exist, and identify and address concerns that may lead to systemic discrimination.[294] Data collection and analysis should be undertaken where an organization or institution has or ought to have reason to believe that discrimination, systemic barriers or the perpetuation of historical disadvantage may potentially exist.

Some methods to do this include surveying employees, service users or tenants (in larger housing organizations), doing interviews, focus groups or asking for verbal or written feedback.

Organizations should keep in mind that people with disabilities may fear that their private information will be shared unnecessarily with others, with negative consequences. It helps to make surveys or data collection anonymous and ensure people know how their information will be used and how it will be kept private.

Information about barriers to accessibility, discrimination and harassment can be monitored by collecting periodic data over time. Data collection can also help an organization understand if its efforts to combat discrimination, such as putting a special program in place, are helping or need to be modified.

11.3 Developing human rights policies and procedures

Developing anti-harassment and anti-discrimination policies, an internal human rights procedure, and an accommodation policy and procedure are part of an overall human rights strategy, but these should also be developed with the needs of people with disabilities in mind.[295]

For example, in procedures dealing with human rights concerns or accommodation requests, the organization should outline how it will maintain the confidentiality of people's private medical information.

Under the *Occupational Health and Safety Act*, all workplaces in Ontario are expected to develop harassment policies and review these at least annually. Harassment policies should explicitly include harassment based on a disability. The *AODA* requires that obligated organizations develop, implement and maintain accommodation policies that govern how the organization will achieve accessibility.

Lack of knowledge about one's rights and fear of reprisal are factors that may contribute to people not knowing how to complain or avoiding making a complaint, even if they feel their human rights are being violated. Organizations should make sure they provide adequate information and training about complaint procedures, and clearly outline that people will not experience reprisal for making a complaint.[296]

> **Example:** A college develops a pamphlet outlining its human rights complaint procedure. In addition to putting the pamphlet online, it consults with disability groups to explore other ways to achieve maximum accessibility. It distributes the pamphlet in its application and acceptance packages and makes it available at its office for students with disabilities.

11.4 Education and training

Education and training on disability issues and human rights is essential to developing a "human rights culture" within an organization that supports the values and principles of the *Code*. Without an understanding of human rights issues relating to people with disabilities, and support for human rights principles, human rights policies and procedures will be less likely to succeed.

Under the *AODA*'s "Integrated Accessibility Standard," organizations also have a duty to train their employees and others on human rights and accessibility. Every obligated organization[297] must make sure that training is given to employees, volunteers, people who help develop the organization's policies, and others who provide goods, services and facilities on behalf of the organization. The training must be provided on the requirements of the accessibility standard and on the Ontario *Human Rights Code* as it pertains to people with disabilities.[298]

Education on human rights works best when accompanied by a strong proactive strategy to prevent and remove barriers to equal participation, and effective policies and procedures for addressing human rights issues that do arise.

Programs that focus on education, raising awareness and changing attitudes should also include evaluating whether behavioural change has resulted in the short and long term and if discriminatory barriers in the organization or system have changed as a result.

In addition to training that is required by the *AODA*, the following items could be integrated into a human rights training program on disability issues:

- the types of barriers that people with disabilities face in housing, employment and services (*e.g*. structural impediments, stereotypes)
- the rights of people with disabilities under the *Code*
- the human rights system in Ontario, including how to file a human rights claim
- the specific obligations that an organization has to uphold people's *Code* rights and ways it can do this
- the organization's human rights strategy and human rights policies and procedures, such as complaint procedures and anti-discrimination and anti-harassment policies, and how these relate to people with disabilities
- how the organization accommodates people with disabilities
- how the organization or its employees, customers, tenants and others can be part of a broader cultural shift to be more inclusive of people with disabilities.

Human rights education should not be a one-time event. Ongoing training should be provided to address developing issues, and regular refreshers provided to all staff. The best defence against human rights claims is for organizations to be fully informed and aware of the responsibilities and protections included in the *Code.* By complying with their responsibilities under the *Code*, organizations will reduce the chances of human rights claims being filed against them, and save the time and expense needed to defend against them. All of society benefits when people with disabilities are encouraged and empowered to take part at all levels.

For more information on the human rights system in Ontario, visit:
www.ontario.ca/humanrights

The human rights system can also be accessed by telephone at:
Local: 416-326-9511
Toll Free: 1-800-387-9080
TTY (Local): 416-326 0603
TTY (Toll Free) 1-800-308-5561

To file a human rights claim (called an application), contact the Human Rights Tribunal of Ontario at:
Toll Free: 1-866-598-0322
TTY: 416-326-2027 or Toll Free: 1-866-607-1240
Website: www.hrto.ca

To talk about your rights or if you need legal help with a human rights claim, contact the Human Rights Legal Support Centre at:
Telephone: 416-597-4900
Toll Free: 1-866-625-5179
TTY: 416-597-4903 or Toll Free: 1-866-612-8627
Website: www.hrlsc.on.ca

For human rights policies, guidelines and other information, visit the Ontario Human Rights Commission website at www.ohrc.on.ca

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Appendix A: Purpose of this policy

Section 30 of the *Code* authorizes the OHRC to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*. The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the *Code*. They are important because they represent the OHRC's interpretation of the *Code* at the time of publication.[299] Also, they advance a progressive understanding of the rights set out in the *Code.*

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

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

OHRC policies are subject to decisions of courts interpreting the *Code*. OHRC policies have been given great deference by the courts and the HRTO,[300] applied to the facts of the case before the court or the HRTO, and quoted in the decisions of these bodies.[301]

Endnotes

[1] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624, 1997 CanLII 327 (SCC) [*Eldridge*] at para. 56.

[2] Ena Chadha, "'Mentally Defectives' Not Welcome: Mental Disability in Canadian Immigration Law, 1859-1927," *Disability Studies Quarterly*, Winter 2008, Volume 28, No.1, www.dsq-sds.org, available online at: http://dsq-sds.org/article/view/67/67.

[3] For example, see: http://rabble.ca/news/2016/04/price-acceptance-immigrants-disabilities-system-disadvantage.

[4] Deborah C. Park & John P. Radford (1998), "From the Case Files: Reconstructing a history of involuntary sterilisation", *Disability & Society*, 13:3, 317-342. The Government of Alberta made an official apology in 1999 and provided financial compensation to the victims: CBC News Canada, "Alberta apologizes for forced sterilization" (November 9, 1999). Available online at: www.cbc.ca/news/canada/story/1999/11/02/sterilize991102.html (Retrieved: June 23, 2016).

[5] L'Arche Canada, "A Resource Document on Institutions and Deinstitutionalization," (2014). Available online at: www.larche.ca/education/Institutions_and_the_Deinstitutionalization_Movement.pdf (Retrieved: June 23, 2016).

[6] For example, in 2010, Canada ratified the United Nations' *Convention on the Rights of Persons with Disabilities*, (2006), 13 December 2006, U.N.T.S. vol. 2515, [*CRPD*], (entered into force 3 May 2008, accession by Canada 11 March 2010). Available online at: www.un.org/disabilities/documents/convention/convention_accessible_pdf.pdf. Parties to the Convention are required to promote and protect the full enjoyment of human rights by people with disabilities and ensure that they enjoy full equality under the law. In Ontario, the provincial government passed the *Accessibility for Ontarians with Disabilities Act, 2005*, S.O. 2005, c. 11 [*AODA*] to improve accessibility standards for Ontarians with physical and mental disabilities in all public establishments by 2025. There have also been notable advancements made through litigation: see, for example, *Moore v. British Columbia (Education)*, [2012] 3 SCR 360, 2012 SCC 61 (CanLII) [*Moore*]; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 SCR 650, 2007 SCC 15 (CanLII) [*Via Rail*]; *Lane v. ADGA Group Consultants Inc.*, 2007 HRTO 34 (CanLII) [*Lane*], upheld in *ADGA Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON SCDC) [*ADGA*].

[7] Ontario *Human Rights Code*, R.S.O.1990, c. H.19 [*Code*].

[8] The HRTO's 2013-2014 Annual Report indicates that "disability" was cited as a ground of discrimination in 54% of the applications filed within that period, making it by far the most frequently cited ground of discrimination (the next most frequently cited area of discrimination was "reprisal" at 27%). The HRTO's previous annual reports show that this is a consistent trend: the ground of disability was cited in 57% of cases in 2012-2013 and 54% in 2011-2012.

[9] Statistics Canada, Special tabulation, based on the *Canadian Survey on Disability, 2012*, as cited by the OHRC's publication, *By the numbers: A statistical profile of people with mental health and addiction disabilities in Ontario*, 2015 at 48 (available online at: www.ohrc.on.ca/sites/default/files/By%20the%20numbers_Statistical%20profile%20of%20people%20with%20mental%20health%20and%20addiction%20disabilities%20in%20Ontario_accessible_5.pdf. These findings are exacerbated for people with mental health disabilities and addictions. For more information, see *By the numbers*, and the OHRC's *Policy on preventing discrimination based on mental health disabilities and addictions*, 2014, available online at: www.ohrc.on.ca/sites/default/files/Policy%20on%20Preventing%20discrimination%20based%20on%20mental%20health%20disabilities%20and%20addictions_ENGLISH_accessible.pdf [*Mental Health Policy*].

[10] See, for example, *Garrie v. Janus Joan Inc.*, 2014 HRTO 272 (CanLII).

[11] Alternative work is now widely held to be a significant component of the right to equal treatment for people with disabilities in the workplace. See section 8.3.2 of this Policy on "Employment-specific accommodation issues" for more information.

[12] See, for example, *Eagleson Co-Operative Homes, Inc. v. Théberge*, 2006 CanLII 29987 (Ont. Div. Ct.) [*Eagleson*]; *Krieger v. Toronto Police Services Board*, 2010 HRTO 1361 (CanLII) [*Krieger*]; *Formosa v. Toronto Transit Commission*, 2009 HRTO 54 (CanLII) [*Formosa*]; *King v. Ontario (Community and Social Services)*, 2015 HRTO 307 (CanLII); *Jakobek v. Toronto Standard Condominium Corporation No. 1626*, 2011 HRTO 1901 (CanLII); *Smolak v. 1636764 Ontario*, 2009 HRTO 1032 (CanLII) [*Smolak*]; *Pridham v. En-Plas Inc*., 2007 HRTO 8 (CanLII) [*Pridham*]; *Wesley v. 2252466 Ontario Inc. o/a The Grounds Guys*, 2014 HRTO 1591 (CanLII); *Darvish-Ghaderi v. Evertz Microsystems*, 2013 HRTO 653 (CanLII) [*Darvish-Ghaderi*]; *Taucar v. University of Western Ontario*, 2014 HRTO 63 (CanLII); *Childs v. The Regional Municipality of Peel Police Services Board*, 2014 HRTO 1829 (CanLII); *Wozenilek v. 7-Eleven Canada*, 2010 HRTO 407 (CanLII); *Baber v. York Region District School Board*, 2011 HRTO 213 (CanLII) [*Baber*]; *A.J.J. v. Toronto District School Board*, 2013 HRTO 1189 (CanLII); *Ravi DeSouza v. 1469328 Ontario Inc*., 2008 HRTO 23 (CanLII) [*DeSouza*]; *Pantoliano v. Metropolitan Condominium Corporation No. 570*, 2011 HRTO 738 (CanLII); *Shiell v. London Transit Commission*, 2014 HRTO 481 (CanLII); *Devoe v. Haran*, 2012 HRTO 1507 (CanLII) [*Devoe*]; *Stewart v. Ontario (Government Services)*, 2013 HRTO 1635 (CanLII); *Smith v. Astley Gilbert*, 2010 HRTO 1945 (CanLII); *Williams v. Hudson's Bay Company/Zellers*, 2009 HRTO 2168 (CanLII); *Simser v. Canada*, 2004 FCA 414 (CanLII); *J.O v. London District Catholic School Board*, 2012 HRTO 732; *County of Brant v. OPSEU*, 2013 ONSC 1955 (CanLII); *Pak v. Toronto (City)*, 2014 HRTO 1702 (CanLII); *Norrena v. Primary Response Inc.*, 2013 HRTO 1175 (CanLII); *Schildt v. POINTTS Advisory Limited*, 2014 HRTO 893 (CanLII).

[13] For more information specifically on discrimination and accommodation issues in rental housing, see the OHRC's *Policy on human rights and rental housing*, available at: www.ohrc.on.ca/sites/default/files/attachments/Policy_on_human_rights_and_rental_housing.pdf.

[14] Arim, Rubab. 2015. "A profile of persons with disabilities among Canadians aged 15 years or older, 2012." *Canadian Survey on Disability, 2012*, Statistics Canada, available online at: www.statcan.gc.ca/daily-quotidien/131203/dq131203a-eng.htm [Arim].

[15] *Ibid.* at 6.

[16] *Ibid.* at 7. For information on the possible intersection of the grounds of disability and age in a person's experience of discrimination, see the section of this policy entitled "Intersecting grounds." About 13% of people surveyed reported that their disability existed at birth, *ibid*. at 3.

[17] *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] 1 SCR 665, 2000 SCC 27 (CanLII) [*Mercier*]; *Chen v. Ingenierie Electro-Optique Exfo*, 2009 HRTO 1641 (CanLII) [*Chen*]; *McLean v. DY 4 Systems*, 2010 HRTO 1107 (CanLII).

[18] Subsection 10(3) of the *Code*, *supra* note 7.

[19] This is consistent with *Hinze v. Great Blue Heron Casino*, 2011 HRTO 93 (CanLII) [*Hinze*], in which the HRTO stated that the definition of disability extends to the actual or perceived possibility that a person may develop a disability in the future. See also *Hill v. Spectrum Telecom Group Ltd.*, 2012 HRTO 133 (CanLII) [*Hill*]; *Davis v. Toronto (City)*, 2011 HRTO 806 (CanLII), request for reconsideration denied, 2011 HRTO 1095 (CanLII); *Chen*, *supra* note 17; *Boodhram v. 2009158 Ontario Ltd*., 2005 HRTO 54 (CanLII) [*Boodhram*]. It is also consistent with the multi-dimensional approach recommended by the Supreme

Court of Canada in *Mercier*, *supra* note 17. In that case, the Court recognized that "[b]y placing the emphasis on human dignity, respect, and the right to equality rather than a simple biomedical condition, this 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." (at para. 77).

[20] The Law Commission of Ontario has observed that older people are often affected by the perception that "they will inevitably *become* disabled, and therefore will become a burden or will be requesting expensive or administratively onerous accommodations or services [emphasis in original]." See Law Commission of Ontario, *A Framework for the Law as it Affects Older Adults: Final Report* (April 2012) at 51, available online at: www.lco-cdo.org/older-adults-final-report.pdf (date retrieved: July 20, 2015). On this point, the LCO Report cites Charmaine Spencer, *Ageism and the Law: Emerging Concepts and Practices in Housing and Health* (Law Commission of Ontario: 2009), 3. Online: www.ontla.on.ca/library/repository/mon/24009/304762.pdf. Along the same lines, in a written submission to the OHRC (April 2015), the Advocacy Centre for the Elderly wrote, "Often, older persons are not affected by the actual experience of a disability itself but by the perception that they will eventually become disabled, despite the fact that the vast majority of older adults do not have such limitations."

[21] The OHRC is concerned about possible discrimination based on a person's genetic characteristics. While the issue has not been litigated extensively before human rights tribunals, it is the OHRC's view that the *Code*'s prohibition on discrimination based on perceived disability could include subjecting a person to unequal treatment because of a belief that the person, due to genetic characteristics, is likely to or will develop a disability in the future.

[22] From the Preamble (e) to the *CRPD*, *supra* note 6 at p. 3.

[23] In *Hinze*, *supra* note 19, the HRTO stated (at para. 19): "The social model conceptualizes 'disability' as the outcome of socially constructed barriers and discriminatory customs and norms and seeks to eliminate those barriers and prejudicial attitudes. The social model asserts what is truly the disadvantage is not the physical or mental condition, but rather society's response, which characterizes the condition as an impairment, and society's failure to accommodate difference. Under the social model, disabled people are not intrinsically disadvantaged because of their conditions, but rather they experience discrimination in the way we organize society."

[24] *Mercier*, *supra* note 17.

[25] *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703, 2000 SCC 28 (CanLII) [*Granovsky*]. In that case, the Supreme Court of Canada recognized that the primary focus of the disability analysis in the context of the *Canadian Charter of Rights and Freedoms* is on the inappropriate legislative or administrative response (or lack thereof) of the State (at para. 39). The Court said (at para. 33):

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

Although in *Granovsky* the focus was on State action, similar principles apply to organizations responsible for accommodation under human rights law: Office for Disability Issues, Human Resources Development Canada, Government of Canada, *Defining Disability: A complex issue,* Her Majesty the Queen in Right of Canada, 2003 at p. 39.

[26] *Devoe*, *supra* note 12.

[27] See for example *Newfoundland (Human Rights Commission) v. Companion*, 2002 NFCA 38 (CanLII); *Lane*, *supra* note 6, upheld in *ADGA*, *supra* note 6. The Federal Court of Appeal, applying *Mercier*, *supra* note 17 and *Granovsky*, *supra* note 25, stated that "disability in a legal sense consists of a physical or mental impairment, which results in a functional limitation or is associated with a perception of impairment. This was in relation to a dispute about whether a woman's chronic headaches were, in fact, a disability under the *Canadian Human Rights Act*. The Court found that they were: *Ottawa (City) v. Canada (Human Rights Comm.) (No. 2)* (2005), 54 C.H.R.R. D/462, 2005 FCA 311 at para. 15 (CanLII), leave to appeal refused [2005] S.C.C.A. No. 534.

[28] See, for example, *Boodhram*, *supra* note 19; *Hinze*, *supra* note 19; *Hill*, *supra* note 19.

[29] Whether a temporary condition amounts to a disability will depend on the facts of each case. In *Mercier*, *supra* note 17 at para. 82, the Supreme Court of Canada held that everyday illnesses or normal ailments, such as a cold, are not generally disabilities under human rights legislation. The HRTO has applied this holding in several decisions, and some adjudicators have expressed the concern that to consider commonplace, temporary illnesses as disabilities would trivialize the *Code*'s protections: see, for example, *Valmassoi v. Canadian Electrocoating Inc*., 2014 HRTO 701 (CanLII); *Davidson v. Brampton (City)*, 2014 HRTO 689 (CanLII). That being said, the fact that a physical condition is of a temporary nature does not exclude it from coverage under the *Code*: see *Hinze*, *supra* note 19 at para. 14; *Mou v. MHPM Project Leaders*, 2016 HRTO 327 (CanLII) [*Mou*]. Temporary injuries for which benefits were claimed or received under the *Workplace Safety and Insurance Act*, S.O. 1997 c. 16 Sch. A [*WSIA*] are clearly protected by the *Code*: see *Deroche v. Recycling Renaissance International Inc*., 2005 HRTO 26 (CanLII). And human rights tribunals in other jurisdictions have also found temporary conditions to constitute disabilities. For example, the tribunal in *Wali v. Jace Holdings Ltd*., 2012 BCHRT 389 (CanLII) stated at para. 82: "It is not necessary that a disability be permanent in order to constitute a disability for the purposes of the *Code*. The *Code*'s protection also extends to persons who suffer from temporarily disabling medical conditions: *Goode v. Interior Health Authority*, 2010 BCHRT 95 (CanLII). Whether a temporary condition constitutes a disability is a question of fact in each case."

[30] *Mou*, *ibid.* at para. 23.

[31] In *J.L. v. York Region District School Board*, 2013 HRTO 948 (CanLII), the HRTO found that while *pes planus* (flat feet) can be a disability in some cases, the applicant's experience of this condition did not amount to a disability as it did not present any obstacles to full participation in society. Similarly, in *Anderson v. Envirotech Office Systems*, 2009 HRTO 1199 (CanLII), the Tribunal found that there was no evidence that the applicant's bronchitis was chronic or became a chronic condition. The kind of bronchitis experienced by the applicant was commonly experienced by many and had no impact on his ability to participate fully in society. Thus, the Tribunal found that it was not a disability under the *Code*.

[32] In *Granovsky*, *supra* note 25, a case that involved a challenge to the Canada Pension Plan disability pension which arose under s. 15 of the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada rejected a notion of disability that would focus only on impairment or functional limitation. The Court said (at para. 29):

> 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.

[33] See, for example, *Dawson v. Canada Post Corp.* 2008 CHRT 41 (CanLII) [*Dawson*] at paras. 90-98.

[34] It generally would not include a medical diagnosis. For more information about the kinds of information that organizations can ask for, see the section of this policy entitled, "Medical information to be provided."

[35] Law Commission of Ontario, *A Framework for the Law as it Affects Persons with Disabilities*, (September 2012) [LCO, "Framework"] at 100, available online at: www.lco-cdo.org/en/disabilities-final-report-framework-introduction (retrieved July 9, 2015).

[36] Marcia H. Rioux and Fraser Valentine, "Does Theory Matter? Exploring the Nexus Between Disability, Human Rights, and Public Policy," in *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law*, (Vancouver: UBC Press), 2006, 47 at 51. The authors write that the "human rights approach to disability…identifies wide variations in cognitive, sensory, and motor ability as inherent to the human condition and, consequently, recognizes the variations as expected events and not as rationales for limiting the potential of persons with disabilities to contribute to society." This approach recognizes "the condition of disability as inherent to society, not some kind of anomaly to normalcy." (at page 52)

[37] Rosemarie Garland-Thomson, "Disability, Identity, and Representation: An Introduction," in *Rethinking Normalcy*, Tanya Titchkosky and Rod Michalko, eds. (Toronto: Canadian Scholars' Press Inc.) 2009, 63 at 70.

[38] In *Dixon v. 930187 Ontario*, 2010 HRTO 256 (CanLII) [*Dixon*], a housing case that involved a female tenant and her husband who used a wheelchair, the HRTO upheld a claim of discrimination based on disability and stated at para. 50: "[the housing provider] appeared to take the position that he was entitled to substitute his judgement for that of the [claimants] as to what they needed and where and how they should live. It appears that he presumed that he knew better than they what they needed, including what needs would arise in future from [the claimant's] medical conditions." The housing provider "did not appear to acknowledge the fact that the [claimants] are responsible adults who have the right and the capacity to make their own decisions. This type of patronising attitude toward people with personal characteristics identified as grounds of discrimination under the *Code* has been characterised as 'infantilising'." See also *Brock v. Tarrant Film Factory Ltd*., 2000 CanLII 20858 (Ont. Bd. of Inq.) and *Turnbull v. Famous Players Inc.*, 2001 CanLII 26228 (Ont. Bd. of Inq.) [*Turnbull*].

[39] In this context, prejudices may be defined as deeply held negative perceptions and feelings about people with disabilities.

[40] Stereotyping is when generalizations are made about individuals based on assumptions about qualities and characteristics of the group they belong to. The Supreme Court of Canada has said "Stereotyping, like prejudice, is a disadvantaging attitude, but one that attributes characteristics to members of a group regardless of their actual capacities": *Quebec (Attorney General) v. A*, [2013] 1 SCR 61, 2013 SCC 5 (CanLII) at para. 326.

[41] A person is stigmatized when they possess an attribute that "marks" them as different and leads people to be devalued in the eyes of others: see Brenda Major and Laurie T. O'Brien, "The social psychology of stigma", *Annu. Rev. Psychol*. 2005 56:393-421 at 394-395. Inherent in this is the idea that people are seen as "deviant" from what society has deemed as the "norm": see Schur, Edwin M. 1971. *Labelling Deviant Behaviour: Its sociological implications*. New York: Harper & Row, Publishers, as cited by the Centre for Addiction and Mental Health, *The Stigma of Substance Abuse: A Review of the Literature* (18 August 1999). Available online at: www.camh.ca/en/education/Documents/www.camh.net/education/Resources_communities_organizations/stigma_subabuse_litreview99.pdf.

[42] LCO, "Framework," *supra* note 35 at 43.

[43] *Yale v. Metropoulos* (1992), 20 C.H.R.R. D/45 (Ont. Bd. Inq.).

[44] *Duliunas v. York-Med Systems*, 2010 HRTO 1404 (CanLII) [*Duliunas*]. See also *Ilevbare v. Domain Registry Group*, 2010 HRTO 2173 (CanLII) [*Ilevbare*], in which the HRTO states at para. 52: "The termination of a disabled employee's employment, in the midst of a medical leave of absence, is *prima facie* discriminatory and likewise demands an explanation." This suggests that *prima facie* discrimination will be found where an employee is terminated while on medical leave and the onus will be on the employer to provide a non-discriminatory reason for the termination. Also see *Russell v. Indeka Imports Ltd.*, 2012 HRTO 926 (CanLII) [*Russell*].

[45] Information taken from a written submission to the OHRC made by the Canadian Hearing Society (April 2015). The CHS states that the lack of widespread supports such as sign language interpretation and closed captioning contributes to this problem.

[46] *Entrop v. Imperial Oil Limited*, 2000 CanLII 16800 (ON CA); *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 (CanLII) [*Tranchemontagne*].

[47] The OHRC's *Minds That Matter: Report on the consultation on human rights, mental health and addictions*, 2012, is available on the OHRC's website at: www.ohrc.on.ca/sites/default/files/Minds%20that%20matter_Report%20on%20the%20consultation%20on%20human%20rights%20mental%20health%20and%20addictions_accessible.pdf

[48] See the OHRC's *Mental Health Policy*, *supra* note 9.

[49] Environmental sensitivities (also known as multiple chemical sensitivities, cerebral allergies, chemical-induced immune dysfunction, *etc.*) are triggered by the exposure to common environmental chemicals in lower levels than those that tend to affect the general public.

[50] *Noe v. Ranee Management*, 2014 HRTO 746 (CanLII) [*Noe*]. In another case, asthma due to environmental allergies was found to be a disability: *Redmond v. Hunter Hill Housing Co-op (No. 2)*, 2013 BCHRT 276 (CanLII) [*Redmond*]. See also Canadian Human Rights Commission, *Policy on Environmental Sensitivities*, available online at: www.chrc-ccdp.gc.ca/sites/default/files/policy_sensitivity_0.pdf (date retrieved: February 8, 2016).

[51] A 2010 Canadian study reported that "[t]he incidence rate of anaphylaxis is increasing, and recent US reports suggest that it may be as high as 49.8 per 100,000 person-years. Foods are primary inciting allergens for anaphylaxis, and hospitalizations because of food-induced anaphylaxis are reported to have increased by 350% during the last decade." See Moshe Ben-Shoshan, *et al.*, "A population-based study on peanut, tree nut, fish, shellfish, and sesame allergy prevalence in Canada," *Journal of Allergy and Clinical Immunology*, 2010, available online at: www.med.mcgill.ca/epidemiology/joseph/publications/medical/benshoshan2010.pdf (date retrieved: March 8, 2016). Food Allergy Canada (formerly Anaphylaxis Canada) reports that food allergies, one of the most common causes of anaphylaxis, now affect more than 960,000 Ontarians (information compiled by Food Allergy Canada and included in a written submission to the OHRC in April 2015).

[52] *An Act to protect anaphylactic pupils*, *2005* – S.O. 2005, Chapter 7 ("*Sabrina's Law*").

[53] People may also be at risk for anaphylaxis due to allergies to medication, insect stings, latex, *etc.*

[54] *Rutledge v. Fitness One Peter Inc.*, [2010] O.H.R.T.D. No. 2041, 2010 HRTO 2039; *Subotic v. Jellybean Park Langley Campus Inc.*, [2009] B.C.H.R.T.D. No. 260, 2009 BCHRT 260. For American cases dealing with food allergies, see *Ridley School District v. M.R.*, 680 F.3d 260, 2012 U.S. App. LEXIS 9908 (QL) (U.S. Court of Appeals for the Third Circuit); *T.F. et al. v. Fox Chapel Area School District*, 2014 U.S. App. Lexis 18066 (U.S. Court of Appeals for the Third Circuit).

[55] See *Ontario (Human Rights Commission) v. Vogue Shoes* (1991), 14. C.H.R.R. D/425.

[56] *Ball v. Ontario (Community and Social Services),* 2010 HRTO 360 (CanLII) [*Ball*].

[57] See http://jurist.org/paperchase/2014/12/european-court-of-justice-rules-obesity-can-be-a-disability.php and http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-07/cp140112en.pdf

[58] See *Turner v. Canada Border Services Agency*, 2014 CHRT 10 (CanLII) in which the Canadian Human Rights Tribunal found that the respondent had discriminated against the complainant, in part, because of a perception that he had a disability due to obesity.

[59] This might apply, for example, where a man is denied employment opportunities that include a physical component because the employer perceives that his "larger-than-average" size prevents him from doing physical work, even where this is not the case.

[60] See *Haykin v. Roth*, 2009 HRTO 2017 (CanLII) [*Haykin*].

[61] See *Lane*, *supra* note 6; *ADGA*, *supra* note 6; and *Osvald v. Videocomm Technologies*, 2010 HRTO 770 (CanLII) at paras. 34 and 54.

[62] See section 8.4 of this Policy on "The legal test" for more information.

[63] See section 7 of this Policy on "Reprisal" for more information.

[64] See, for example, *Knibbs v. Brant Artillery Gunners Club*, 2011 HRTO 1032 (CanLII) [*Knibbs*] (discrimination because of association with a person who had filed a disability discrimination claim); *Giguere v. Popeye Restaurant*, 2008 HRTO 2 (CanLII) (dismissal of an employee because her husband was HIV-positive); *Barclay v. Royal Canadian Legion, Branch 12*, (1997) 31 C.H.R.R. D/486 (Ont. Bd. Inq.) (punishment of a member because she objected to racist comments about Black and Indigenous people); and *Jahn v. Johnstone* (September 16, 1977), No. 82, Eberts (Ont. Bd. Inq.) (eviction of a tenant because of the race of the tenant's dinner guest).

[65] See *Torrejon v. 114735 Ontario*, 2010 HRTO 934 (CanLII), upheld on judicial review in *1147335 Ontario Inc., o/a Weston Property Management v. Torrejon*, 2012 ONSC 1978 (CanLII).

[66] See section 9 of this Policy on "Undue hardship" for more information. See also *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3, 1999 CanLII 652 (SCC) [*Meiorin*].

[67] The full text of these exceptions is set out in the *Code*: www.ontario.ca/laws/statute/90h19#BK25.

[68] Section 52 of the *Charter* acts to make sure that any law that is inconsistent with the *Charter* is, to the extent of the inconsistency, of no force or effect.

[69] *Canada (Attorney General) v. Jodhan*, 2012 FCA 161 (CanLII) [*Jodhan*] .

[70] *AODA*, *supra* note 6.

[71] Letter from former OHRC Chief Commissioner Barbara Hall to Mayo Moran, regarding the OHRC's submission to the second independent legislative review of the AODA (June 30, 2014), online: Ontario Human Rights Commission www.ohrc.on.ca/en/news_centre/ohrc-submission-regarding-aoda-legislative-review-2013-2014. The independent reviewer made recommendations to government about, among other things: renewed leadership; better enforcement; more public awareness including about the relationship

between the *Code* and the *AODA*; new standards including health care, education and building retrofits; focus on barrier removal planning; and improved standards development and review processes. Mayo Moran, Second Legislative Review of the *Accessibility for Ontarians with Disabilities Act*, 2005 (2014), online: Ontario Government www.ontario.ca/document/legislative-review-accessibility-ontarians-disabilities-act. The OHRC has prepared an eLearning video to help organizations understand the relationship between the *AODA* and the *Human Rights Code*. Working Together: The Ontario *Human Rights Code* and the *Accessibility for Ontarians with Disabilities Act*: www.ohrc.on.ca/en/learning/working-together-ontario-human-rights-code-and-accessibility-ontarians-disabilities-act.

[72] *CRPD*, *supra* note 6 at Article 1.

[73] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*] at para. 69.

[74] *Baker*, *ibid* at para. 70. The UN has said that ratifying the *CRPD* creates a "strong interpretive preference in favour of the Convention. This means that the judiciary will apply domestic law and interpret legislation in a way that is as consistent as possible with the Convention." UN, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities: Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (Geneva: United Nations, 2007) at 107.

[75] In June 2016, CASHRA issued a public statement calling for all levels of government to enact laws that fully implement the *CRPD*, including the right to adequate housing, income, education and employment, as well as accessible facilities and services. CASHRA also called on Canada to sign the Optional Protocol to the *CRPD*, which would allow the United Nations to consider communications from Canadian individuals or groups alleging violations. CASHRA also called on the federal government to designate an independent mechanism to monitor implementation of the *CRPD* and to ensure people with disabilities and their representative organizations are able to participate fully in the process.

[76] From the Preamble (p) to the *CRPD*, *supra* note 6.

[77] From the Preamble (q) to the *CRPD*, *ibid.*

[78] See, for example, Fiona Sampson, "Globalization and the Inequality of Women with Disabilities," (2003) 2 J. L. & Equality 16; Susan Fineran, "Sexual harassment and students with disabilities," (2002) Paper presented at the annual meeting of the Society for the Study of Social Problems, Washington D.C.; and Susan Fineran, "Sexual Harassment Between Same-Sex Peers: The Intersection of Mental Health, Homophobia, and Sexual Violence in Schools," (2002) *Social Work, 47.* Both papers are discussed in James E. Gruber and Susan Fineran, "The Impact of Bullying and Sexual Harassment on Middle and High School Girls," *Violence Against Women*, Volume 13, Number 6, June 2007, 627 at 632.

[79] Women with disabilities have faced unequal treatment relating to many aspects of their reproductive freedom, including infringements of: "the right to equality and non-discrimination, the right to marry and found a family; the right to comprehensive reproductive health care including family planning and maternal health services, education, and information; the right to give informed consent to all medical procedures including sterilization and abortion; and the right to be free from sexual abuse and exploitation." See, Centre for Reproductive Rights, "Reproductive Rights and Women with Disabilities: A Human Rights Framework" (2002), available online at: http://www.reproductiverights.org/sites/default/files/documents/pub_bp_disabilities.pdf.

[80] See Vera Chouinard, "Legal Peripheries: Struggles over disAbled Canadians' Places in Law, Society, and Space," in *Rethinking Normalcy*, Tanya Titchkosky and Rod Michalko, eds. (Toronto: Canadian Scholars' Press Inc.) 2009, 217 at 218, 221.

[81] Arim, *supra* note 14 at p. 7.

[82] Information taken from a written submission to the OHRC made by the Advocacy Centre for the Elderly (April 2015).

[83] Human Resources Development Canada reports that while 14% of Canadians have disabilities, the rate for older people is much higher, at 43%. After the age of 75, the rate is more than 50%: Human Resources Development Canada, *Federal Disability Report: Seniors with Disabilities in Canada*, Her Majesty the Queen in Right of Canada, 2011 (available online at: www.esdc.gc.ca/eng/disability/arc/federal_report2011/index.shtml). For more information on disability and aging, see *Time for Action: Advancing Human Rights for Older Ontarians*, Ontario Human Rights Commission, (2001), available online at: www.ohrc.on.ca/sites/default/files/attachments/Time_for_action%3A_Advancing_human_rights_for_older_Ontarians.pdf, and the OHRC's *Policy on discrimination against older people because of age*, available online at: www.ohrc.on.ca/sites/default/files/attachments/Policy_on_discrimination_against_older_people_because_of_age.pdf.

[84] "Cultural competence" may be defined as "an ability to interact effectively with people of different cultures and socio-economic backgrounds, particularly in the context of human resources, non-profit organizations, and government agencies whose employees work with persons from different cultural/ ethnic backgrounds. Cultural competence comprises four components: (a) Awareness of one's own cultural worldview, (b) Attitude towards cultural differences, (c) Knowledge of different cultural practices and worldviews, and (d) Cross-cultural skills. Developing cultural competence results in an ability to understand, communicate with, and effectively interact with people across cultures." See: http://worldlibrary.org/articles/cultural_competence#cite_note-1 (Retrieved: April 6, 2016).

[85] See *Moore*, *supra* note 6; *Peel Law Association v. Pieters*, 2013 ONCA 396 (CanLII). Note that in a few cases, most of which have challenged government services or have raised concerns that different treatment may not amount to discrimination in a substantive sense, disadvantage has not been inferred or assumed from the circumstances but may have been required to be shown by the claimant to establish adverse treatment or impact: see, for example, *Tranchemontagne*, *supra* note 46; *Peart v. Ontario (Community Safety and Correctional Services)*, 2014 HRTO 611 (CanLII); *Ivancicevic v. Ontario (Consumer Services)*, 2011 HRTO 1714 (CanLII) [*Ivancicevic*]; *Klonowski v. Ontario (Community Safety and Correctional Services)*, 2012 HRTO 1568 (CanLII). However, the Court of Appeal for Ontario and the HRTO have noted that in most cases under the *Code*, disadvantage can be assumed where there is adverse treatment based on a prohibited ground and that in most human rights cases it will not be necessary to go through a process of specifically proving what the disadvantage is: *Tranchemontagne*, *supra* note 46 and *Hendershott v. Ontario (Community and Social Services)*, 2011 HRTO 482 (CanLII) at para. 45.

[86] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, [2015] 2 SCR 789, 2015 SCC 39 (CanLII); *Gray v. A&W Food Service of Canada Ltd.* (1994), CHRR Doc 94-146 (Ont. Bd. Inq.); *Dominion Management v. Velenosi,* [1977] O.J. No. 1277 at para. 1 (C.A.); *Smith v. Mardana Ltd. (No. 1)* (2005), 52 C.H.R.R. D/89 at para. 22 (Ont. Div. Ct.); *King v. CDI Career Development Institutes Ltd.* (2001), 39 C.H.R.R. D/322 (Sask. Bd. Inq.); *Wilson v. Solis Mexican Foods Inc.*, 2013 ONSC 5799.

[87] Another example of indirect discrimination would be where an employment agency screens out people with disabilities from recruitment processes at the request of an employer.

[88] See *Johnson v. Halifax Regional Police Service* (2003), 48 C.H.R.R. D/307 (N.S. Bd. Inq.) at para. 57 for an example of a case where deviations from normal practice supported a finding of race discrimination.

[89] Human rights case law has established that, depending on the circumstances, one incident could be significant enough or substantial enough to be harassment: see *Murchie v. JB's Mongolian Grill (No. 2)*, 2006 HRTO 33 (CanLII); *Haykin*, *supra* note 60; *Wamsley v. Ed Green Blueprinting*, 2010 HRTO 1491 (CanLII) [*Wamsley*]; *Ford v. Nipissing University*, 2011 HRTO 204 (CanLII); and *Gregory v. Parkbridge Lifestyle Communities Inc*. 2011 HRTO 1535 (CanLII) [*Gregory*].

[90] Section 10(1) of the *Code*, *supra* note 7.

[91] See *Reed v. Cattolica Investments Ltd*. *and Salvatore Ragusa*, [1996] O.H.R.B.I.D. No. 7 [*Reed*]. See also, *Gregory*, *supra* note 89 at para. 87 citing *Ghosh v. Domglas Inc. (No. 2)* (1992), 17 C.H.R.R. D/216 (Ont. Bd. Inq.) [*Ghosh*] at paras. 43 to 48 and *Dhanjal v. Air Canada*, (1996), 28 C.H.R.R. D/367 at p. 50 (C.H.R.T.) [*Dhanjal*].

[92] *Reed*, *ibid.* See also, *Gregory*, *ibid.*

[93] See sections 5(2) and 2(2) of the *Code*, *supra* note 7, respectively.

[94] Employers should also be aware of their obligations under the *Occupational Health and Safety Act*, R.S.O. 1990, c.O.1 [*OHSA*].

[95] *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520 (CanLII) [*Strudwick*].

[96] See, for example, *S.S. v. Taylor*, 2012 HRTO 1839 at paras. 53-56 (CanLII) citing *Janzen v. Platy Enterprises Ltd.,* [1989] 2 S.C.R. 1252 [*Janzen*] and *Simpson v. Consumers' Assn. of Canada*, 2001 CanLII 23994 (ON CA), leave to appeal refused [2002] S.C.C.A. No. 83.

[97] *Aquilina v. Pokoj* (1991), 14 C.H.R.R. D/230 (Ont. Bd. Inq.).

[98] *Janzen*, *supra* note 96; *Haykin*, *supra* note 60.

[99] In *Harriott v. National Money Mart Co*., 2010 HRTO 353 [*Harriott*], a sexual harassment case, it was confirmed that a person is not required to protest or object to the harassing conduct (at para. 108).

[100] In the case of employment, amendments to the *OHSA*, *supra* note 94, require all employers with over five employees to establish policies on harassment and violence in the workplace and to review these annually.

[101] In *Harriott* , *supra* note 99, the HRTO found that the respondent's continued sexualized and inappropriate comments and conduct were unwelcome in the workplace (at para. 104).

[102] See, for example, *Perez-Moreno v. Kulczycki*, 2013 HRTO 1074 (CanLII) that deals with posting discriminatory comments on Facebook, and *C.U. v. Blencowe*, 2013 HRTO 1667 (CanLII) that deals with harassing text messages.

[103] See the OHRC's *Policy on preventing sexual and gender-based harassment*, 2013, available online at: www.ohrc.on.ca/sites/default/files/policy%20on%20preventing%20sexual%20and%20gender-based%20harassment_2013_accessible_1.pdf, for more information.

[104] See, for example, *Smith v. Menzies Chrysler Inc*., 2009 HRTO 1936 (CanLII); *Dhillon v. F.W. Woolworth Co.* (1982), 3 C.H.R.R. D/743 at para. 6691 (Ont. Bd. Inq.); *Naraine v. Ford Motor Co. of Canada (No. 4)* (1996), 27 C.H.R.R. D/230 at para. 50 (Ont. Bd. Inq.); and *Cugliari v. Telefficiency Corporation*, 2006 HRTO 7 (CanLII).

[105] In *Dhanjal*, *supra* note 91, the Tribunal noted that the more serious the conduct, the less need there is for it to be repeated. Conversely, the Tribunal held the less serious the conduct, the greater the need to show its persistence. See also *General Motors of Canada Limited v. Johnson*, 2013 ONCA 502 (CanLII).

[106] *McKinnon v. Ontario (Ministry of Correctional Services)*, [1998] O.H.R.B.I.D. No. 10; *Vanderputten v. Seydaco Packaging Corp.*, 2012 HRTO 1977 (CanLII).

[107] *Ghosh*, *supra* note 91 at para. 76 [as cited in *McKinnon v. Ontario (Ministry of Correctional Services*), [2002] O.H.R.B.I.D. No. 22]; *Welykyi v. Rouge Valley Co-operative Homes Inc.*, 2016 HRTO 299 (CanLII) [*Welykyi*].

[108] *Welykyi* , *ibid.*

[109] Colin Barnes, "A Brief History of Discrimination and Disabled People," in *The Disability Studies Reader*, 3rd ed., Lennerd J. Davis, ed. (New York: Routledge), 2010, 20 at 31. While the author's observations relate to discrimination against people with disabilities in the United Kingdom, it can be argued that much of what he describes pertains to the situation for people with disabilities in Canada.

[110] In *Moore*, *supra* note 6, the Supreme Court of Canada reaffirmed its earlier definition of systemic discrimination set out in its seminal 1987 decision *Canadian National Railway Co. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 [*CNR*] as, "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" (at pp. 1138-1139). The OHRC uses "systemic discrimination" when referring to individual institutions, or a system of institutions, that fall under the jurisdiction of the *Code* (*e.g.* the education system).

[111] *Vancouver Area Network of Drug Users v. British Columbia Human Rights Tribunal*, 2015 BCSC 534 (CanLII) at 107.

[112] *CNR*, *supra* note 110 at para. 34.

[113] OHRC's *Policy and guidelines on racism and racial discrimination*, (2005) [OHRC's *Racism Policy*], available online at: www.ohrc.on.ca/sites/default/files/attachments/Policy_and_guidelines_on_racism_and_racial_discrimination.pdf.

[114] Section 7(3)(b) of the *Code*, *supra* note 7, also specifically prohibits reprisal for rejecting a sexual solicitation or advance, where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

[115] *Noble v. York University*, 2010 HRTO 878 at paras. 30-31, 33-34 (CanLII) [*Noble*].

[116] *Ibid*. See also *Bertrand v. Primary Response*, 2010 HRTO 186 (CanLII).

[117] *Noble*, *supra* note 115 at paras. 30-31.

[118] *Sears v. Honda of Canada Mfg*., 2014 HRTO 45 (CanLII) [*Sears*] at 199.

[119] *Knibbs*, *supra* note 64.

[120] *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000* (SCFP-FTQ), 2008 SCC 43 (CanLII) [*Hydro-Québec*] at paras. 14 and 16.

[121] *CRPD*, *supra* note 6 at Article 13(1), Article 24(2)(c), and Article 27(1)(i), respectively. "Reasonable accommodation" is covered under Article 5 generally.

[122] See *Meiorin*, *supra* note 66 at paras. 65-66 and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CanLII 646, [1999] 3 S.C.R. 868, at paras. 22 and 42-45 [*Grismer*]. In *Gourley v. Hamilton Health Sciences* 2010 HRTO 2168 (CanLII) [*Gourley*], the adjudicator stated (at para. 8): "The substantive component of the analysis considers the reasonableness of the accommodation offered or the respondent's reasons for not providing accommodation. It is the respondent who bears the onus of demonstrating what considerations, assessments, and steps were undertaken to accommodate the employee to the point of undue hardship…" See also *Lee v. Kawartha Pine Ridge District School Board*, 2014 HRTO 1212 (CanLII) [*Lee*] ; *McCarthy v. Caesar's Plumbing and Heating Ltd.*, 2014 HRTO 1795; *Philomen v. Jessar Eglinton Ltd. (c.o.b. Aaron's Sales and Lease to Ownership)*, 2014 HRTO 1794.

[123] *ADGA*, *supra* note 6 at para. 107.

[124] In *Lane*, *supra* note 6, the HRTO held at para. 150 that a failure to meet the procedural dimensions of the duty to accommodate is a form of discrimination in itself because it "denies the affected person the benefit of what the law requires: a recognition of the obligation not to discriminate and to act in such a way as to ensure that discrimination does not take place." The HRTO's decision was confirmed on appeal: *ADGA*, *supra* note 6. See also *Lee*, *supra* note 122.

[125] *Gaisiner v. Method Integration Inc.*, 2014 HRTO 1718 (CanLII) [*Gaisiner*] at para. 149.

[126] *Redmond*, *supra* note 50.

[127] From the Preamble (h) to the *CRPD*, *supra* note 6.

[128] In *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 [*Eaton*], the Supreme Court of Canada recognized the unique nature of disability and emphasized the need for individualized accommodation because the ground of disability "means vastly different things depending upon the individual and the context" (at para. 69).

[129] *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 (CanLII), [2007] 1 SCR 161, 2007 [*McGill*]. Along the same lines, the HRTO found that an employment policy that mandates a set return to work plan for people with disabilities may be discriminatory if the particular circumstances of a person making an accommodation request are not considered: *Duliunas*, *supra* note 44.

[130] In *Eaton*, *supra* note 128, the Supreme Court of Canada stated that "integration should be recognized as the norm of general application because of the benefits it generally provides" (at para. 69). However, the Court found that in Emily Eaton's circumstances, segregated accommodation was in her best interests. The Court was of the view that this was one of those unusual cases where segregation was a more appropriate accommodation.

[131] The *CRPD*, *supra* note 6 states at Article 2, "'Universal design' means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. 'Universal design' shall not exclude assistive devices for particular groups of persons with disabilities where this is needed."

[132] *Eldridge*, *supra* note 1 para. 78.

[133] LCO "Framework," *supra* note 35 at 79.

[134] *Eaton*, *supra* note 128 at para. 67.

[135] *Meiorin, supra* note 66 at para. 68.

[136] *Ibid.*

[137] Letter from former Chief Commissioner Barbara Hall to Navanethem Pillay, High Commissioner for Human Rights, regarding the United Nations' study on participation of persons with disabilities in political and public life (October 2011). Online: www.ohrc.on.ca/en/re-ohchr-thematic-study-participation-persons-disabilities-political-and-public-life

[138] Under section 13.1 (1) of Ontario's *Election Act*, the returning officer shall ensure that each polling place is accessible to electors with disabilities. *Election Act*, R.S.O. 1990, c. E.6, online: www.ontario.ca/laws/statute/90e06. In *Hughes v. Elections Canada*, 2010 CHRT 4 (CanLII), the Canadian Human Rights Tribunal found in favour of a voter with a disability who filed a complaint after experiencing physical barriers at his polling station.

[139] Elections Ontario, accessible voting, online: www.elections.on.ca/en/voting-in-ontario/how--when-and-where-to-vote/when-and-where-to-vote/accessible-voting.html.

[140] *Count Us In: Removing Barriers to Political Participation – Accessible All Candidates Meetings Quick Reference Guide*. Ontario Government (2007) online: www.mcss.gov.on.ca/documents/en/mcss/publications/accessibility/Quickreferenceguidetoaccessibleallcandidatesmeetin.pdf. See also, letter from former Chief Commissioner Barbara Hall to the Executive of all political parties registered in Ontario regarding elections accessibility (March 2011) online: www.ohrc.on.ca/en/elections-accessibility-letter-executive-all-political-parties-registered-ontario.

[141] In *VIA Rail*, *supra* note 6, the Supreme Court of Canada stated at para. 186: "…while human rights principles include an acknowledgment that not every barrier can be eliminated, they also include a duty to prevent new ones, or at least, not knowingly to perpetuate old ones where preventable." Organizations, including government, should design their programs, services and facilities inclusively with the needs of people with disabilities in mind. In *Jodhan*, *supra* note 69, a case decided under the *Canadian Charter of Rights and Freedoms*, the Federal Court of Appeal found that inaccessible federal government websites violated the equality rights of a woman with a vision disability.

[142] See http://universaldesign.ie/What-is-Universal-Design/The-7-Principles/

[143] *AODA*, supra note 6.

[144] The Ontario *Building Code Act*, 1992, S.O. 1992, c. 23 governs the construction of new buildings and the renovation and maintenance of existing buildings.

[145] Similarly, organizations cannot rely only on the requirements of the Ontario *Building Code*, but must consider their obligations under the *Human Rights Code*. The *Human Rights Code* prevails over the *Building Code* and organizations may be vulnerable to a human rights claim if their premises fall short of the requirements of the *Human Rights Code*. Relying on relevant building codes has been clearly rejected as a defence to a complaint of discrimination under the *Human Rights Code*: see, for example, *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 [*Quesnel*] .

[146] Information taken from a written submission made to the OHRC by the Advocacy Centre for the Elderly (April 2015).

[147] A large number of people become hard of hearing as they age. In a written submission to the OHRC in April 2015, the Canadian Hard of Hearing Association stated, "Forty percent of Canadians over the age of 50 are hard of hearing. With an aging Baby Boomer population, the proportion of Canadians with hearing loss will increase rapidly over the next several decades."

[148] *Quesnel , supra* note 145 at para. 16.

[149] *Graham v. Underground Miata Network*, 2013 HRTO 1457 (CanLII) at para. 31.

[150] The duty to accommodate does not require an employer to promote an employee to a higher-level position he or she would not otherwise have been entitled to: *Ellis v. General Motors of Canada Ltd*., 2011 HRTO 1453 (CanLII). The duty to accommodate also does not require "an employer to place an employee in the position that the employee considers ideal…": *Seguin v. Xstrata Nickel*, 2012 HRTO 15 (CanLII) at para. 11.

[151] *Kelly v. University of British Columbia*, 2012 BCHRT 32 (CanLII); upheld on merits on judicial review in *University of British Columbia v. Kelly*, 2015 BCSC 1731 (CanLII).

[152] *Duliunas*, *supra* note 44. Along the same lines, see *Ilevbare*, *supra* note 44, in which the HRTO states at para. 52: "The termination of a disabled employee's employment, in the midst of a medical leave of absence, is *prima facie* discriminatory and likewise demands an explanation." This suggests that *prima facie* discrimination will be found where an employee is terminated while on medical leave, and the onus will be on the employer to provide a non-discriminatory reason for the termination.

[153] *Grismer*, *supra* note 122; *Cameron v. Nel-gor Nursing Home* (1984), 5 C.H.R.R. D/2170 at D/2192 (Ont. Bd. of Inq.). See also *Crabtree v. 671632 Ontario Ltd. (c.o.b. Econoprint (Stoney Creek)*, [1996] O.H.R.B.I.D. No. 37 (QL) (Ont. Bd. Inq.); *Gaisiner* , *supra* note 125.

[154] *Gaisiner* , *ibid.*

[155] *Pourasadi v. Bentley Leathers Inc.*, 2015 HRTO 138 (interim decision) (CanLII) [*Pourasadi*]; *Brown v. Children's Aid Society of Toronto*, 2012 HRTO 1025 (CanLII) [*Brown*]*; Briffa v. Costco Wholesale Canada Ltd*. 2012 HRTO 1970 (CanLII) [*Briffa*]; *Yeats v. Commissionaires Great Lakes*, 2010 HRTO 906 (CanLII) [*Yeats*]; *Perron v. Revera Long Term Care Inc*., 2014 HRTO 766 (CanLII) [*Perron*].

[156] *Yeats*, *ibid*.; *Briffa*, *ibid*.; *Perron*, *ibid.*

[157] *Arumugam v. Venture Industrial Supplies Inc*. (No. 5), (2013), CHRR Doc. 13-2276, 2013 HRTO 1776. See also: *Hydro-Québec*, *supra* note 120; *Briffa*, *ibid*.; *Yeats*, *ibid*.; and *Brown*, *supra* note 155. Ultimately, an accommodated employee must be able to perform useful and productive work for his or her employer: *Vanegas v. Liverton Hotels International Inc*., 2011 HRTO 715 (CanLII) [*Vanegas*] .

[158] See, for example, *Metsala v. Falconbridge*, (2001), 39 C.H.R.R. D/153 (Ont. Bd. Inq.) [*Metsala*] ; *ADGA*, *supra* note 6 at para. 107; *Hamilton-Wentworth District School Board v. Fair*, 2016 ONCA 421 (CanLII) [*Fair*]; *MacLeod v. Lambton (County)*, 2014 HRTO 1330 (CanLII) [*MacLeod*]; *Lee*, *supra* note 122. In *Ontario Liquor Board Employees' Union v. Ontario (Liquor Control Board of Ontario) (Di Caro)*, 2005 CanLII 55204 [*DiCaro*] , the arbitrator stated "…the duty to accommodate has evolved and expanded to such an extent that today the law requires an employer to look far beyond the disabled employee's own position as a means of accommodation."

[159] In *Hodkin v. SCM Supply Chain Management Inc.,* 2013 HRTO 923 (CanLII) [*Hodkin*] , it was stated at para. 52: "The accommodation process requires communication and collaboration between the employer and the employee in order to conduct an exhaustive search for positions or tasks that match what the applicant is capable of doing despite his restrictions."

[160] This is consistent with the Supreme Court of Canada's decision in *Hydro-Québec*, *supra* note 120.

[161] See *Carter v. Chrysler Canada Inc*., 2014 HRTO 845 (CanLII) [*Carter*]; *MacLeod*, *supra* note 158 at para. 219; *Vanegas*, *supra* note 157; *DiCaro*, *supra* note 158; *Ontario Liquor Control Boards Employees' Union v Ontario (Liquor Control Board of Ontario) (Sanfilippo)*, 2005 CanLII 55184 [*Sanfilippo*].

[162] See *Ontario Public Service Employees Union v. Ontario (Ministry of Community and Correctional Services) (Hyland Grievance)*, [2014] O.G.S.B.A. No. 1.

[163] Note that in *Ramasawaksingh v. Brampton (City)*, 2015 HRTO 1047 (interim decision) (CanLII), the HRTO stated at para. 9: "[T]he fact that a new position attracts a lesser rate of pay [than the pre-injury job] is not discriminatory." The HRTO stated its agreement with and adopted the reasoning of *Nearing v. Toronto (City)*, 2010 HRTO 1351 (CanLII) and *Koroli v. Automodule Corp*, 2011 HRTO 774 (CanLII), both of which refer to the Ontario Court of Appeal's decision in *Ontario Nurses' Association v. Orillia Soldiers' Memorial Hospital*, [1999] CanLII 3687 (ON CA).

[164] In *Chamberlin v. 599273 Ontario Ltd cob Stirling Honda* (1989), 11 C.H.R.R. D/110 (Ont. Bd. of Inq.), the Board of Inquiry found that the employer should have given the complainant the opportunity to prove he could still perform his old job.

[165] Employers should also be aware of their responsibility to provide suitable work to satisfy the obligation to re-employ workers who sustain a work-related injury: see the *WSIA*, *supra* note 29, ss. 40 and 41.

[166] See, for example, *Re Community Lifecare Inc. and Ontario Nurses'* Association, (2011), 101 L.A.C. 4th 87, in which an arbitrator found that an employer had failed to accommodate an employee who had developed a bad back when it failed to consider what modified light duty work it might be able to provide on a permanent basis.

[167] *Metsala*, *supra* note 158. The HRTO has identified several "best practices" related to this process. For example, in at least two cases the HRTO commented favourably on an employer's practice of canvassing vacant positions that match an employee's disability-related needs and qualifications and then "holding" or "'protecting" those positions to make sure that they are not first filled by someone who does not require accommodation: see *Harnden v. The Ottawa Hospital*, 2011 HRTO 1258 (CanLII) and *Gourley*, *supra* note 122. Other cases have confirmed that direct placement in an alternative position, without being required to succeed in a job competition, may be required: *Fair*, *supra* note 158. See also *MacLeod*, *supra* note 158. For possible exceptions in specific circumstances, see: *Buttar v. Halton Regional Police Services Board*, 2013 HRTO 1578 (CanLII) [*Buttar*] and *Formosa*, *supra* note 12.

[168] *Hydro-Québec*, *supra* note 120 at para. 15.

[169] *Gahagan v. James Campbell Inc.*, 2014 HRTO 14 (CanLII) at para. 27 [recon dismissed 2014 HRTO 339]; see also, *Saucier v. Smart Lazer* Grafix, 2009 HRTO 1053 (CanLII).

[170] The *Code* does not require an employer to schedule a second employee during time that an employee would normally be working alone where there is a need to perform duties that the employee is incapable of performing due to a disability: *Pourasadi* , *supra* note 155; *Perron*, *supra* note 155; *Lee*, *supra* note 122; *Re Hamilton Health Sciences and ONA (Pringle)*, 2013 CarswellOnt 8640, 115 C.L.A.S. 97, 232

L.A.C. (4th) 334; *Canadian Union of Public Employees, Local No. 1487 v. Scarborough Hospital,* [2009] O.L.A.A. No. 650.

[171] *Vanegas*, *supra* note 157.

[172] *Fair*, *supra* note 158. Employers should also be aware of the rights and obligations pertaining to return to work set out by Ontario's Workplace Safety and Insurance Board that exist concurrently with human rights protections: see www.wsib.on.ca/WSIBPortal/faces/WSIBManualPage?cGUID=19-02-02&rDef=WSIB_RD_OPM&fGUID=835502100635000524&_afrLoop=1033712479352182&_afrWindowMode=0&_afrWindowId=gnnbsv3wk_14#%40%3FcGUID%3D19-02-02%26_afrWindowId%3Dgnnbsv3wk_14%26_afrLoop%3D1033712479352182%26rDef%3DWSIB_RD_OPM%26_afrWindowMode%3D0%26fGUID%3D835502100635000524%26_adf.ctrl-state%3Dgnnbsv3wk_38

[173] See also section 29 of Regulation 191/11, *Integrated Accessibility Standards*, under the *AODA*, *supra* note 6 which requires employers (other than employers in private/not-for-profit organizations with fewer than 50 employees) to establish a documented process for supporting employees who return to work after being away for disability-related reasons and require accommodation.

[174] *Tombs v. 1303939 Ontario Ltd. (c.o.b. Holiday Inn Express)*, 2015 HRTO 842 (CanLII).

[175] See Section 17 of the *Code*, *supra* note 7.

[176] A policy that mandates a set return-to-work plan for people with disabilities may be discriminatory if the particular circumstances of a person making an accommodation request are not considered: *Duliunas*, *supra* note 44.

[177] See *Darvish-Ghaderi*, *supra* note 12 in which the HRTO (at para. 37) cited *Hydro-Québec*, *supra* note 120 and found that since a woman was permanently unfit to return to work, she was "no longer able to fulfill the basic obligations associated with her employment relationship for the foreseeable future" and for that reason the employer's duty to accommodate had come to an end. The HRTO went on to state at para. 36 that "to continue [the woman] in employment in these circumstances would have resulted in undue hardship."

[178] *Carter*, *supra* note 161 at para. 145, citing *McGill*, *supra* note 129.

[179] The test for undue hardship is set out fully in section 9 of this Policy.

[180] *Meiorin, supra* note 66 at para. 54.

[181] See *Hydro-Québec*, *supra* note 120 for the Supreme Court of Canada's comments on what the third part of this test means, in a practical sense, in the context of a disability accommodation in the workplace.

[182] *Grismer*, *supra* note 122 at para. 20.

[183] *Meiorin, supra* note 66 at para. 65.

[184] The duty to accommodate may require employers and others to consider modifying performance standards or productivity targets: *Meiorin*, *supra* note 66 at para. 65. The term "performance standard" refers broadly to qualitative or quantitative standards that may be imposed on some or all aspects of work, whether they are set by the employer or through collective bargaining. A productivity target is a performance standard that relates specifically to the output of work expected by the employer.

Performance standards generally can be distinguished from qualification standards, which are the skills or attributes that one must have to be eligible for a particular job:

> Production standards identify the level at which an employee must perform job functions in order to perform successfully. Qualification standards, on the other hand, identify the skills and abilities necessary to perform the functions at the required level.
> (Robert L. Burgdorf, *Disability Discrimination in Employment Law* (Washington D.C.: Bureau of National Affairs, 1995) at 241.)

The central issue in determining whether or how performance standards should be modified is whether the standards in question are essential duties or requirements within the meaning of section 17 of the *Code*. If the person is unable to perform the standard, but the standard is not considered an essential part of the job, it can be changed or the function removed from the employee altogether and reassigned. If the standard is essential, the employer is nevertheless required to accommodate the employee under section 17(2) of the *Code*. Keeping in mind the overall objective of the inclusion of employees with disabilities in the workplace, sections 17(1) and (2) of the *Code* together include an obligation on an employer to accommodate a person. This does not preclude the employer from enforcing performance standards that are unrelated to the disability. The employer is entitled to a productive employee and to develop standards and targets that maximize organizational objectives. Organizations should be guided by objective evidence when developing or assessing qualification standards that they consider are essential duties or requirements. If an employer is considering a standard that will be widely adopted, it should consider the job duties of employees in different settings that are or would be subject to the standard and whether there is a link between the standard and the duties of employees: *Lauzon v. Ontario Provincial Police*, 2011 HRTO 1404 (CanLII).

[185] According to Statistics Canada, the most needed accommodation for people with disabilities in the Canadian workplace is modified/reduced hours. And while this is the need most commonly met by employers, modified/reduced hours is also "the reason most frequently cited for difficulty advancing in employment": Matthew Till, *et al*., (2015). *Canadian Survey on Disability, 2012: A Profile of the Labour Market Experiences of Adults with Disabilities among Canadians aged 15 years and older, 2012*, Statistics Canada, 2015, at 12 and 17, available online at: www.statcan.gc.ca/pub/89-654-x/89-654-x2015005-eng.htm.

[186] *Hodkin*, *supra* note 159.

[187] See *Vanegas*, *supra* note 157; *DiCaro*, *supra* note 158; *Sanfilippo*, *supra* note 161.

[188] See section 8.3.2 of this Policy on "Employment-specific accommodation issues" for more information on alternative work.

[189] *Allen v. Ottawa (City)*, 2011 HRTO 344 (CanLII) and *Kelly v. CultureLink Settlement Services*, 2010 HRTO 977 (CanLII). Note that delays must be shown to be related to a disability and must be made in good faith: see *Arcuri v. Cambridge Memorial Hospital*, 2010 HRTO 578 (CanLII); *Vallen v. Ford Motor Company of Canada*, 2012 HRTO 932 (CanLII) and *M.C. v. London School of Business*, 2015 HRTO 635 (CanLII). Note also that in relation to adjudicators or in the context of administrative tribunals, the "Doctrine of Judicial Immunity" may apply to protect adjudicators who are alleged to have not provided accommodation in the exercise of their decision-making and dispute resolution functions: see *Thomson v. Ontario Secondary School Teachers' Federation*, 2011 HRTO 116 (CanLII); *Hazel v. Ainsworth Engineered*, 2009 HRTO 2180 (CanLII); *McWilliams v. Criminal Injuries Compensation Board*, 2010 HRTO 937 (CanLII).

[190] See *Smolak*, *supra* note 12; *Hill v. Bani-Ahmad*, 2014 HRTO 937 (CanLII); *Bourdeau v. Kingston Bazar*, 2012 HRTO 393 (CanLII).

[191] People with disabilities who use service animals to assist them with disability-related needs (such as anxiety) are also protected under the definition of "disability" in section 10 of the *Code*. Service animals do not have to be trained or certified by a recognized disability-related organization. However, where it is not immediately obvious that the animal is performing a disability-related service, a person must be able to show evidence (such as a letter from a doctor or other qualified medical professional) that they have a disability and that the animal assists with their disability-related needs. Service providers and others who receive such documentation should not use their own assumptions and observations to second-guess this verification. See *Allarie v. Rouble*, 2010 HRTO 61 (CanLII); *Sweet v. 1790907 Ontario Inc. o/a Kanda Sushi*, 2015 HRTO 433 (CanLII); *Sprague v. RioCan Empress Walk Inc.*, 2015 HRTO 942 (CanLII); *Schussler v. 1709043 Ontario*, 2009 HRTO 2194 (CanLII); *Kamis v. 1903397 Ontario Inc*., 2015 HRTO 741 (CanLII)**.** Section 4 of Regulation 429/07 under the *AODA*, *supra* note 6, also requires organizations to permit a person with a disability to be accompanied by their guide dog or service animal on all premises that are normally open to the public or third parties, unless the animal is otherwise excluded by law from the premises.

[192] For example, some disabilities may result in "acting out" behaviours. Education providers and other responsible organizations need to take into account whether behaviours that would otherwise warrant discipline are related to a disability.

[193] This might apply where a person with a disability does not have a rental or credit history to provide to a prospective landlord because they have previously only lived as a dependent.

[194] *Supra*, note 192.

[195] *Dixon*, *supra* note 38; *Devoe*, *supra* note 12.

[196] See section 8.8 of this Policy on "Confidentiality" for more information.

[197] In *Lane*, *supra* note 6, a case involving an employee with a mental health disability, the HRTO stated at para. 144: "The procedural dimensions of the duty to accommodate required those responsible to engage in a fuller exploration of the nature of bipolar disorder and to form a better informed prognosis of the likely impact of his condition in the workplace."

[198] See *Dawson*, *supra* note 33 at paras. 243-245.

[199] See section 8.6.1 of this Policy on "Duty to inquire about accommodation needs" for information on when an organization is expected to inquire about accommodation needs, even when a person may not have made a specific request.

[200] In *Baber*, *supra* note 12, the HRTO found that even if the duty to accommodate was triggered, the employer had fulfilled its duty to accommodate because Ms. Baber failed to co-operate in the accommodation process by refusing reasonable requests for information that would confirm her needs. She consistently refused to provide the necessary medical information. The HRTO found that the employer did not breach its duty to accommodate her when it terminated her employment.

[201] *Supra* note 184.

[202] *Supra* note 199.

[203] *Meiorin, supra* note 66 at paras. 65-66.

[204] *Conte v. Rogers Cablesystems Ltd.,* (1999) 36 C.H.R.R. D/403 (C.H.R.T.); *Mazuelos v. Clark* (2000) C.H.R.R. Doc. 00-011 (B.C.H.R.T.); *Lane*, *supra* note 6; *Krieger*, *supra* note 12; *Hodkin*, *supra* note 159; *MacLeod*, *supra* note 158.

[205] *Hodkin*, *ibid.*

[206] In *Turnbull*, *supra* note 38, the Board of Inquiry upheld a discrimination complaint finding that although Famous Players had taken steps to comply with the *Code* by providing equal access to its movie theatres for people with disabilities, it had not done so quickly enough, and had failed to act with "due diligence and dispatch" (para. 216).

[207] Human rights decision-makers have not been consistent on the issue of who is responsible for the costs of accommodation (or what types of expenses are included in "the costs of accommodation"). See *Iley v. Sault Ste. Marie Community Information and Career Centre*, 2010 HRTO 1773 (CanLII) in which the HRTO ordered the applicant to obtain medical information and stated: "The respondents are… directed to reimburse the applicant for the costs of such a production, since it is being done at their request." But also see *Drost v. Ottawa-Carleton District School Board***,** 2012 HRTO 235 (CanLII) where, in the context of a hearing in which the parties are subject to the HRTO's rules that require that they disclose all arguably relevant documents, the HRTO placed the onus of covering the costs of medical information for both establishing a disability and outlining the accommodation needs on the applicant. It is the OHRC's position that the procedural component of the duty to accommodate – which includes obtaining all relevant information and considering how to accommodate – includes a responsibility to pay the costs necessary to facilitate accommodation, such as medical assessments and doctor's reports, unless to do so would cause undue hardship. This position is consistent with the human rights principle that the *Code* be given a broad, purposive and contextual interpretation to advance the goal of eliminating discrimination.

[208] *Central Okanagan School Dist. No. 23 v. Renaud*, [1992] 2 S.C.R. 970, [*Renaud*].

[209] In *DeSouza*, *supra* note 12, the HRTO found that a tennis club discriminated against a tennis instructor based on disability when it imposed requirements on the instructor that he tell all private clients about his epilepsy and instruct all staff on how to deal with a seizure.

[210] *Puleio v. Moneris Solutions*, 2011 HRTO 659 (CanLII).

[211] The Supreme Court of Canada's decision in *Renaud*, *supra* note 208, sets out the obligations of unions. See also *Bubb-Clarke v. Toronto Transit* Commission, 2002 CanLII 46503 (HRTO) [*Bubb-Clarke*]; and *Carter*, *supra* note 161. See section 9 of this Policy on Undue Hardship for more detailed information.

[212] *Eldridge*, *supra* note 1.

[213] For example, people with mental health disabilities experiencing a first episode of a disability may be unaware that they are experiencing impairment. Also, denying the presence of a disability may be an aspect of having an addiction. For more information on mental health disabilities and addictions, see the OHRC's *Mental Health Policy*, *supra* note 9.

[214] See, for example, *Lane*, *supra* note 6; *ADGA*, *supra* note 6; *Krieger*, *supra* note 12; *Mellon v. Canada (Human Resources Development)*, 2006 CHRT 3 (CanLII) [*Mellon*] at paras. 97-98; *MacLeod*, *supra* note 158.

[215] *Sears*¸ *supra* note 118 at para. 114. See also *Wall v. The Lippé Group*, 2008 HRTO 50 (CanLII) [*Wall*]; *Davis v. 1041433 Ontario Ltd. (No. 2)*, 2005 HRTO 37 (CanLII), at paras. 67-68.

[216] See, for example, *Lane*, *supra* note 6; *Krieger*, *supra* note 12; *Mellon*, *supra* note 214; *Willems-Wilson v. Allbright Drycleaners Ltd.* (1997), 32 C.H.R.R. D/71 (B.C.H.R.T.); *Zaryski v. Loftsgard* (1995), 22 C.H.R.R. D/256 (Sask. Bd. Inq.).

[217] See *Krieger, ibid.* at para. 157; *Bowden v. Yellow Cab and others (No. 2),* 2011 BCHRT 14 (CanLII); *Trask v. Nova Scotia (Correctional Services) (No. 1)* (2010), 70 C.H.R.R. D/21 (N.S. Bd. Inq.); *Fleming v. North Bay (City)*, 2010 HRTO 355 (CanLII) [*Fleming*]; *Walton Enterprises v. Lombardi*, 2013 ONSC 4218 (CanLII) [*Walton*]; *McLean v. Riverside Health Care Facilities Inc.*, 2014 HRTO 1621 (CanLII) at para. 27.

[218] See *Fleming* and *Lombardi, ibid*. and *Wright v. College and Association of Registered Nurses of Alberta* (Appeals Committee), 2012 ABCA 267, leave to appeal refused [2012] S.C.C.A. No. 486.

[219] In *Morris v. British Columbia Railway Co.* (2003), 46 C.H.R.R. D/162, 2003 BCHRT 14 [*Morris*], a tribunal found that if performance problems related to a disability are a reason for the termination, the disability is a factor in the termination. Knowing of the claimant's condition, the employer should have considered whether the disability was affecting his performance and sought further medical assessment. It failed to do so. The case also confirms that an employer can't "blind itself to its observations of an employee's behaviour…All relevant factors must be considered by an employer dealing with an employee with a disability, including medical evidence, its own observations, and the employee's own comments and concerns." (at para. 238).

[220] Many disabilities continue to be highly stigmatized (*e.g.* mental health disabilities, addictions, HIV and AIDS), and many people may be justifiably worried that sharing personal medical information will make them vulnerable to discrimination.

[221] *Morris*, *supra* note 219; *Yeats*, *supra* note 155 at paras. 47-8.

[222] For more information on human rights issues in the job recruitment process, see the OHRC's *Policy on employment-related medical information*, available online at: www.ohrc.on.ca/sites/default/files/attachments/Policy_on_employment-related_medical_information.pdf.

[223] The Court applied the *Code* and the OHRC's 2001 *Disability Policy* and held that it would have been reasonable and appropriate for the co-op to obtain answers from the occupant's doctor to determine if any of the volunteer tasks could be performed, notwithstanding her medical condition. If so, it could have accommodated her by assigning her tasks she could perform, but if not, the cost of accommodating her by exempting her from the volunteer work requirement would be unlikely to impose an undue hardship. The Court concluded that it would be unjust in all the circumstances to evict the occupant: *Eagleson*, *supra* note 12.

[224] In *Providence Care, Mental Health Services v. Ontario Public Service Employees Union, Local 431*, 2011 CanLII 6863 (ON LA), the arbitrator distinguishes the "nature of disability" from a "diagnosis" by saying at para. 33: "However, I continue to be of the view that nature of illness (or injury) is a general statement of same in plain language without an actual diagnosis or other technical medical details or symptoms. Diagnosis and nature of illness are not synonymous terms, but there is an overlap between them, such that a description of the nature of an illness or injury may reveal the diagnosis and in others it will not."

[225] See *Duliunas*, *supra* note 44; *Devoe*, *supra* note 12; and, *Eagleson*, *supra* note 12.

[226] See *Morris*, *supra* note 219; *Russell*, *supra* note 44. But also see *Oak Bay Marina Ltd. v. British Columbia (Human Rights Tribunal) (No. 2)* (2002), 43 C.H.R.R. D/487, 2002 BCCA 495 [*Oak Bay*].

[227] In *Simpson v. Commissionaires (Great Lakes)*, 2009 HRTO 1362 (CanLII), the HRTO stated at para. 35:

> For the purposes of a request for employment accommodation, generally the focus should be on the functional limitations of the employee's condition (capacities and symptoms) and how those functional aspects interact with the workplace duties and environment. Consequently, an employer need not be informed of the specific cause of the employee's condition or the exact diagnosis in order to be put on notice that an employee has disability-related needs requiring accommodation.

Similarly, in *Cristiano v. Grand National Apparel Inc.*, 2012 HRTO 991 (CanLII), the HRTO stated at para. 20: "There are limits on what a respondent can require of its employees claiming a need for a medical leave. For example, in most instances, an employer is not entitled to a diagnosis. But an employer is entitled to know enough to make some assessment of the *bona fides* of the leave request and sufficient information to determine what if any accommodations might be made…" See also *Wall*, *supra* note 215; *Mellon*, *supra* note 214; *Leong v. Ontario (Attorney General)*, 2012 HRTO 1685 (CanLII); *Noe*, *supra* note 50; *Ilevbare*, *supra* note 44; *Jarrold v. Brewers Retail Inc. (c.o.b. Beer Store)*, 2014 HRTO 1070 (CanLII); *Easthom v. Dyna-Mig*, 2014 HRTO 1457(CanLII) .

[228] A person may have more rigorous obligations to disclose medical information in the context of litigation. In *Hicks v. Hamilton-Wentworth Catholic District School Board*¸ 2015 HRTO 1285 (CanLII), the HRTO stated at paragraph 17: "Where there is a dispute about the medical status of an employee further medical information may be required and where, as in these circumstances, there is litigation with respect to the dispute the parties will be entitled to much more fulsome disclosure of the medical documentation than might be the case in other circumstances." See also *Fay v. Independent Living Services*, 2014 HRTO 720(CanLII) .

[229] Where there is a reasonable basis to question the legitimacy of a person's request for accommodation or the adequacy of the information provided, an accommodation provider may be entitled to medical confirmation that a diagnosis exists, though this would not normally include disclosure of a person's specific diagnosis. Accommodation providers should keep in mind that diagnoses for certain disabilities can be difficult to get, may change over time and may result in vastly different symptoms and experiences for different people. Therefore, a general statement that a person has a disability and identifying what a person needs in relation to their functional limitations is often more helpful to the accommodation process than a diagnosis. See *Mellon*, *supra* note 214 at para. 99: "An individual with a disability…may not know the exact nature and extent of that disability at the time they are experiencing the symptoms. In such circumstances, we cannot impose a duty to disclose a conclusive medical diagnosis." Some people may present with a set of symptoms, but without a specific diagnosis. See *Ball*, *supra* note 56.

[230] See *Canadian Union of Public Employees, Local 831 v. Brampton (City)* [2008] O.L.A.A. No. 359 [*C.U.P.E.*].

[231] The Canadian Human Rights Tribunal has found that requests for a person with autism to undergo a psychiatric examination after asking for a leave of absence because of workplace harassment was in itself a form of harassment. It stated, "Indeed, the evidence shows that the Respondent remained deaf to the pleas of Ms. Dawson who did not want to see a physician whom she did not know and who knew nothing about autism, of her union representatives who expressed concern and consternation about Ms. Dawson having to submit to a medical examination by a Canada Post designated physician, but more importantly, of her treating physician who stated that she was very concerned that this could provoke a serious emotional reaction from Ms. Dawson. …However well-intended Canada Post management was in seeking a medical evaluation, the Tribunal finds that, in the present circumstances, the general behaviour of those Canada Post employees who were involved in the medical evaluation process constitutes harassment." See *Dawson*, *supra* note 33 at paras. 216 and 219. For arbitration cases that have found that treatment requirements imposed by employers interfered with employees' privacy, see: *Central Care Corp. v. Christian Labour Assn. of Canada, Local 302 (Courtney Grievance)*, [2011] O.L.A.A. No. 144; *Federated Cooperatives Ltd. v. General Teamsters, Local 987 (Policy Grievance)* (2010), 194 L.A.C. (4th) 326; and, *Brant Community Healthcare System v. Ontario Nurses' Assn. (Medical Form Grievance)*, [2008]

O.L.A.A. No. 116, in which the arbitrator stated: "Treatment modalities are a matter for the doctor and the patient."

[232] See, for example, *Oak Bay*, *supra* note 226.

[233] In one case, a doctor's note stating that a woman had a "medical condition" was considered insufficient to establish that she had a disability as per the meaning of the *Code*: see *Simcoe Condominium Corporation No. 89 v. Dominelli*, 2015 ONSC 3661 (CanLII) .

[234] *Alberta (Human Rights and Citizenship Comm.) v. Federated Co-operatives Ltd.* (2005), 53 C.H.R.R. D/496, 2005 ABQB 58; *Duliunas*, *supra* note 44 at para. 77, and *Pridham*, *supra* note 12. See also *Liu v. Carleton University*, 2015 HRTO 621 (CanLII).

[235] See *Baber*, *supra* note 12 and *C.U.P.E., supra* note 230.

[236] See section 4.9.g) in the OHRC's publication *Human Rights at Work* for a more detailed description of these factors, available online at: www.ohrc.on.ca/en/human-rights-work-2008-third-edition?page=human-Contents.html.

[237] See: www.priv.gc.ca/index_e.asp and www.ipc.on.ca/english/Home-Page/. Different privacy laws apply to different organizations – for example, private housing providers may be covered by the *Personal Information Protection and Electronic Documents Act* (*PIPEDA*), S.C. 2000, c. 5, and are only permitted to disclose personal health information under certain circumstances (see Section 7(3)).

[238] *Renaud*, *supra* note 208 at para. 984.

[239] There have been cases originating from other jurisdictions that have included other factors such as employee morale, or conflict with a collective agreement. For example, the Supreme Court of Canada considered additional undue hardship factors in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (1990), 72 D.L.R. (4th) 417 (S.C.C.) [*Central Alberta*] and *Renaud*, *ibid.* However, both of these cases were decided under legislation that does not set out enumerated factors for undue hardship (Alberta, and British Columbia, respectively). See also *Fair*, *supra* note 158, which references *Central Alberta*. The Ontario legislature enacted a higher standard by specifically limiting undue hardship to three particular components as set out in the *Code*. In *Meiorin*, *supra* note 66, the Supreme Court of Canada stated at para. 63 that "The various factors [in assessing undue hardship] are not entrenched, **except to the extent that they are expressly included or excluded by statute**" [emphasis added]. For HRTO cases following this approach, see *McDonald v. Mid-Huron Roofing*, 2009 HRTO 1306(CanLII) [*McDonald*] at paras. 35 and 42; *Dixon*, *supra* note 38 at para. 42; *Noseworthy v. 1008218 Ontario Ltd.*, 2015 HRTO 782 at para. 55 (CanLII). Cases decided under the *Code* before it was amended to limit the undue hardship factors to costs, health and safety and outside sources of funding, such as *Roosma v. Ford Motor Co. of Canada (No. 4), (*1995), 24 C.H.R.R. D/89 and *Ontario (Human Rights Commission) v. Roosma*, 2002 CanLII 15946 (ON SCDC), do not reflect the legislature's later decision to expressly limit the undue hardship factors.

[240] "Business inconvenience" is not a defence to the duty to accommodate. In amending the *Code* in 1988, the Legislature considered and rejected "business inconvenience" as a possible enumerated factor in assessing undue hardship. 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.

[241] *Meiorin*, *supra* note 66. In some cases, accommodating an employee may generate negative reactions from co-workers who are either unaware of the reason for the accommodation or who believe that the employee is receiving an undue benefit. The reaction may range from resentment to hostility. However, those responsible for providing accommodation should make sure that staff are supportive and are helping to foster an environment that is positive for all employees. It is not acceptable to allow discriminatory attitudes to fester into hostilities that poison the environment for people with disabilities. In *McDonald*, *supra* note 239, the HRTO stated at para. 43: "If a respondent wishes to cite morale in the workplace as an element of undue hardship, it should also be able to cite its own efforts to quell inaccurate rumours that accommodation is being requested unreasonably." Further, people with disabilities have a right to accommodation with dignity. It is an affront to a person's dignity if issues of morale and misconception stemming from perceived unfairness are not prevented or dealt with. In such cases, those responsible will not have met their duty to provide accommodation with dignity. In *Backs v. Ottawa (City),* 2011 HRTO 959 (CanLII), the respondent argued that employee morale was a factor contributing to undue hardship. The adjudicator stated (at para. 58): "…As regards the…issue of employee morale…it must be acknowledged that workplace accommodations can result in these kinds of problems for management. However while a challenge for management, such issues are not normally considered a legitimate consideration in an undue hardship analysis."

[242] See *Qureshi v. G4S Security Services*, 2009 HRTO 409 at para. 35 (CanLII). The issue of customer, third-party and employee preference is also discussed in J. Keene, *Human Rights in Ontario*, 2nd ed. (Toronto: Carswell, 1992) at 204-5.

[243] Note that in rare cases the HRTO has indirectly considered other factors as part of costs or health and safety. See, for example, *Munroe v. Padulo Integrated Inc.*, 2011 HRTO 1410 (CanLII); *Wozenilek v. City of Guelph*, 2010 HRTO 1652 (CanLII); *Espey v. London (City)*, 2009 HRTO 271 (CanLII).

[244] *Grismer*, *supra* note 122 at para. 42.

[245] *Meiorin, supra* note 66 at para. 78-79; *Grismer*, *ibid.* at para. 41; *Miele v. Famous Players Inc*. (2000), 37 C.H.R.R. D/1 (B.C.H.R.T.).

[246] *Renaud, supra* note 208.

[247] Some labour arbitrators in Ontario have considered a breach of a collective agreement as a factor in assessing undue hardship: see, for example, *Chatham-Kent Children's Services v. Ontario Public Service Employees' Union, Local 148 (Bowen Grievance),* [2014] O.L.A.A. No. 424 (note, however, that the arbitrator in this case relied on *Renaud*, *supra* note 208, a case that arose under British Columbia's *Human Rights Act, S.B.C. 1984*, which did not enumerate specific factors for assessing undue hardship, as the Ontario *Human Rights Code* does). Other arbitrators have restricted their undue hardship analysis to the three factors stipulated in the *Code*. While not binding on human rights adjudicators, arbitral jurisprudence can raise interesting employment issues and has been used by the OHRC to inform a broad and purposive interpretation of the *Code.* It is not used, however, as the basis for taking a restrictive interpretation of the *Code* in the formulation of OHRC policy.

[248] In *Ontario Human Rights Commission v. Etobicoke*, 1982 CanLII 15 (SCC), [1982] 1 SCR 202 [*Etobicoke*], the Supreme Court of Canada stated (at p. 213): "Although the *Code* contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the Statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy."

[249] The Supreme Court of Canada has repeatedly held that human rights legislation has a unique quasi-constitutional nature and should be interpreted in a liberal and purposive manner to advance the broad policy considerations underlying it: see, for example, *Gould v. Yukon Order of Pioneers*, 1996 CanLII 231 (SCC), [1996] 1 S.C.R. 571, at para. 120; *University of British Columbia v. Berg*, 1993 CanLII 89 (SCC), [1993] 2 S.C.R. 353, at p. 370; *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 S.C.R. 84, at pp. 89-90; *Insurance Corp. of British Columbia v. Heerspink*, 1982 CanLII 27 (SCC), [1982] 2 S.C.R. 145, at pp. 157-58.

[250] *Westfair Foods Ltd. v. United Food & Commercial Workers International Union, Local 1000A (Walkosz Grievance)*, 2014 CanLII 31669 (ON LA); *Re Mohawk Council of Akwesasne and Ahkwesasne Police Association* (2003), 122 L.A.C. (4th) 161 (Chapman).

[251] *Meiorin, supra* note 66 at para. 68. In *McGill*, *supra* note 129, the Supreme Court of Canada stated at para. 20, "[s]ince the right to equality is a fundamental right, the parties to a collective agreement cannot agree to a level of protection that is lower than the one to which employees are entitled under human rights legislation…"

[252] *Renaud*, *supra* note 208.

[253] *Ibid.*

[254] See *Carter*, *supra* note 161 at para. 88 where the HRTO stated: "Under the *Code*, if a disabled employee cannot do his regular job, the employer is first obliged, in conjunction with the employee, to see whether the employee can continue to do the regular job with accommodation. If that is not possible, the employer is obliged to look for other jobs that the disabled employee can do. That obligation can include measures that impact on other employees, for example as a result of changing job duties of other employees to accommodate the disabled employee. However, the duty to accommodate does not include an obligation to displace another employee out of his or her job." See also *Chadwick v. Norfolk (County)*, 2013 HRTO 2101 (CanLII); *Bubb-Clarke*, *supra* note 211. In a 2015 article entitled, "One Law for All : Perspectives from a Statutory Tribunal" (available online at: www.queensu.ca/clcw/sites/webpublish.queensu.ca.clcwwww/files/files/Weber%20Symposium/Jo-Anne%20Pickel%20Paper.pdf), Jo-Anne Pickel, a Vice-Chair at the HRTO, commented on the challenges of adjudicating cases that involve conflicts between human rights and collectively bargained rights. She writes at page 36, "Although the Tribunal has had occasion to comment on the challenges posed by such cases, the Tribunal does not appear to have been called upon to decide a case in which there was a direct conflict between rights under the *Code*, and rights, such as seniority rights, under the collective agreement."

[255] In meeting their accommodation obligations, employers should seek out the alternatives that least intrude on the rights of others: *Hamilton Police Association v. Hamilton Police Services Board*, 2005 CanLII 20788 (ON SCDC); *Renaud*, *supra* note 208.

[256] *Grismer*, *supra* note 122 at para. 41.

[257] To determine whether a financial cost would alter the essential nature or substantially affect the viability of the organization, consideration should 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 across 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
  - any increase in clientele, potential labour pool, or tenants, and
  - the availability of the Workplace Safety and Insurance Board's *Second Injury and Enhancement Fund* (for more information, see www.wsib.on.ca).

[258] The financial costs of the accommodation may include:
- capital costs, such as for installing a ramp, buying screen magnification or software, *etc.*
- operating costs such as sign language interpreters, personal attendants or additional staff time
- costs incurred as a result of restructuring that are necessitated by the accommodation, and
- any other quantifiable costs incurred directly as a result of the accommodation.

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

[260] More information about how to offset costs can be found in sections 9.2.2 and 9.3.

[261] Governments have a positive duty to make sure that services generally available to the public are also available to people with disabilities. Governments should be mindful of their human rights responsibilities and the impact on people with disabilities when delegating implementation of their policies and programs to private entities: *Eldridge*, *supra* note 1. People with disabilities should not be worse off as a result. An organization that assumes responsibility for a government program must attend to the accommodation needs of its users.

[262] Such resources should most appropriately meet the accommodation needs of the individual, including respect for dignity.

[263] See, for example, *Ivancicevic* , *supra* note 85 at para. 211 and *Gibson v. Ridgeview Restaurant Limited*, 2013 HRTO 1163 (CanLII) at para. 100, both of which dealt with the use of medical marijuana in the service context.

[264] If waiving the health and safety requirement is likely to result in a violation of the *OHSA*, *supra* note 94, the employer should generate alternative measures based on the equivalency clauses in the regulations of the *OHSA*. The employer is required to show an objective assessment of the risk as well as how the alternative measure provides equal opportunity to the person with a disability. The employer might be able to claim undue hardship if a significant risk still remains after taking these measures. Fulfilling the *OHSA* provision, however, does not necessarily mean that the test for undue hardship or *bona fide* requirements under the *Code* has been satisfied. The *Code* has primacy over the *OHSA* and may sometimes prevail where these conflict with one another.

[265] *Ouji v. APLUS Institute*, 2010 HRTO 1389 (CanLII); *Brown v. Trebas Institute Ontario Inc.*, 2008 HRTO 10 (CanLII).

[266] See *Etobicoke*, *supra* note 248; *VIA Rail*, *supra* note 6 at para. 226; *Buttar*; *supra* note 167 at para. 132; *R.B. v. Keewatin-Patricia District School Board*, 2013 HRTO 1436 (CanLII).

[267] *Lane*, *supra* note 6; *ADGA*, *supra* note 6. See also *Bobyk-Huys v. Canadian Mental Health Assn*., [1994] O.J. No. 1347 (Gen Div.).

[268] Example adapted from information provided to the OHRC in a written submission from the Advocacy Centre for the Elderly (April 2015).

[269] *Lepofsky v. TTC*, 2007 HRTO 23 (CanLII).

[270] *Meiorin*, *supra* note 66. See *Radek v. Henderson Development (Canada) Ltd. (No. 3)* (2005), 52 C.H.R.R. D/430, 2005 BCHRT 302.

[271] See *Barton v. Loft Community Centre*, 2009 HRTO 647 (CanLII).

[272] Organizations should consider spreading the financing of accommodation over time by taking out loans, issuing shares or bonds, or other business methods of financing. Amortization or depreciation is another means that an organization might be expected to use to reduce the financial burden, where possible. Tax deductions or other government benefits flowing from the accommodation will also be taken into account as offsetting the cost of accommodation. The effects of the Second Injury and Enhancement Fund of the Workplace Safety and Insurance Board must also be considered (for more information, see www.wsib.on.ca).

[273] *Moore*, *supra* note 6. In the case of government, the term "whole operation" should refer to the programs and services offered or funded by the government. There may be accommodations that require substantial expenditure, which, if implemented immediately, would alter the essential nature of government programs or substantially affect their viability in whole or in part. In these instances, it may be necessary to implement the required accommodation incrementally.

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

[275] See *Hydro-Québec*, *supra* note 120; *McGill*, *supra* note 129.

[276] Section 17 of the *Code*, *supra* note 7.

[277] *McGill*, *supra* note 129 at para. 38. See also *Keays v. Honda Canada*, [2008] 2 S.C.R. 362 in which the Supreme Court overturned a lower court award of punitive damages that was awarded in a wrongful dismissal case where the employer had required an employee with a disability to take part in an attendance management program. The Court found that the conduct of the employer was not punitive, and accepted that the need to monitor the absences of employees who are regularly absent from work is a *bona fide* work requirement in light of the very nature of the employment contract and responsibility of the employer to manage its workforce. While these statements made by the Supreme Court are significant, they must be considered in the context of the type of claim that was before the Court. The issue was whether the conduct of the employer was sufficiently "harsh, vindictive, reprehensible and malicious" to justify an award of punitive damages in the context of a wrongful dismissal lawsuit. The Court found that creating a disability management program such as the one at issue could not be equated with a malicious intent to discriminate. The employer's conduct was not sufficiently outrageous or egregious for there to be an award of punitive damages.

[278] *Gourley*, *supra* note 122. See also, *Ontario Public Service Employees Union (Bartolotta) v Ontario (Children and Youth Services)*, 2015 CanLII 19329 (ON GSB) and *Toronto (City) v. Canadian Union of Public Employees, Local 416 (Toronto Civic Employees' Union) (Tucker Grievance),* [2014] O.L.A.A. No. 75.

[279] *Arends v. Children's Hospital of Eastern Ontario*, 2012 HRTO 1574 (CanLII) at para. 29.

[280] *Briffa*, *supra* note 155 at paras. 52-54 and 60. See also *Communications, Energy and Paperworkers Union of Canada, Local 41-0 v. Nestle Purina Petcare*, 2012 CanLII 65216 (ON LA).

[281] *Hydro-Québec*, *supra* note 120; *McGill*, *supra* note 129.

[282] *Pazhaidam v. North York General Hospital*, 2014 HRTO 984 (CanLII); *Remtulla v. The Athletic Club (Trainyards) Inc.,* 2014 HRTO 940 (CanLII) [*Remtulla*] .

[283] *Rodgers v. SCM Supply Chain Management*, 2010 HRTO 653 (CanLII); *Sugiono v. Centres for Early Learning – Seneca Hill*, 2013 HRTO 1976 (CanLII) (reconsideration on evidentiary ground denied in *Sugiono v. Centres for Early Learning – Seneca Hill*, 2014 HRTO 72 (CanLII)); *Tiano v. Toronto (City),* 2014 HRTO 1187 (CanLII); *Cohen v. Law School Admission Council,* 2014 HRTO 537 (CanLII); *Remtulla*, *ibid.*

[284] This example was adapted from information provided to the OHRC (April 2015) in a written submission from Guide Dog Users of Canada. See the OHRC's *Policy on competing human rights* for guidance in resolving this and other competing rights scenarios.

[285] Available online at: www.ohrc.on.ca/en/policy-competing-human-rights.

[286] See *Strudwick* , *supra* note 95 at para. 67.

[287] *Olarte v. DeFilippis and Commodore Business Machines Ltd. (No. 2)* (1983), 4 C.H.R.R. D/1705 (Ont. Bd. Of Inq.), aff'd (1984), 14 D.L.R. [4th] 118 (Div. Ct.). See also *Strudwick*, *ibid.* at paras. 67-70.

[288] See *Payne v. Otsuka Pharmaceutical Co. (No. 3)* (2002), 44 C.H.R.R. D/203 (Ont. Bd. Inq.) at para. 63:

> The nature of when a third party or collateral person would be drawn into the chain of discrimination is fact specific. However, general principles can be determined. The key is the control or power that the collateral or indirect respondent had over the claimant and the principal respondent. The greater the control or power over the situation and the parties, the greater the legal obligation not to condone or further the discriminatory action. The power or control is important because it implies an ability to correct the situation or do something to ameliorate the conditions.

[289] See, for example, *Wamsley*, *supra* note 89.

[290] *Renaud*, *supra* note 208.

[291] See, for example, *Selinger v. McFarland*, 2008 HRTO 49 (CanLII).

[292] *Wall v. University of Waterloo* (1995), 27 C.H.R.R. D/44 at paras. 162-67 (Ont. Bd. Inq.). These factors help to assess the reasonableness of an organization's response to harassment, which can affect the legal consequences that flow from the harassment. See also *Laskowska v. Marineland of Canada Inc.*, 2005 HRTO 30.

[293] Available online at: www.ohrc.on.ca/en/policy-primer-guide-developing-human-rights-policies-and-procedures.

[294] For more information on data collection, see the OHRC's guide: *Count me in! Collecting human rights-based data*, (2010), available online at www.ohrc.on.ca/en/count-me-collecting-human-rights-based-data, and the OHRC's *Racism Policy*, *supra* note 113.

[295] In addition to what the *Code* requires, organizations should also be aware of the requirements under the *AODA*, *supra* note 6. For example, section 3 of Regulation 191/11, *Integrated Accessibility Standards* [*IASR*], requires organizations to develop accessibility policies; section 28 of the *IASR* requires organizations to create a written process to develop individual accommodation plans for employees with disabilities; and section 4 of the *IASR* requires all organizations (except for small private/not-for-profit organizations with fewer than 50 employees) to develop multi-year accessibility plans that outline the organization's strategy to prevent and remove barriers and meet their accessibility requirements. These plans must be reviewed and updated every five years.

[296] See section 8 of the *Code*, *supra* note 7.

[297] "Obligated organizations" means the Government of Ontario, the Legislative Assembly, a designated public sector organization, a large organization (50 or more employees in Ontario) and a small organization (fewer than 50 employees in Ontario).

[298] *AODA*, *supra* note 6, O. Reg. 191/11, s.7.

[299] Note that case law developments, legislative amendments, and/or changes in the OHRC's own policy positions that take place after a document's publication date will not be reflected in that document. For more information, please contact the OHRC.

[300] In *Quesnel , supra* note 145, the Board of Inquiry applied the United States Supreme Court's decision in *Griggs v. Duke Power Co*., 401 U.S. 424 (4th Cir. 1971) to conclude that OHRC policy statements should be given "great deference" if they are consistent with *Code* values and are formed in a way that is consistent with the legislative history of the *Code* itself. This latter requirement was interpreted to mean that they were formed through a process of public consultation.

[301] For example, the Ontario Superior Court of Justice quoted at length excerpts from the OHRC's published policy work in the area of mandatory retirement and stated that the OHRC's efforts led to a "sea change" in the attitude to mandatory retirement in Ontario. The OHRC's policy work on mandatory retirement heightened public awareness of this issue and was at least partially responsible for the Ontario government's decision to pass legislation amending the *Code* to prohibit age discrimination in employment after age 65, subject to limited exceptions. This amendment, which became effective December 2006, made mandatory retirement policies illegal for most employers in Ontario: *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 16 at para. 45 (Sup.Ct.). For cases citing the OHRC's 2001 *Disability Policy*, see *supra* note 12.