

# Disability and the Implementation of the Accommodation Duty in the Canadian Workplace by Labour Arbitrators

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## I Introduction

Labour arbitration has become the leading forum for the application of the disability accommodation principles in Canada. Three reasons for its ascension can be cited. First, unions have been assertive in promoting human rights through collective bargaining, campaigns and grievances over the past two decades.<sup>1</sup> As a result of their statutorily-protected institutional presence in organized workplaces, unions have the resources to litigate a broad spectrum of disability accommodation issues, and the staying power to police the implementation of disability accommodation settlements and orders. Second, the very fact that unions and employers have a long-term mandatory relationship, however loveless or difficult, means that they have been compelled to creatively cooperate with each other to make the accommodations, and the relationship, work over the long haul.<sup>2</sup> Out of this often emerges progressive and detailed accommodation policies and programs which create templates for human resources throughout all workplaces in Canada. And third, labour arbitrators have had the remedial power since the 1940s to order the reinstatement of terminated employees, and they have actively used it.<sup>3</sup> This power, together with their more recently-acquired authority to apply human rights statutes,<sup>4</sup> has enabled arbitrators to place dismissed employees with disabilities back to work. It also provides arbitrators with the ability to issue flexible, viable and dynamic disability accommodation remedies that go beyond the limited impact of damage awards

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<sup>1</sup> A. Jackson, *Work and Labour in Canada: Critical Issues* (Toronto: Canadian Scholars' Press, 2005) ch. 6.

<sup>2</sup> K. Williams, "Impediments to Disability Accommodation" (2007), 62:3 *Relations Industrielles/Industrial Relations* 405; A. Ponak & P. Morris "The Practical Problems of Accommodating Physically Disabled Employees" (1998) 27 *Journal of Collective Negotiations in the Public Sector* 13.

<sup>3</sup> H. Brown & D. Beatty, *Canadian Labour Arbitration*, 4th ed., looseleaf (Aurora, Ont.: Canada Law Book, 2008) ch. 2:1470. The reinstatement remedy has been widely applied in labour law because the union, as the institutional bargaining agent in the workplace, has the capacity and the interest to mediate the renewed employment relationship between the employer and the returning employee.

<sup>4</sup> Beginning in the early 1990s, a number of legislatures explicitly gave arbitrators the jurisdiction to apply human rights statutes when adjudicating grievances under a collective agreement (i.e., Ontario *Labour Relations Act, 1995*, S.O. 1995, Ch. 1, s. 48(12)(j)). The breadth of this jurisdiction was confirmed by the Supreme Court of Canada in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157. Arbitrators have subsequently held that, as a result of *Parry Sound*, they have the authority to apply human rights statutes when reading collective agreements even when the governing labour legislation does not explicitly grant this authority: *Re Ottawa Police Services Board and Ottawa Police Association (Carriere)* (2007), 160 L.A.C. (4<sup>th</sup>) 118 (Lynk).

given in lieu of reinstatement by the courts and by most human rights tribunals. The consequence of all this has been that, while the jurisdiction of labour arbitrators is confined to the unionized workplace (collective agreements cover approximately 31% of the Canadian labour force),<sup>5</sup> many of their rulings in disability accommodation cases have established human rights standards that are influential in workplaces well beyond their writ.

As for human rights tribunals in Canada, they have statutory jurisdiction over all workplaces, both unionized and non-unionized. However, the great volume of their workplace cases comes from employee-complainants located at the middle and lower end of the labour market (who typically cannot afford to enforce employment rights in the courts), who are (or, more likely, were) employed in non-unionized workplaces.<sup>6</sup> Tribunals have the statutory authority to issue a reinstatement remedy.<sup>7</sup> However, unlike in the labour arbitration process, reinstatement is only occasionally requested and awarded,<sup>8</sup> likely because there is no realistic prospect of restoring an ongoing and productive employment relationship in a non-unionized setting. Consequently, many of the remedies issued by human rights tribunals in successful disability accommodation complaints consist primarily of damage awards,<sup>9</sup> since the forward-looking and dynamic accommodation remedies that are relatively common in labour arbitration are superfluous if there is no continuing relationship between the employer and the employee-complainant.

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<sup>5</sup> “Unionization”, (2008) 9:8 *Perspectives on Labour and Income* (Statistics Canada) 1.

<sup>6</sup> In the version of the *Ontario Human Rights Code*, R.S.O. 1990, Ch. H-19 that existed until the major 2006 amendments, the Ontario Human Rights Commission had the statutory power to decide not to deal with a human rights complaint which it determined could be more appropriately dealt with in another forum: s. 34(1)(a). This was frequently invoked by the Commission to decide not to deal with human rights complaints arising from unionized workplaces, because labour arbitrators had the legal authority to handle grievances with a human rights basis. Under the 2006 amendments to the *Code*, the Human Rights Tribunal (which is assuming the powers previously exercised by the Commission to receive complaints) has been given a broad authority to determine the disposition of applications, which will likely mean that it will only hear human rights complaints arising out of a unionized workplace in exceptional circumstances: [Amended by *Human Rights Code Amendments Act*, R.O. 2006, c. 30]. Other jurisdictions have similar filtering provisions in their governing statutes.

<sup>7</sup> *Ontario Human Rights Code*, *ibid.*, s. 41(1).

<sup>8</sup> W. Tarnopolsky & W. Pentney, *Discrimination and the Law*, looseleaf (Toronto: R. de Boo, 1985-) at ch. 15.6.

<sup>9</sup> *Ibid.* at 7A-51 to 64.

## II Labour Arbitration and the Accommodation Duty

### (A) The General Principles

Accommodation is both a right and a duty. In the Canadian workplace, the right of an employee to be accommodated because of her or his disability is enshrined in human rights legislation.<sup>10</sup> As a human right, it is to be applied broadly, and exceptions to the right are to be narrowly construed.<sup>11</sup> It extends to all employees, including temporary<sup>12</sup> and probationary<sup>13</sup> employees, and at all stages of the employment relationship: pre-hiring, during active duty, while off on disability leave, and even after termination.<sup>14</sup>

Correspondingly, accommodation also creates broad obligations. The duty to accommodate in the Canadian workplace requires that an employer must demonstrate that it has taken *every* reasonable step, short of undue hardship, to search for and create a productive position for an employee with a disability. The duty is considerable: the accommodation caselaw requires that the employer must establish that it was “impossible” for it to accommodate without incurring undue hardship,<sup>15</sup> and that its efforts were “serious”,<sup>16</sup> “conscientious”,<sup>17</sup> “genuine”<sup>18</sup> and represented its “best

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<sup>10</sup> *Ontario Human Rights Code*, *supra* note 6, at s. 17.

<sup>11</sup> *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114; and *Craton v. Winnipeg School Division No. 1*, [1985] 2 S.C.R. 150, at 156.

<sup>12</sup> *United Nurses of Alberta, Local 115 v. Calgary Health Authority (Boyer Grievance)*, (2004), 339 A.R. 265 (C.A.), upholding (2002), 324 A.R. 306 (Q.B), quashing *Foothills Medical Centre and U.N.A., Loc. 115 (Boyer) (Re)* (2001), 102 L.A.C. (4th) 385 (Smith); *Canada Post Corp. and C.U.P.W. (Reniak) (Re)* (1998), 73 L.A.C. (4th) 15 (Ponak).

<sup>13</sup> *Dominion Castings Ltd. and U.S.W.A., Loc. 9392 (Re)* (1998), 73 L.A.C. (4th) 347 (Levinson).

<sup>14</sup> *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27, [2000] 1 S.C.R. 665; and *Ottawa Civic Hospital and O.N.A. (Hodgins) (Re)* (1995), 48 L.A.C. (4th) 388 (R.M. Brown) (“...[e]ven if the [*Human Rights*] Code does not apply to a dismissal which occurred before a handicap is known, this legislation would apply to a refusal to reinstate the complainant once the disability has been revealed”).

<sup>15</sup> *British Columbia (Public Service Employee Relations Commission) v. BCGSEU (“Meiorin”)*, [1999] 3 S.C.R. 3, at para. 54.

<sup>16</sup> *Krznicar v. Timmins Police Services Board* (1997), 154 D.L.R. (4th) 527 (Ont. Gen. Div.).

<sup>17</sup> *Canada Post Corp. and C.U.P.W. (Yeo) (Re)*, [1997] C.L.A.D. No. 98 (Ponak).

<sup>18</sup> *Holmes v. Canada (Attorney General)* (1997), 130 F.T.R. 251 (T.D.), *aff’d* (1999), 36 C.H.R.R. D/444 (F.C.A.).

efforts”.<sup>19</sup> This duty applies to all employers, whether large or small.<sup>20</sup> Accommodation is a multi-party obligation: while resting primarily on the shoulders of the employer, it also imposes legal responsibilities on unions, the employee seeking the accommodation, and on other employees in the workplace.<sup>21</sup>

The employee seeking an accommodation assumes the initial onus, and has three *prima facie* steps to satisfy before the onus would shift to the employer. The onus requires the employee to establish: (i) that he or she has an actual disability, or is perceived to have one;<sup>22</sup> (ii) the causal link between his or her disability and the necessity for a workplace accommodation (which may include a physiological or medical explanation for alleged workplace misbehaviour);<sup>23</sup> and (iii) the adverse disadvantage that he or she suffered as a consequence. If these three steps are satisfied, then the onus shifts to the employer to meet the three-part *Meiorin* test.<sup>24</sup> The employer must initiate the search for the accommodation, and it bears the greatest responsibility for ensuring its accomplishment. Other employees in the workplace have a responsibility not to obstruct the accommodation process, but they also have the right not to have an accommodation impose a “significant impact” upon their legitimate employment interests.<sup>25</sup>

When searching for an accommodation, the employer is entitled to require that the employee with a disability must be able to productively perform the core aspects of the proposed position.<sup>26</sup> The employer is not obliged to create an accommodation position

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<sup>19</sup> *Royal Oaks Mines Inc. and C.A.W., Loc. 3204 (Crews) (Re)* (1997), 63 L.A.C. (4th) 346 (Bird).

<sup>20</sup> *Country Leathers Manufacturing Ltd. v. Graham* (2004), 257 Sask. L.R. 31 (C.A.), affirming (2003), C.L.L.C. 230-020 (Sask H.R.Bd. Inq.). The company in this case employed five full-time employees.

<sup>21</sup> *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970.

<sup>22</sup> See footnotes 134-154 below.

<sup>23</sup> *Canadian Union of Public Employees, Local 831 v. Brampton (City) (Brand Grievance)*, [2008] O.L.A.A. No. 359 (MacDowell); *Real Canadian Superstore v. United Food and Commercial*, [2008] A.J. No. 607 (Alb. Q.B.); *Ryan v. Canada Safeway Ltd.*, [2008] B.C.H.R.T.D. No. 12 (B.C.H.R.T.D.); *Dyrda v. Kindale Developmental Assn.*, [2007] B.C.H.R.T.D. No. 366; *Cadbury Adams Canada Inc. v. United Food and Commercial Workers Union, Local 175 (Boodhoo Grievance)*, [2007] O.L.A.A. No. 367 (R.L. Kennedy).

<sup>24</sup> *Supra* at note 15.

<sup>25</sup> *Ibid.*

<sup>26</sup> *C.E.P., Local 593 v. H.L. Blatchford (O'Dwyer)*, [2005] O.L.A.A. No. 713 (Mitchnick); *Canadian National Railway Co. and Brotherhood of Locomotive Engineers (Re)* (2003), 118 L.A.C. (4th) 228 (M. Picher).

that produces little or any value,<sup>27</sup> nor does it have to invent ‘make-work’ positions when it has demonstrably reached a saturation point in the number of accommodation positions already established in its workplace.<sup>28</sup> However, while the accommodation duty seeks to consider both the right of the employee with a disability to an accommodation and the right of an employer to a productive workplace, legal decision-makers have insisted that it is inappropriate to weigh the mercantile interests of the employer against the human rights of the employee. The British Columbia Human Rights Tribunal has stated: “While both the hardship to be suffered by the employer and the consequences of a lack of accommodation to the employee are clearly relevant to the hardship analysis, they are not to be weighed against one another.”<sup>29</sup>

(B) Re-Bundling and Modification of Jobs

The most flexible accommodation tool available to employers is the re-bundling of existing job duties to create a modified position that can be productively performed by an employee with a disability. The accommodation duty clearly requires much more from employers than simply asking whether the employee can perform all of the duties of his or her existing job, or whether there might be a suitable job vacancy in the workplace.<sup>30</sup> Rather, it demands that the employer imaginatively assess any and all reasonable possibilities, including reorganizing or reassembling existing jobs, searching in other work locations within the same business, waiving collective agreement provisions and

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<sup>27</sup> *Ottawa-Carleton District School Board v. O.S.S.T.F., District 25 (Abdulle)*, [2007] O.L.A.A. No. 137 (Albertyn); *H.L. Blatchford, ibid.* The one exception to this rule is that an employer can be required to create a temporary “work-hardening” position.

<sup>28</sup> *Canada Post Corp. v. C.U.P.W. (Roberts)*, [2003] C.L.A.D. No. 336 (Joliffe). However, whether a saturation point has been reached is fact-dependent, and the employer bears the evidentiary onus to demonstrate that its absorption capacity has been exceeded: *Tenneco Canada Inc. (c.o.b. Walker Exhausts) v. United Steelworkers of America, Local 2894 (La Grievance)*, [2006] O.L.A.A. No. 688 (Samuels).

<sup>29</sup> *Ingenhron v. Overwaitea Food Group*, 2006 BCHRT 556 at para. 53. Also see *Cape Breton Healthcare Complex and C.A.W.-Canada, Loc. 4600 (McFadden) (Re)* (2000), 90 L.A.C. (4th) 403 (Ashley).

<sup>30</sup> *Russo v. Lions Gate Trailers Ltd.*, (2006), 55 C.H.R.R. D/202; *Ontario Liquor Board Employees’ Union v. Ontario (Liquor Control Board) (Di Caro)*, [2005] O.C.S.B.A. No. 60 (Dissanayake); *Muldoon v. Canada (Attorney General)* (2004), 249 F.T.R. 42 (F.C.); *Community Lifecare Inc. and O.N.A. (Clark) (Re)* (2001), 101 L.A.C. (4th) 87 (Howe); *Canada Safeway and U.F.C.W., Loc. 401 (Oliphant) (Re)* (2000), 89 L.A.C. (4th) 312 (Sims); *Greater Niagara General Hospital and O.N.A. (Re)* (1995), 50 L.A.C. (4th) 34 (H.D. Brown); and *Calgary District Hospital Group and U.N.A., Loc. 121-R* (1994), 41 L.A.C. (4th) 319 (Ponak)

work practices, and conducting an individualized work assessment.<sup>31</sup> When exploring the possibilities for an accommodation, the employer is required to engage in a four-step job investigation process, which involves: (i) first determining whether the employee can productively fulfill his or her existing job as it is presently constituted; (ii) if not, then determining whether he or she can perform the core aspects of the original job in a modified or re-bundled form; (iii) if not, determining whether the employee can accomplish the duties of another job in its present form; and finally (iv) if not, then determining whether he or she could perform another job in a modified or re-bundled fashion.<sup>32</sup> In most cases, the employer will have legally fulfilled its accommodation duty if it has thoroughly investigated, and has been genuinely unable to satisfy, all of these four steps.

In devising a modified or re-bundled position, an employer has to be prepared to strip a current job of its non-core functions and re-assign work among employees so as to create a productive work assignment for an employee who requires a disability accommodation that may consist entirely of reassembled light work duties.<sup>33</sup> Any accommodation possibility has to attempt to minimize an adverse impact upon other employees,<sup>34</sup> although that might be allowed if no other reasonable accommodation is possible. Indeed, in some circumstances, the duty might require the employer to permit the employee with a disability to displace or bump another employee out of a position.<sup>35</sup> Where a full-time employee with a disability can only work part-time hours, but requires the maintenance of full-time status in order to access workplace benefits, labour arbitrators have directed the continuance of the full-time status if the cost does not amount to an undue hardship for the employer.<sup>36</sup> Similarly, an alternative work scheduling program that excluded

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<sup>31</sup> *Mohawk Council of Akwesasne and Akwesasne Police Assn. (Re)* (2003), 122 L.A.C. (4th) 161 (Chapman).

<sup>32</sup> *Ottawa-Carleton District School Board and O.S.S.T.F. (Re)* (2005), 141 L.A.C. (4th) 41 (Bendel).

<sup>33</sup> *Toronto District School Board and C.U.P.E., Loc. 4400 (Shaw) (Re)* (2003) 120 L.A.C. (4th) 395 (Howe).

<sup>34</sup> *Edgell v. Board of School Trustees, District No. 11* (1996), 97 C.L.L.C. 145,079 (B.C.C.H.R.).

<sup>35</sup> *Tenneco Canada Inc.*, *supra* note 28; *Mohawk Council of Akwesasne*, *supra* note 31.

<sup>36</sup> *Insurance Corp. of British Columbia and O.P.E.I.U. Loc.378 (Baus) (Re)* (2003), 123 L.A.C. (4th) 422 (Germaine); *British Columbia Public School Employers' Assn. and B.C.T.F. (Coutts) (Re)* (1998), 78 L.A.C. (4th) 289 (Jackson); *Peel Board of Education and O.S.S.T.F. (Lambert) (Re)* (1998), 73 L.A.C. (4th) 183 (Albertyn).

workers with disabilities who were on a reduced work week was found to be discriminatory, because it denied them the opportunity to participate in a cost-neutral program available to other employees, solely on account of their disabilities.<sup>37</sup> Additionally, an employer has to exhaustively search for other full-time accommodation positions before it direct an employee to work a part-time job as its accommodation offer.<sup>38</sup>

### (C) Mental Illness and Addiction

Labour arbitrators and human rights tribunals have repeatedly held that employers bear a considerable onus to ensure that employees with mental illnesses or substance addictions are appropriately accommodated.<sup>39</sup> The accommodation duty remains active, even when an employee did not disclose the illness or addiction to the employer,<sup>40</sup> violated a last chance agreement while in the throes of an illness or addiction,<sup>41</sup> resigned from work when impaired by an intellectual disability,<sup>42</sup> or displayed obvious signs of the illness at work, even when engaged in problematic behaviour.<sup>43</sup> As well, arbitrators have accepted that both denial and relapses are integral aspects of the diseases of substance addictions and mental illnesses, and employers must be prepared to tolerate some interference with the production process, up to the point of undue hardship, in order to satisfy the accommodation duty.<sup>44</sup> While safety sensitive and zero-tolerance rules in the workplace

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<sup>37</sup> *City of Toronto v. C.U.P.E., Local 79 (Berg)* (2006), 149 L.A.C. (4th) 353 (Nairn).

<sup>38</sup> *United Food and Commercial Workers, Local 401 v. Canada Safeway Ltd. (Kemp Grievance)*, [2007] C.L.A.D. No. 269 (W.D. McFetridge).

<sup>39</sup> The leading cases are: *Lane v. ADGA Group Consultants Inc.*, [2007] O.H.R.T.D. No. 34; *Gordy v. Oak Bay Marine Management Ltd.*, 2004 BCHRT 225; *Shuswap Lake General Hospital and British Columbia Nurses' Union (Lockie Grievance)*, (2002) B.C.C.A.A.A. No. 21 (J.M. Gordon); and *Vancouver Police Board and Teamsters, Loc. 31 (James) (Re)* (2002), 112 L.A.C. (4th) 193 (Germaine).

<sup>40</sup> *Sealy Canada Ltd. and U.S.W.A., Local 5885 (Bender) (Re)* (2006), 147 L.A.C. (4<sup>th</sup>) 68 (P.A. Smith); *Mager v. Louisiana-Pacific Canada Ltd.* (1998), 98 C.L.L.C. 145,374 (B.C.H.R.T.); *Canada Safeway Ltd. and U.F.C.W., Loc. 401, Re* (1992), 26 L.A.C. (4th) 409 (Wakeling), aff'd (1993), 10 Alta. L.R. (3d) 51 (Q.B.).

<sup>41</sup> *Ontario Liquor Boards Employees' Union v. Ontario (Liquor Control Board of Ontario) (McNaughton Grievance)*, [2006] O.G.S.B.A. No. 25 (Dissanayake).

<sup>42</sup> *617400 Saskatchewan Ltd. and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (Olson) (Re)* (2007), 159 L.A.C. (4th) 308 (Priel).

<sup>43</sup> *City of Surrey and C.U.P.E., Local 402 (Bubela) (Re)* (2006), 147 L.A.C. (4th) 386 (Burke).

<sup>44</sup> *Hendrickson Spring and United Steelworkers of America, Local 8773 (B.A. Grievance)*, [2008] O.L.A.A. No. 30 (P. Haefling); *International Assn. of Bridge Structural & Ornamental Ironworkers, Local 834 v.*



are significant features of a modern workplace, they cannot be advanced to defeat an accommodation if a tolerable range of risk could be employed that would permit an employee with a mental health or addiction disability to productively work.<sup>45</sup> Likewise, an employer cannot impose inflexible or unrealistic production standards if that would defeat an ongoing accommodation for an employee with a mental disability.<sup>46</sup> Finally, post-discharge evidence of active and fruitful rehabilitation efforts by terminated employees with a substance addiction have regularly persuaded labour arbitrators that the accommodation duty has not been exhausted and a productive employment relationship is still possible.<sup>47</sup>

However, the employer's duty to accommodate is not without boundaries. Arbitrators and human rights tribunals have accepted that, given the nature of an addiction disease, the employee must play an active and positive role in combating his or her own disability. While denial may be a central feature of an addiction disease, it is not a destiny, and employees with addictions are expected to confront the seriousness of their disability, and demonstrate progress in managing their illness.<sup>48</sup> As such, employers' decisions to terminate addicted employees because their recovery efforts on their own behalf were inadequate have been upheld when the employee would not accept responsibility for his work conduct,<sup>49</sup> or when the employee insists that his continued drinking would not harm his rehabilitation program.<sup>50</sup> Extended but unsuccessful efforts by an employer to provide

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*Harris Rebar, a Division of Harris Steel Ltd. (Shopmen's Union) (Rose Grievance)*, (2007), 165 L.A.C. (4<sup>th</sup>) 1 (MacDowell); *Sealy Canada Ltd.*, *supra* note 40; *Uniroyal Goodrich Canada Inc. and U.S.W.A.*, *Loc. 677 (N.S.) (Re)* (1999), 79 L.A.C. (4th) 129 (Knopf); *St. Paul's Hospital and H.E.U.*, *Re* (1995), 47 L.A.C. (4th) 423 (Bluman).

<sup>45</sup> *Shuswap Lake General Hospital*, *supra* note 39; *Vancouver Police Board*, *supra*, note 39.

<sup>46</sup> *Zettel Manufacturing Ltd and C.A.W.-Canada, Loc. 1524 (Hauss) (Re)* (2005), 140 L.A.C. (4th) 377 (Reilly).

<sup>47</sup> *Gates Canada v. U.S.W.A., Local 9193*, [2006] O.L.A.A. No. 683 (Reilly); *Sifto Canada Inc. v. C.E.P., Local 16-0 (Schultz)*, [2006] O.L.A.A. No. 361 (H.D. Brown); *Natrel Inc. and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Loc. 674 (Patterson) (Re)* (2004), 134 L.A.C. (4th) 142 (Albertyn); *Canada Post Corp. v. C.U.P.W. (C.M. Grievance)*, [2004] C.L.A.D. No. 226 (Jolliffe). As in these cases, labour arbitrators have generally found a way around the ostensible restrictions posed by the Supreme Court of Canada in *Quebec Cartier v. Quebec*, [1995] 2 S.C.R. 1095 against the use in labour arbitration of post-discharge evidence, such as medical documentation of rehabilitation efforts.

<sup>48</sup> *Hendrickson Spring and United Steelworkers of America, Local 8773 (B.A. Grievance)*, [2008] O.L.A.A. No. 30 (P. Haefling); *Sifto Canada Inc. ibid.*

<sup>49</sup> *Town of Richmond Hill v. C.U.P.E., Local 905 (Doobay)*, [2004] O.L.A.A. No. 418 (Brent).

<sup>50</sup> *City of Thunder Bay v. C.U.P.E., Local 87 (Alexa)*, [2004] O.L.A.A. No. 152 (Carrier).

an accommodation to an addicted employee who has been unable to manage his or her illness have resulted in the denial of the terminated employee's grievances or complaints.<sup>51</sup> An employer, regardless of size or resources, is not expected to indefinitely provide rehabilitation accommodations to addicted employees; the British Columbia Court of Appeal has suggested as a rule of thumb that three relapses will meet the undue hardship limit in most cases.<sup>52</sup>

In spite of the burgeoning accommodation caselaw on mental illness and addictions, a common approach among labour arbitrators and human rights tribunals to assessing issues of accommodating addictions and mental illness in the workplace has proven to be elusive. The difficulty arises from several sources. First, these illnesses are often the underlying features of workplace behaviour issues that, but for the disability which has caused some degree of cognitive impairment, would be *prima facie* culpable acts justifying discipline and even dismissal. Second, addictions and, to a lesser degree, mental illnesses require some degree of patient awareness of their disability, as well as a personal commitment to their own recovery. Arbitrators, in particular, have not had an easy time reconciling accommodation principles with traditional workplace and arbitral approaches towards personal employee responsibility for misconduct and recovery.

Among arbitrators and tribunals, three different schools can be identified. On one end of the spectrum, a minority of labour arbitrators and tribunals have adopted a *discipline* approach. In this line of cases, the arbitrator forthrightly acknowledges the applicability of the duty to accommodate, but generally places the duty not as a foundation tool of non-culpable analysis, but rather as a secondary mitigating factor once the grievor's

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<sup>51</sup> *C.A.W. Local 6363 v. Oxford (County) Woodingford Lodge (Marsh Grievance)*, [2008] O.L.A.A. No. 12 (Reilly); *Eddy Specialty Papers v. I.B.E.W., Local 956 (Lewis)*, [2007] O.L.A.A. No. 30 (Albertyn); *Kellogg Canada Inc. v. B.C.T.W. & G.M., Local 154-G (Fickling)*, [2006] O.L.A.A. No. 375 (Roberts); *Pacific Blue Cross v. Canadian Union of Public Employees., Local 1816 (Colledge)* (2005), 138 L.A.C. (4th) 27 (McPhillips); *Restigouche Health Services Corp. and C.U.P.E. (Lyons) (Re)* (2003), 128 L.A.C. (4th) 97 (Bruce).

<sup>52</sup> *Health Employers Association of British Columbia v. B.C.N.U.* (2006), 54 B.C.L.R. (4th) 113 (C.A.). Also see *Restigouche Health Services Corp., ibid.*

culpability has been determined.<sup>53</sup> This model has attracted relatively little support, as it appears to abdicate any substantive application of the accommodation duty. In the middle of the spectrum is the *hybrid* model, which has created a half-way house by intertwining traditional disciplinary analysis with accommodation principles. This model is reflective of the concerns by some labour arbitrators about abandoning the application of culpability when employment misconduct has been proven, particularly in addiction cases where there appears to be some quasi-voluntary aspects to the employee's disability.<sup>54</sup> The hybrid approach, which has been developed primarily by arbitrators and the courts in British Columbia, has yet to articulate a principled and consistent approach towards the demanding disability accommodation standards reflected in *Meiorin* and *Grismer*. Finally, at the other end of the spectrum lies the *disability* approach. This model seeks to determine whether the purported misconduct is linked to an underlying disability. If a persuasive nexus is established, then the arbitral inquiry becomes focused on whether the accommodation duty was properly applied, and any application of culpability falls off the table.<sup>55</sup> The disability model is the most proximate to the *Meiorin* and *Grismer* requirements, but it remains to be seen whether it can develop enough flexibility to adapt to the myriad challenges that mental illness and addiction issues present in the Canadian workplace.

(D) The Ongoing Duty to Accommodate

In the face of changing circumstances, the employer's duty to accommodate may well continue beyond its original accommodation search or its creation of an initial accommodation position. These changing circumstances may include a change (for better or for worse) in the employee's disability, a change in staffing levels, or a request by

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<sup>53</sup> *Benoit v. Bell Canada (Quebec)* (2004), 51 C.H.R.R. D/30; *York Region Board of Education and O.S.S.T.F. (Re)* (1999), 84 L.A.C. (4th) 90 (Shime); *Toronto Transit Commission and A.T.U. (Re) (Geobey)* (1997), 72 L.A.C. (4th) 109 (Shime).

<sup>54</sup> *Algoma Tubes Inc. v. U.S.W.A., Local 8748 (Smith)*, [2006] O.L.A.A. No. 768 (Randall); *Kemess Mines Ltd v. I.U.O.E., Local 115*, 147 L.A.C. (4th) 129 (B.C.C.A.); *Winnipeg (City) and A.T.U., Local 1505 (Levesque) (Re)* (2006), 147 L.A.C. (4th) 162 (Graham); *City of Surrey*, *supra* note 43. In *Kootenay Boundary Regional Hospital v. B.C.N.U. (Bergen)* (2006), 147 L.A.C. (4th) 146, the British Columbia Court of Appeal upheld the application of the hybrid approach by an arbitrator and ruled that: "Addiction, as a treatable illness, requires an employee to take some responsibility for his rehabilitation program".

<sup>55</sup> *Shuswap Lake General Hospital*, *supra*, note 39; *Vancouver Police Board*, *supra*, note 39.

accommodated employee for a job transfer. A leading case is *Jeppesen v. Town of Ancaster*,<sup>56</sup> which involved an unsuccessful applicant for a municipal firefighter's position. The position required that a firefighter hold driver's licenses to operate both ambulances and fire trucks. While the job applicant's visual disability was not a barrier to acquiring a license to drive a fire truck, it prevented him from obtaining the ambulance license. Subsequently, the municipality expanded its firefighter staffing, and the applicant applied again, asking to be accommodated by being allowed to drive only a fire truck. The municipality denied his application, and he filed a human rights complaint. An Ontario board of inquiry subsequently held that the municipality had breached the *Human Rights Code* because it did not consider whether, with the increased staffing, it could allow the applicant to drive only fire trucks.

Accommodation is a fluid requirement, which runs throughout the life of the employment relationship. As a general rule, an accommodated employee would normally be entitled to seek another position, with a new accommodation, if undue hardship to the employer or to other employees would not be the result. Thus, an employee who was already in an accommodated position had the right to apply for a transfer to another position, and to request that she should be exempted from rotating shift work as an accommodation in the new position.<sup>57</sup> Similarly, an employee with a back injury was entitled to receive training when he returned from disability leave in order to acquire the operational skills for an available position.<sup>58</sup> This general rule also applies to the sale of a business: an employer who has bought a business cannot shed its human rights responsibilities by refusing to employ the employees of the old enterprise who are on long-term disability leave.<sup>59</sup> However, where an employer can establish that the creation on a new accommodation for an employee will create undue hardship, it will have satisfied the duty. Hence, where the new accommodation would be only experimental,<sup>60</sup> or an employer had an immediate

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<sup>56</sup> [2001] O.H.R.B.I.D. No. 1 (Ont. Bd.Inq.).

<sup>57</sup> *Siemens VDO Automotive Inc. v. C.A.W., Loc. 1941 (Young)*, [2006] O.L.A.A. No. 492 (Watters). Also see *Ingenthron v. Overwaitea Food Group*, *supra* note 29.

<sup>58</sup> *Smith v. PCL Industrial Constructors Inc.* (2004), 48 C.H.R.R. D/474 (Nfld. Bd.Inq.).

<sup>59</sup> *Fenton v. Rona Revy Inc.*, 2004 BCHRT 143.

<sup>60</sup> *U.S.W.A. v. Aclo Compounders Inc. (O'Brien)*, [2005] O.L.A.A. No. 35 (Langille).

need to fill a job vacancy,<sup>61</sup> the ongoing duty was not triggered. As well, changing circumstances justify permitting an employer to revisit an accommodation to ascertain whether it is still appropriate, but it still must satisfy the undue hardship threshold if it wants to alter the *status quo*.<sup>62</sup>

(E) Access to Medical Information

Employer access to medical information regarding an employee's disability is a commonly litigated issue in disability accommodation cases. When an employer requests an employee's medical information, it is invariably for one of four accepted reasons: (i) to verify the existence of a disability; (ii) to understand an employee's capabilities and limitations in order to devise a suitable accommodation; (iii) to be assured that an employee can return to work without posing a safety risk to himself, herself or others; or (iv) to determine whether an employee's disability still requires him or her to remain away from active employment. The prevailing test employed by arbitrators and tribunals is to protect the employee's right to keep personal medical information confidential, and to permit access by the employer only when it can demonstrate that the information is reasonably necessary to fulfill one of these four legitimate workplace objectives. The legal emphasis is on privacy,<sup>63</sup> and the employer's requirement for medical information must be narrowly tailored to the specific need to accomplish the accommodation and/or the return to work.<sup>64</sup>

Arbitrators and tribunals have protected employee privacy in a variety of accommodation circumstances. They have ruled that confidential medical information can only be made available to an employer and a union when the employee has either consented to such

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<sup>61</sup> *Kretschmar Inc. and U.F.C.W., Loc. 1000A (MacEachern)* (2004), 129 L.A.C. (4th) 68 (Herman).

<sup>62</sup> *Rescare Premier Canada Inc. v. U.S.W.A., Local I-500 (Rempel)*, [2007] O.L.A.A. No. 244 (Springate).

<sup>63</sup> *Hobart Brothers of Canada and ITW Canada Co. v. Glass, Molders, Pottery, Plastics and Allied Workers International Union Loc. 446 (Return to Work)*, [2006] O.L.A.A. No. 149 (Levinson); *St. James-Assiniboia School Division No. 2 and St. James-Assiniboia Teachers' Assn. No. 2 (Re)* (2004), 131 L.A.C. (4th) 313 (Peltz).

<sup>64</sup> *Ontario (Ministry of Children and Youth Services) and O.P.S.E.U. (Hyland) (Re)* (2006), 150 L.A.C. (4th) 149 (Petryshen); *O.N.A. v. St. Joseph's Health Centre* (2005), 76 O.R. (3d) 22 (Div. Ct.).

disclosure, or by an order of a legal decision-maker.<sup>65</sup> Requests that are too invasive, or that go beyond a need-to-know basis, will be denied.<sup>66</sup> In particular, employers do not have a free standing right to an employee's confidential medical information, or to have uncontrolled direct contact with the employee's physician.<sup>67</sup> Medical release or information forms that are too broadly worded have been voided by labour arbitrators.<sup>68</sup> Psychiatric examinations of employees are deemed to be especially intrusive, and are only available to employers when the workplace necessity has been firmly established.<sup>69</sup> Employer requests for medical information should be done in private in order to avoid employee humiliation,<sup>70</sup> and health care workers have been scolded when they disclosed an employee's immunization status to an employer without the employee's consent.<sup>71</sup> An employer cannot insist that an employee inform other employees of his disability (in this case, epilepsy) against his wishes.<sup>72</sup>

Employers also have obligations regarding their investigation of medical information on a disability. They are required to ask a sufficient range of questions on the nature of an employee's disability and the expected length of time for recovery to put them in a position to accommodate.<sup>73</sup> As well, employers must clearly and directly state their specific request for medical information to an employee;<sup>74</sup> a passive expectation by the employer that the employee should provide this information is insufficient.<sup>75</sup>

Additionally, while the reliance by employers on an external institutional conclusion

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<sup>65</sup> *Sunnybrook Health Sciences Centre v. O.N.A. (Devine)*, [2006] O.L.A.A. No. 600 (Davie). Older caselaw which suggested that the employee's physician had the responsibility to decide whether to answer the employer's inquiries appears to have been eclipsed: *Bowater Mersey Paper Co. and C.E.P., Loc. 141 (Leslie) (Re)* (1998), 76 L.A.C. (4th) 411 (Outhouse).

<sup>66</sup> *Ontario (Ministry of Children and Youth Services)* *supra* note 64.

<sup>67</sup> *Hobart Brothers of Canada*, *supra* note 63.

<sup>68</sup> *Vancouver Public Library Board v. Canadian Union of Public Employees, Local 291 (Gulay Grievance)*, [2008] B.C.C.A.A.A. No. 24 (S. Lanyon); *Brant Community Healthcare System v. Ontario Nurses' Assn. (Medical Form Grievance)*, [2008] O.L.A.A. No. 116 (Harris).

<sup>69</sup> *St. Joseph's Health Centre*, *supra* note 64.

<sup>70</sup> *Wiens v. West Telemarketing Canada*, 2006 BCHRT 432.

<sup>71</sup> *North Bay General Hospital v. O.P.S.E.U. (Anger)*, [2006] O.L.A.A. No. 533 (Randall).

<sup>72</sup> *Ravi DeSouza v. 1469328 Ontario Inc.*, 2008 HRTO 23.

<sup>73</sup> *McLellan v. MacTara Ltd.*, [2004] N.S.H.R.B.I.D. No. 6.

<sup>74</sup> *Alberta (Human Rights and Citizenship Commission) v. Federated Co-operatives Ltd.* (2005), 383 A.R. 341 (Q.B.); *Davis v. 1041433 Ontario Ltd. (c.o.b. Trust Flooring Group)*, 2005 HRTO 37.

<sup>75</sup> *Ottawa (City) v. Civic Institute of Professional Personnel (Lasalle)*, [2006] O.L.A.A. No. 226 (Weatherill).

(such as by a workers' compensation board) that an employee is fit to return to work may be generally acceptable, the failure to evaluate contrary medical information provided by the employee can be fatal to an employer's case.<sup>76</sup>

However, once an employer has demonstrated that its request for medical information is reasonable necessary, the onus shifts to the employee to either provide the information or to challenge the basis for the request. In these circumstances, a failure by the employee to furnish the reasonably necessary medical documents will usually end the employer's accommodation duty.<sup>77</sup> Arbitrators have recognized that the provision of medical information necessary to establish one legitimate disclosure purpose (i.e., the existence of a disability) may not be sufficient for another purpose (i.e., the crafting of a suitable accommodation, or addressing safety concerns).<sup>78</sup> If the employer can demonstrate legitimate concerns about the quality, applicability or thoroughness of the medical diagnosis provided by the employee, it may demand further and better documentation.<sup>79</sup> In the course of acquiring appropriate medical information, employers are entitled to expect that employees will co-operate in the process when the request is reasonable,<sup>80</sup> and that they will accurately and truthfully report their medical symptoms to their physicians.<sup>81</sup> And while employers are required to handle employees' medical information with the strictest of sensitivity and confidentiality, they do not need to utilize a physician or a health official to receive the information on its behalf.<sup>82</sup>

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<sup>76</sup> *Gentak Building Products Ltd. and U.S.W.A., Loc. 1105 (Batko) (Re)* (2003), 119 L.A.C. (4th) 193 (Surdykowski).

<sup>77</sup> *United Nurses of Alberta, Local 33 v. Capital Health Authority (Royal Alexandra)*, [2008] A.J. No. 202 (Alb. Q.B.); *Christie v. Canada (Attorney General)*, 2004 FC 1383; *Kelfor Industries Ltd. v. I.W.A., Loc. I-3567 (Anderson)*, [2003] B.C.C.A.A.A. No. 214 (Hope); *Grant v. Newfoundland (Human Rights Commission)* (2003), 227 D.L.R. (4th) 508 (Nfld. & Lab. C.A.); *L.B. (Committee of) v. Newfoundland (Human Rights Commission)* (2002), 214 Nfld. & P.E.I.R. 183 (Nfld. & Lab. C.A.); *Hudson Bay Mining and Smelting Co. (Zochem Division) and C.E.P., Loc. 819 (Folo) (Re)* (2001), 93 L.A.C. (4th) 289 (Springate); *Brimacombe v. Northland Road Services Ltd.* (1998), 33 C.H.R.R. D/53 (B.C.C.H.R.).

<sup>78</sup> *Capital Health Authority (Royal Alexandra) v. U.N.A., Loc. 33 (Schram)*, [2006] A.G.A.A. No. 60 (Ponak); *Code Electric Products Ltd. v. I.B.E.W., Loc. 258 (Kinder)*, [2005] B.C.C.A.A.A. No. 14 (Burke).

<sup>79</sup> *Kautex Corp. and C.A.W., Local 195* (9 April, 1996, unreported) (Brent).

<sup>80</sup> *Babcock & Wilcox v. U.S.W.A. (Handorf)*, [2007] O.L.A.A. No. 152 (Kaplan); *Christie, supra* note 77.

<sup>81</sup> *Petro-Canada and C.E.P., Loc. 593 (Bulleid) (Re)* (2006), 146 L.A.C. (4th) 275 (Starkman).

<sup>82</sup> *St. James-Assiniboia School Division No. 2, supra* note 63.

(F) Drug and Alcohol Testing

Another feature of the accommodation duty with a strong privacy element is the legal scope available to employers to test its employees for impairments or disabilities caused by drug or alcohol use. Tribunals, arbitrators and the courts have all emphasized that employee privacy is the dominant concern, and the employer must persuasively demonstrate that its particular workplace circumstances require the invasive use of drug or alcohol testing in some form.<sup>83</sup> The starting point is *Entrop v. Imperial Oil Ltd.*,<sup>84</sup> where the Ontario Court of Appeal in 2000, relying upon the *Meiorin* analysis, provided an influential judicial statement on the compatibility of different forms of drug and alcohol testing with accommodation and human rights norms. Employers may demand that their employees submit to impairment tests only when it can demonstrate the connection between: (i) the seriousness of the impairment; (ii) the safety requirements of the position; (iii) the reliability of the testing technology to measure impairment; and (iv) the flexibility of the workplace policy to accommodate an employee with a substance addiction. The employer must prove that its substance abuse policy is proportional to the actual requirements of the particular workplace, and its listed punishment for violations does not exceed what is required to ensure legitimate safety standards and production goals.<sup>85</sup>

Turning to the varied impairment testing measures commonly used in the workplace, the Court of Appeal in *Entrop* maintained a critical eye. Random testing and pre-employment screening for drug use, the Court observed, was inherently unreliable in its present technology because, while it could accurately identify the presence of drugs in an employee's body, it could not reliably demonstrate impairment.<sup>86</sup> Testing for recent alcohol use through breathalyzers, on the other hand, met the *Meiorin* test, because it could accurately detect impairment, and employees were given reasonably advanced

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<sup>83</sup> See *Imperial Oil Ltd. and C.E.P., Local 900 (Re)*, [2006] O.L.A.A. No. 721 (M. Picher) at para. 92: "... a drug test is an extraordinary and intrusive measure, justified only by the touchstone condition of reasonable cause."

<sup>84</sup> (2000), 50 O.R. (3d) 18 (C.A.), rev'g in part (1998), 108 O.A.C. 81 (Div. Ct.), aff'g (1995), 23 C.H.R.R. D/196 (Ont. Bd.Inq.).

<sup>85</sup> *Ibid.* at para. 100.

<sup>86</sup> *Ibid.* at para. 99.



notice of its possible use.<sup>87</sup> As well, testing an employee for cause and after a workplace incident, such as an accident, is permissible if sufficient necessity is demonstrated by the employer.<sup>88</sup> However, the requirement for mandatory employee disclosure of all past substance abuse was deemed to be too harsh and inflexible, as was the automatic reassignment of an employee out of a safety-sensitive position following the disclosure of a past substance abuse problem.<sup>89</sup> And a requirement that an employee with a past substance abuse problem would have to demonstrate a minimum of two years' rehabilitation and five years' abstinence was overly broad, and not sufficiently tailored to accommodate the individual employee's recovery path short of undue hardship.<sup>90</sup> In *Entrop*, the Court of Appeal intimated that employers must ensure that human rights, privacy and accommodation values are intimately interwoven throughout its drug testing policy, and that the policy is rationally and necessarily connected to the employer's legitimate business interests.

After *Entrop*, labour arbitrators, human rights tribunals and the courts (on review applications) have held employers to strict standards regarding the content and the application of the drug testing policies, emphasizing the social and workplace values of dignity, integrity and privacy.<sup>91</sup> Random and speculative drug testing – whether by breathalyzer, urinalysis, buccal swabs or other means – have been frequently struck down, unless they are a part of an agreed-upon rehabilitation program.<sup>92</sup> Concern has been expressed about “zero-tolerance” standards which imposed an automatic termination of employment if any drug metabolites were found in an employee's system

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<sup>87</sup> *Ibid.* at para. 106.

<sup>88</sup> *Ibid.* at para. 114.

<sup>89</sup> *Ibid.* at para. 118.

<sup>90</sup> *Ibid.* at para. 124.

<sup>91</sup> The current legal approach towards workplace drug testing is succinctly described by Arbitrator Michel Picher in *Imperial Oil Ltd.* *supra* note 83 at para. 101: “...to subject employees to an alcohol or drug test when there is no reasonable cause to do so, or in the absence of an accident or near-miss and outside of the context of a rehabilitation plan for an employee with an acknowledged problem is an unjustified affront to the dignity and privacy of an employee which falls beyond the balancing of any legitimate employer interest, including deterrence and the enforcement of safe practices.”

<sup>92</sup> *Imperial Oil Ltd.*, *ibid.*; *Halter v. Ceda-Reactor Ltd.*, [2005] Alta. H.R.C.C.; *Kimberly-Clark Forest Products Inc. and P.A.C.E. International Union, Loc. 7-0665 (Re)* (2003), 115 L.A.C. (4th) 344 (Levinson); *Trimac Transportation Services-Bulk Systems and T.C.U. (Re)* (1999), 88 L.A.C. (4th) 237 (Burkett); *Canadian National Railway Co. and U.T.U., Re* (1989), 6 L.A.C. (4th) 381 (M. Picher).

while at work, because they fail to allow employees to be accommodated through a rehabilitation program, with the opportunity to return to work.<sup>93</sup>

Notwithstanding the concern for the privacy and human rights of employees, legal decisions-makers have stated that none of these new requirements abrogate the employers' right to access whether their employees are capable of performing their duties safely.<sup>94</sup> In select circumstances (such as hiring for safety-sensitive positions), employers are entitled to insist on pre-employment drug testing.<sup>95</sup> Employers have been permitted to utilize drug testing, including random testing, on employees in the following three defined circumstances: (i) the facts in a particular case justify the testing (i.e., an accident or near-miss; reasonable grounds to suspect drug use or impairment at work);<sup>96</sup> (ii) express language in the collective agreement identifying specific and justifiable instances;<sup>97</sup> or (iii) as part of an agreed-upon monitoring system for employees recovering from drug or alcohol abuse.<sup>98</sup> The failure of an employee to participate in a justified drug test may be grounds for serious discipline.<sup>99</sup> However, an employer's imposition of random and pre-access drug and alcohol testing on its security employees at the request of a site contractor does not absolve it of its own human rights responsibilities to ensure that the request is justified.<sup>100</sup>

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<sup>93</sup> *Milazzo v. Autocar Connaissance Inc. (No. 2)* (2003), 47 C.H.R.R. D/468.

<sup>94</sup> *Ibid.* para. 98. Also see *Procur Sulphur Services and C.E.P., Loc. 57 (Holden) (Re)* (1998), 79 L.A.C. (4th) 341 (Ponak).

<sup>95</sup> *Alberta (Human Rights and Citizenship Commission) v. Kellogg Root & Brown (Canada) Co.*, [2007] A.J. No. 1460 (Alta. C.A.).

<sup>96</sup> *Suncor Energy Inc., Oil Sands and C.E.P., Loc. 707 (Pearson)* (2004) 128 L.A.C. (4th) 48 (Jones); *Canadian National Railway Co. and C.A.W.-Canada (Re)* (2000), 95 L.A.C. (4th) 341 (M. Picher).

<sup>97</sup> *Imperial Oil Ltd.*, *supra*, note 83 at para. 100.

<sup>98</sup> *Gates Canada v. United Steelworkers of America, Local 9193 (Employee A Grievance)*, [2006] O.L.A.A. No. 683 (Reilly); *Algoma Tubes Inc. v. U.S.W.A., Loc. 8748 (Smith)*, [2006] O.L.A.A. No. 768 (Randall); *Core-Mark International Inc. and U.F.C.W., Loc. 401 (T.M.) (Re)* (2005), 138 L.A.C. (4th) 237 (Sims); *DuPont Canada Inc. and C.E.P., Loc. 28-O (Re)* (2002), 105 L.A.C. (4th) 399 (P. Picher); *Fording Coal Ltd. and U.S.W.A., Loc. 7884 (Shypitka) (Re)* (2001), 94 L.A.C. (4th) 354 (Hope); *Esso Petroleum Canada and C.E.P., Loc. 614* (1994), 56 L.A.C. (4th) 440 (McAlpine).

<sup>99</sup> *Imperial Oil*, *supra* note 83.

<sup>100</sup> *Metropol Security, a division of Barnes Security Services Ltd. and U.S.W.A., Loc. 5296 (Drug and Alcohol testing) (Re)* (1998), 69 L.A.C. (4th) 399 (Whitaker). Also see *Finning (Canada) and I.A.M., Loc. 99 (Re)* (2005), 136 L.A.C. (4th) 129 (Sims).

(G) Innocent Absenteeism

In traditional employment law, an employer had just cause to terminate an employee for innocent absenteeism when two standards were met: (i) the employee's past record of absenteeism was excessive; and (ii) there was no reasonable prognosis for improvement. In the classical language of employment law, the employment contract was frustrated for non-blameworthy reasons. The arrival of the accommodation duty has expanded and transformed the test in the labour arbitration arena. Now, in addition to these two traditional standards, an employer must also establish two further criteria: (iii) the employee had been warned that his or her absenteeism was excessive, and that failure to improve could result in dismissal; and (iv) if the absenteeism is the result of a disability, then accommodation efforts to the point of undue hardship have to be extended to the employee.<sup>101</sup> While employers still maintain the ability to terminate employees for extended non-culpable absences from work, their obligations have increased significantly since the early 1990s, and arbitrators and tribunals have regularly overturned dismissals for innocent absenteeism that, in earlier days, would have lacked any persuasive legal grounds for reinstatement. The duty to accommodate has not simply re-arranged the conceptual legal boxes into which we place our categories and analytical tools, but is actually rendering some of them dated, if not obsolete. In the words of a 2000 ruling by the British Columbia Human Rights Tribunal: "Legal concepts developed in the law with respect to frustration of contract have no place in the current view of obligations imposed on employers to accommodate those with disabilities into their workplace."<sup>102</sup>

The accommodation requirement is a demanding standard in innocent absenteeism cases, and legal decision-makers have insisted that employers must demonstrate that they have understood the disabled employee's capacities and limitations.<sup>103</sup> As well, they must fully explore whether rehabilitation, medical treatment or further recuperation could enable the employee to make a productive return to work within a reasonable time period.<sup>104</sup> Labour

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<sup>101</sup> *Shelter Regent Industries v. I.W.A., Loc. I-207 (Marples)*, [2003] A.G.A.A. No. 114 (Ponak).

<sup>102</sup> *Wu v. Ellery Manufacturing Ltd.*, [2000] B.C.H.R.T. 53, at para. 35.

<sup>103</sup> *Toronto Transit Commission v. A.T.U., Loc. 113 (Langille)*, [2003] O.L.A.A. No. 520 (Chapman).

<sup>104</sup> *O-I Canada Corp. v. U.S.W.A., Loc. 2805 (N.A.)*, [2005] O.L.A.A. No. 170 (Levinson).

arbitrators have overturned dismissals where an employee's health improvements and better attendance occurred after treatment by a specialist,<sup>105</sup> where undue hardship could not be proven by the employer and the employee could be productively returned to work with conditions that he improve his attendance and provide medical certificates for absences,<sup>106</sup> and where the employer did not expressly warn the employee that her job was at risk.<sup>107</sup> Innocent absenteeism does not involve blameworthy behaviour, and employers cannot discipline employees for their inability to attend work.<sup>108</sup> The strongest statement about the new era in innocent absenteeism is found in *Desormeaux v. Ottawa-Carleton Regional Transit Commission*,<sup>109</sup> where the Federal Court of Appeal restored a Canadian Human Rights Tribunal ruling that had upheld a complaint by a bus driver against her dismissal. The employee had a high rate of absenteeism, but it was comparable to other absenteeism rates tolerated by the employer, and the employer had failed to thoroughly investigate non-driving accommodations which might have lessened the impact of her absences and thereby reduce the hardship to the transport operations.

While the emergence of the accommodation duty has raised the threshold which employers have to pass in order to lawfully terminate an employee because of innocent absenteeism, satisfying that standard still occurs regularly. In a number of recent rulings, labour arbitrators have upheld dismissals where the employee could not provide a reasonable prognosis that she or he would be able to return to work.<sup>110</sup> The prevailing arbitral approach has been articulated in the following way:

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<sup>105</sup> *Alberta (Department of Energy) v. Alberta Union of Public Employees (Worden Grievance)*, [2004] AG.A.A. No. 31 (Smith). Also see *Canada Post Corp. v. C.U.P.W. (C.M.)*, [2004] C.L.A.D. No. 226 (Jolliffe).

<sup>106</sup> *Canada Post Corp. v. C.U.P.W. (Doane)*, [2004] C.L.A.D. No. 510 (Christie) (Can. Arb. Bd.).

<sup>107</sup> *LCBO and OPSEU (Norris)* (2008), GSB 2006-1421 (Ont. G.S.B.) (Gray).

<sup>108</sup> *Washington Mills Electro Minerals Corp. and U.S.W.A., Loc. 4151 (Gill) (Re)* (2003), 117 L.A.C. (4th) 313 (H.D. Brown).

<sup>109</sup> *Desormeaux v. Ottawa-Carleton Regional Transit Commission*, [2005] F.C.A. 311 (C.A.), leave to appeal to S.C.C. dismissed, 26 March 2006, [2005] S.C.C.A. No. 534.

<sup>110</sup> *United Food and Commercial Workers, Local 1288P and Maple Leaf Consumer Foods Moncton Ltd. (Nugent Grievance)*, [2008] N.B.L.A.A. No. 1 (Christie); *Maple Leaf Consumer Foods Inc. and Schneider Employees' Assn. (Karges)* (2007), 165 L.A.C. (4<sup>th</sup>) 432 (Hinnegan); *Ottawa-Carleton District School Board and Ottawa Secondary School Teachers' Federation (Re)* (2005), 141 L.A.C. (4<sup>th</sup>) 41 (Bendel); *Shelter Regent Industries, supra*, note 101; *Pasteur Merieux Connaught Canada and C.E.P., Loc. 1701 (Gain) (Re)* (1998), 75 L.A.C. (4<sup>th</sup>) 235 (Knopf); *Alcan Smelters and Chemicals Ltd and C.A.W., Loc. 2301, Re* (1996), 55 L.A.C. (4<sup>th</sup>) 261 (Hope).

While an employer has an obligation to accommodate such an employee to the point of undue hardship, where it is clear that no accommodation could possibly permit the employee to return to work, the set of obligations which attach to an employer under the *Code* do not prevent the discharge of an employee for innocent absenteeism.<sup>111</sup>

The accommodation duty does not extend so far as to require an employer to preserve an employee's status at work on the unproven expectation that they may be able to return to work in some capacity at an unstated time in the future.<sup>112</sup> As well, employers have no obligation to park an employee in an unproductive position when there is no reasonable prospect for recovery and a productive return to work, even with an accommodation.<sup>113</sup>

#### (H) The Employee's Duties

While the employer – because of its control and management of the workplace – bears the primary duty to investigate accommodation requests and craft and monitor their application,<sup>114</sup> the employee with a disability has clear responsibilities in the accommodation process as well. The caselaw to date articulates four requirements with respect to the employee's responsibilities: (i) they must actively co-operate with the employer in locating potential accommodations;<sup>115</sup> (ii) if offered a reasonable accommodation, they must provide a persuasive reason as to why the proposal cannot be accepted;<sup>116</sup> (iii) they are required to accept a reasonable accommodation offer that satisfies the employer's operation needs if their legitimate concerns have been

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<sup>111</sup> *Maple Leaf Meats and U.F.C.W., Locs. 175 & 603 (Re)* (2001), 98 L.A.C. (4th) 40 (Whitaker) at 46.

<sup>112</sup> *Kelfor Industries Ltd v. I.W.A., Loc. I-3567 (Anderson)*, [2003] B.C.C.A.A.A. No. 214 (Hope).

<sup>113</sup> *Fletcher's Fine Foods Ltd. v. U.F.C.W., Loc. 1518 (Parmar)*, [2004] B.C.C.A.A.A. No. 74 (MacIntyre).

<sup>114</sup> *Marc v. Fletcher Challenge Canada Ltd., (No. 3)* (1998), 35 C.H.R.R. D/112 (B.C. Trib.).

<sup>115</sup> *Francoeur v. Capilano Golf & Country Club Ltd.*, [2008] B.C.H.R.T.D. No. 171 (B.C.H.R.T.D.); *Van Leening v. College of Physical Therapists of British Columbia*, 2006 BCHRT 357; *Nakina Forest Products v. U.S.W.A., Loc. I-2693 (Rodak)*, [2006] O.L.A.A. No. 184 (Surdykiski); *Miremadi v. Pepsi Bottling Group (Canada) Co.*, 2005 BCHRT 261; *Fairmont Chateau Laurier v. C.A.W.-Canada, Loc. 4270 (Bara)*, [2005] C.L.A.D. No. 219 (Weatherill); *GSW Heating Products Co. and U.S.W.A. (Re)* (1996), 56 L.A.C. (4th) 249 (Barrett).

<sup>116</sup> *Ideal Roofing Co. v. Union Steel Workers (Gauthier)*, [2007] O.L.A.A. No. 140 (Baxter); *Sault Area Hospitals; Sault Area Hospitals and S.E.I.U., Local 268* (2001), 94 L.A.C. (4th) 230 (Whitaker); *Guibord v. Canada*, [1997] 2 F.C. 17 (T.D.).

sufficiently addressed;<sup>117</sup> and (iv) if they decline to accept a reasonable accommodation, the employer's accommodation duty is normally extinguished.<sup>118</sup>

In the application of these principles, legal decision-makers have regularly held that an employee with a disability is entitled to a reasonable accommodation, not necessarily a perfect accommodation,<sup>119</sup> and he or she may have to accept some discomfort or inconvenience in the accommodation process.<sup>120</sup> This legal duty may mean that the employee would have to accept a lower-paying position as an accommodation,<sup>121</sup> unless the employer failed to exhaustively investigate potential accommodations at the employee's old classification and rate of pay.<sup>122</sup> However, an employee seeking an accommodation is entitled to require the employer, when deciding which potential accommodation location to select, to consider the workplace that will best enhance his or her promotional opportunities and possible overtime assignments; thus, the selection of an accommodation is not simply what is necessarily most convenient for the employer.<sup>123</sup> As well, the assignment of an accommodation for an employee with a disability may adversely impact upon other employees, but, short of a "significant interference" with

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<sup>117</sup> *Ottawa Carleton District School Board v. O.S.S.T.F., District 25 (Sauve)*, [2007] O.L.A.A. No. 104 (Trachuk); *CANPAR and U.S.W.A., Loc. 1976 (Re)*, (2000), 93 L.A.C. (4th) 208 (M. Picher).

<sup>118</sup> *Quackenbush v. Purves Ritchie Equipment Ltd.*, 2004 BCHRT 10, (2004) C.H.R.R. Doc. 04-027 (Francoeur); *New Brunswick (Department of Public Safety) v. C.U.P.E., Local 1251 (Cosman)*, [2005] N.B.L.A.A. No. 9 (Bruce); *University of Victoria v. P.E.A. (Wood)*, [2003] B.C.C.A.A. No. 266 (Taylor); *St. Paul's Hospital and H.E.U. (Smelding) (Re)* (2001), 96 L.A.C. (4th) 129 (M. Jackson); *Turanich v. Saskatchewan (Dept. of Municipal Government)* (2000), 37 C.H.R.R. D/209 (Sask. Bd.Inq.).

<sup>119</sup> *Toronto District School Board v. Ontario Secondary School Teachers' Federation (Cherry Grievance)*, [2008] O.L.A.A. No. 153 (Knopf); *Van Leening v. College of Physical Therapists of British Columbia*, 2006 BCHRT 357; *Save-on-Foods # 969 v. U.F.C.W., Local 1518 (Rickard) (Re)* (2005) 137 L.A.C. (4th) 97 (Sullivan).

<sup>120</sup> *Ottawa Carleton District School Board*, *supra* note 32; *Ontario Public Service Employees Union v. Ontario (Ministry of Public Safety and Security) (Hyland Grievance)*, [2004] O.G.S.B.A. No. 1 (Petryshen).

<sup>121</sup> *Greyhound Canada Transportation Corp. v. Amalgamated Transit Union, Local 1415 (Lawson Grievance)*, [2007] C.L.A.D. No. 435 (R. Brown); *Lyons v. Taylor Gas Liquids Ltd.*, [2007] B.C.H.R.T.D. No. 13; *Overwatea Food Group v. H.C. & S.E.U., Local 301*, [2003] A.G.A.A. No. 54 (Sims); *Fenwick Automotive and U.S.W.A., Loc. 7454 (Re)* (1999), 84 L.A.C. (4th) 271 (Kirkwood); *T.C.C. Bottling Ltd. and R.W.D.S.U., Loc. 1065 (Re)* (1993), 32 L.A.C. (4th) 73 (Christie).

<sup>122</sup> *Westfair Foods Ltd. v. U.F.C.W., Local 1400 (Adamson)*, [2005] S.L.A.A. No. 5 (Wallace); *Poulin v. Quintette Operating Corp.*, 2000 BCHRT 48

<sup>123</sup> *Ontario (Ministry of Public Safety and Security)*, *supra* note 120.

their workplace rights, they are expected to make some sacrifices to enable an accommodation to succeed.<sup>124</sup>

### I) The Definition of Disability

Disability is notoriously difficult to define with precision, whether in medicine, social science or the law.<sup>125</sup> Many reasons account for this: individual variations in capacities and limitations are wide, even with the same impairment; the variability of an impairment's consequences differ from setting to setting; different definitions of disability are employed in statutes that have different social objectives; our traditional view of disability as encompassing a diminished medical and social status is evolving, but not yet complete; and the role of the social environment in erecting and reinforcing barriers to opportunities is complex and, as yet, not well understood. Even the World Health Organization, the United Nations agency responsible for international health issues, has struggled with the issue; it has recently rewritten its comprehensive definition of disability in order to reflect the shift from a medical-based analysis to an approach grounded in the interaction of bodily impairments with externally imposed activity and participation limitations.<sup>126</sup>

In Canadian human rights law, the challenge has been to invest the definition with sufficient meaning and breadth to effectively stem discrimination, yet to also allow enough elasticity to adapt to the almost infinite variety of life situations where a disability may encounter a barrier. The *Charter of Rights and Freedoms* prohibits discrimination on the grounds of “mental and physical disability”,<sup>127</sup> although it provides no definition of disability. The Supreme Court of Canada, when reading both the *Charter* and human

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<sup>124</sup> *Turpin v. I.A.T.A.*, [2004] C.L.A.D. No. 160 (Adramowitz).

<sup>125</sup> See generally Office of Disability Issues, *Defining Disability: A Complex Issue* (Ottawa: HRDC, 2003).

<sup>126</sup> *Ibid.* at 6-7. Also see World Health Organization, *International Classification of Functioning, Disability and Health* (Geneva: WHO, 2001). The WHO's new classification scheme (“ICF”) is designed to take into account the social aspects of disability and to put all diseases and health conditions on an equal footing irrespective of their cause. One of the intended consequences is to improve the collection of reliable and comparable data on international and domestic health outcomes of individuals and populations. The ICF replaces the WHO's 1980 International Classification of Impairments, Disabilities and Handicaps (“ICIDH”), which had been criticized for its linear, and inadequate, explanation of disability.

<sup>127</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

rights statutes, has held that “disability” must be read liberally, purposively and contextually in order to accomplish the constitutional goal of equality.<sup>128</sup> In *City of Montreal*, L’Heureux-Dube J. for the Supreme Court provided a definition of “handicap” (which has an identical meaning in law as “disability”) which comes as close as any recent judicial and tribunal attempt in capturing its modern evolution as a social-political concept:

A “handicap” may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors. Indeed, it is the combined effect of all of these circumstances that determines whether the individual has a “handicap” for the purposes of the [Quebec] *Charter*.<sup>129</sup>

In its contemporary legal reading, a disability is not only the consequence of a disease, injury or condition that impairs one or more facets of a person’s ability to perform the daily functions of life, but it must also be assessed within the social circumstances in which the person with the health condition is requesting an accommodation or claiming unlawful differential treatment.<sup>130</sup> The modern definition is both context-specific and flexible. For example, a person with a current impairment may be disabled in one given circumstance, but not in another. Similarly, a person who no longer has an impairment may legitimately seek human rights protection because he or she has been differentially treated on the basis of the former disability. As well, a person may never have had a bodily impairment, but will be protected in law if others perceive him or her to be disabled, and they act upon that perception to his or her detriment.

The *Ontario Human Rights Code*,<sup>131</sup> like other human rights statutes across Canada, prohibits discrimination on the grounds of “disability.” It provides an expansive meaning that has permitted human rights tribunals and labour arbitrators to read new illnesses and

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<sup>128</sup> *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *City of Montreal*, *supra* note 14.

<sup>129</sup> *Ibid.* at para. 79.

<sup>130</sup> *Ibid.* at para. 80: “Courts, therefore, have to consider not only an individual’s biomedical condition, but also the circumstances in which a distinction is made. In examining the context in which an impugned act occurred, courts must determine, *inter alia*, whether an actual or perceived ailment causes the individual to experience “the loss or limitation of opportunities to take part in the life of the community on an equal level with other”: I. McKenna, [“Legal Rights for Persons with Disabilities in Canada: Can the Impasse be Resolved?” (1997-98) 29 *Ottawa L. Rev.* 153] at 163-4. The fact remains that a “handicap” also includes persons who have overcome all functional limitations and who are limited in their everyday activities only by the prejudice or stereotypes that are associated with this ground.”

<sup>131</sup> R.S.O. 1990, Chap. H.19, as amended.



conditions into the definition that are not specifically mentioned in the provision.<sup>132</sup> This has resulted in an ever-expanding list of health conditions that are now accepted as disabilities. The Supreme Court of Canada, in *City of Montreal*, listed some of the health conditions that tribunals and arbitrators have determined are disabilities:

Whatever the wording of the definitions used in human rights legislation, Canadian courts tend to consider not only the objective basis for certain exclusionary practices (i.e. the actual existence of functional limitations), but also the subjective and erroneous perceptions regarding the existence of such limitations. Thus tribunals and courts have recognized that even though they do not result in functional limitations, various ailments such as congenital physical malformations, asthma, speech impediments, obesity, acne and, more recently, being HIV positive, may constitute grounds of discrimination.<sup>133</sup>

Labour arbitrators and human rights tribunals have brought a wide variety of other impairments and conditions within the legal definition of “disability” and “handicap” in recent years. These have included: height,<sup>134</sup> an anxio-depressive state,<sup>135</sup> bi-polar disorder,<sup>136</sup> alcoholism,<sup>137</sup> drug dependency,<sup>138</sup> a hysterectomy,<sup>139</sup> panic attacks,<sup>140</sup>

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<sup>132</sup> *Ibid.* s. 10(1). “Disability means:

- (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, including diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a dog guide 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*.

<sup>133</sup> *Supra* note 14, at para. 48.

<sup>134</sup> *Fiset v. Gamble* (1992), 18 C.H.R.R. D/81 (B.C.H.R.T.).

<sup>135</sup> *Ottawa (City) v. Ottawa-Carleton Public Employees' Union, Local 503* (2007), 221 O.A.C. 224 (Ont. Sup. Ct.), upholding, [2005] O.L.A.A. No. 502 (P.C. Picher).

<sup>136</sup> *Sealy Canada Ltd. and U.S.W.A., Loc. 5885 (Bender) (Re)*, (2006) 147 L.A.C. (4th) 68 (P.A. Smith); *Gordy v. Oak Bay Marine Management Ltd.*, (2004) B.C.H.R.T. 225; *Shuswap Lake General Hospital and British Columbia Nurses' Union (Lockie Grievance)*, [2002] B.C.C.A.A.A. No. 21 (J.M. Gordon).

<sup>137</sup> *Ontario Liquor Boards Employees' Union v. Ontario (Liquor Control Board of Ontario) (McNaughton Grievance)*, [2006] O.G.S.B.A. No. 25 (Dissanayake).

<sup>138</sup> *Gates Canada v. United Steelworkers of America, Local 9193 (Employee A Grievance)*, [2006] O.L.A.A. No. 683 (Reilly); *Pacific Blue Cross v. Canadian Union of Public Employees, Local 1816 (Colledge)* (2005), 138 L.A.C. (4th) 27 (McPhillips).

<sup>139</sup> *Wilson v. Douglas Care Manor Ltd.* (1992), 21 C.H.R.R. D/1992 (B.C.H.R.T.).

<sup>140</sup> *Frito-Lay Canada v. United Steelworkers of America, Local 461 (McGimpsey Grievance)*, [2007] O.L.A.A. No. 458 (M.R. Newman); *Mellon v. Canada (Human Resources Development)*, [2006] C.H.R.D. No. 2 (C.H.R.T.D.).

dyslexia,<sup>141</sup> stress,<sup>142</sup> tobacco addiction,<sup>143</sup> an injury to the vocal nodules,<sup>144</sup> chronic fatigue syndrome,<sup>145</sup> tendonitis,<sup>146</sup> insomnia,<sup>147</sup> a sensitivity to cigarette smoke,<sup>148</sup> a dental condition,<sup>149</sup> marijuana addiction,<sup>150</sup> a fear of flying,<sup>151</sup> an obsessive compulsive disorder,<sup>152</sup> attention deficit disorder<sup>153</sup> and chronic headaches.<sup>154</sup> While most health conditions or impairments that have been accepted as a disability for human rights purposes have a permanent or long-term character, the Supreme Court of Canada has expressed caution about including temporary health conditions and “normal ailments”.<sup>155</sup> Commentators, however, have criticized this approach,<sup>156</sup> and human rights tribunals and labour arbitrators have accepted that short-term illnesses and injuries can fall within the statutory definition.<sup>157</sup> When a human rights claim asserts that a particular health

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<sup>141</sup> *Green v. Canada (Public Service Commission)* (1998), 34 C.H.R.R. D/166 (C.H.R.T.), aff’d (2000), 38 C.H.R.R. D/1 (F.C.T.D.).

<sup>142</sup> *Sault Area Hospitals and S.E.I.U., Local 268* (2001), 94 L.A.C. (4th) 230 (Whitaker).

<sup>143</sup> *Cominco Ltd. and U.S.W.A., Loc. 9705 (Re)* (1998), 70 L.A.C. (4th) 129 (Chertkow).

<sup>144</sup> *Conte v. Rogers Cablesystems Ltd.* (1999), 36 C.H.R.R. D/403 (C.H.R.T.).

<sup>145</sup> *Honda Canada Inc. v. Keays*, 2008 SCC 39; *Calgary Herald and Calgary Printing Trades Union, Loc. 1 (Re)* (1995), 52 L.A.C. (4th) 393 (Tettensor).

<sup>146</sup> *Country Leathers Manufacturing Ltd. v. Graham* (2004), 257 Sask. L.R. 31 (C.A.), affirming (2003), C.L.L.C. 230-020 (Sask H.R.Bd. Inq.); *XL Beef v. U.F.C.W., Local 373A*, [2003] A.G.A.A. No. 58 (Jones).

<sup>147</sup> *City of Ottawa v. Civic Institute of Professional Personnel* (LaSalle), [2006] O.L.A.A. No. 226 (Weatherill).

<sup>148</sup> *Ontario Public Service Employees Union v. Ontario (Ministry of Public Safety and Security) (Hyland Grievance)*, [2004] O.G.S.B.A. No. 1 (Petryshen).

<sup>149</sup> *Winpak Ltd. v. Communications Energy and Paperworkers Union of Canada, Local 830*, [2006] M.G.A.D. No. 41 (A. Ponak).

<sup>150</sup> *Algoma Tubes Inc. v. U.S.W.A., Local 8748 (Smith)*, [2006] O.L.A.A. No. 768 (Randall).

<sup>151</sup> *NAV Canada and I.B.E.W. (Tomkins) (Re)* (2001), 101 L.A.C. (4th) 159 (Chertkow).

<sup>152</sup> *Washington Mills Electro Minerals Corp. and U.S.W.A., Loc. 4151 (Gill) (Re)* (2003), 117 L.A.C. (4th) 313 (H.D. Brown).

<sup>153</sup> *A.J. v. Canada (Attorney General)*, [2008] F.C.J. No. 741 (F.C.A.).

<sup>154</sup> *O-I Canada Corp. v. United Steelworkers of America, Local 2805 (N.A. Grievance)*, [2005] O.L.A.A. No. 170 (R.L. Levinson); *Desormeaux v. Ottawa-Carleton Regional Transit Commission*, [2005] F.C.A. 311 (C.A.), leave to appeal to S.C.C. dismissed, 26 March 2006, [2005] S.C.C.A. No. 534; *Alberta (Department of Energy) v. A.U.P.E. (Worden)*, [2004] A.G.A.A. No. 31 (Smith); *Country Leathers Manufacturing Ltd. v. Graham* (2004), 257 Sask. R. 31 (C.A.); *Ingersoll (Town) and London Civic Employees, Local 107 (Re)* (2003), 122 L.A.C. (4<sup>th</sup>) 402 (Williamson).

<sup>155</sup> *City of Montreal*, *supra* note 14, at para. 82: “As the emphasis is on full participation in society rather than on the condition or state of the individual, ailments (a cold, for example) or personal characteristics (such as eye colour) will necessarily be excluded from the scope of “handicap”, although they may be discriminatory for other reasons.”

<sup>156</sup> See Tarnopolsky & Pentney, *supra* note 8, at 7A-12 to 13: (“...this analysis is overly simplistic.”).

<sup>157</sup> *Mississauga (City) v. Amalgamated Transit Union, Local 1572 (Tanner Grievance)* (2005), 141 L.A.C. (4th) 84 (Springate); *C.U.P.W. v. Canada Post Corp.* (Kenny), [2005] C.L.A.D. No. 228 (Christie); *Masters v. Willow Butte Cattle Co. Ltd.* (2002), 42 C.H.R.R. D/321 (Alta H.R. Bd.Inq.); *Cominco Ltd.*, *supra*, note 146; *Canadian Waste Services Inc. and Christian Labour Association of Canada (McGee) (Re)* (2000), 91 L.A.C. (4th) 320 (Lynk). These cases point in a different direction that an earlier Ontario human

condition or an impairment amounts to a disability in law, the initial onus rests on the party advancing the claim to establish that the condition/impairment has a demonstrable basis both in medicine and in fact.<sup>158</sup>

The stereotyping of persons with disability is impermissible. This applies equally to workplace policies, discretionary decisions of employers, and political choices by legislators. While the definition of disability may necessarily vary according to the specific purposes of a statute or the particular circumstances of a workplace program, its content, scope and application must conform to human rights values. In *Ontario Nurses' Association v. Mount Sinai Hospital*,<sup>159</sup> the Ontario Court of Appeal struck down a provision in the *Employment Standards Act*<sup>160</sup> which denied severance benefits to an employee whose employment had been terminated as a result of contractual frustration due to a disability. The Court held that cases involving persons with disabilities and work must be read within the context of their historical undervaluation in Canadian society generally, and in the employment arena in particular. It went on to rule that the *ESA* provision provided for differential treatment for persons with disabilities and was unjustified, because it was premised "...on the stereotype that people with severe and prolonged disabilities will not return to the workforce."<sup>161</sup> Accordingly, the statutory provision failed s. 15 of the *Charter* and was not saved by the "reasonable limits prescribed by law" requirements in s. 1. *Mount Sinai Hospital* requires that, as our understanding of the various dimensions of disability in the workplace evolves, "the actual needs, capabilities and circumstances of [an employee with a disability] and others

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rights board of inquiry ruling that a temporary impairment is not a disability under the *Code: Ouimette v. Lily Cups Ltd.* (1990), 12 C.H.R.R. D/19. However, for a recent judicial ruling that has required a degree of permanence in an impairment in order to qualify as a disability, see *Newfoundland Human Rights Commission and Critch v. Newfoundland*, [2007] N.L.C.A. 10.

<sup>158</sup> *Johnson Controls, L.P. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 222 (J.P. Grievance)*, [2007] O.L.A.A. No. 20 (R. L. Levinson); *Peele Co. v. United Steelworkers of America (Termination Grievance)*, [2007] O.L.A.A. No. 41 (Craven); *Accuride Canada Inc. v. C.A.W., Local 27 (Bishop)*, [2006] O.L.A.A. No. 569 (Hinnegan); *J. (M.) v. Companion* (2002), 45 C.H.R.R. D/375 (Nfld. C.A.).

<sup>159</sup> (2005), 255 D.L.R. (4th) 195.

<sup>160</sup> R.S.O. 1990, c.E.14. The provision in question was s.58(5)(c), as rep. by *Statutes of Ontario*, 2000, c.41, ss. 144(1).

<sup>161</sup> *Ontario Nurses' Association v. Mount Sinai Hospital* (2005), 255 D.L.R. (4th) 195 (Ont. C.A.), at para. 24.

in the claimant group”<sup>162</sup> must be central to all employment opportunities and statutory entitlements.

### III Conclusion

Disability discrimination is among the most serious of human rights challenges in Canada today. In the workplace, its presence is evident in the dispiriting employment conditions experienced by persons with disabilities: the high unemployment rates, the elevated numbers of low-quality and low-paying jobs, the stubborn persistence of visible and invisible workplace barriers, and the consistently high volume of employment-based complaints to human rights commissions. Among equality designated groups protected by employment equity legislation, persons with disabilities have fared the worst in achieving employment gains. Yet, modest improvements over the past two decades have occurred. More persons with disabilities are in the work force, they have more access to a wider range of good jobs, and workplace policies are now addressing some of their substantive concerns for the first time. Better, stronger, broader human rights laws have made a meaningful difference, and they have contributed substantially to the revolution in the way that we now think about disablement as a social right, as opposed to a personal misfortune.

The arrival and consolidation of accommodation obligations has been the single most important legal advance for persons with disabilities over the past two decades. The duty has been a transformative experience in the Canadian workplace, albeit one that has been uneven and disparate. Disability has become by far the most litigated and the most jurisprudentially influential of the accepted human rights grounds, and its inherent variety and complexity has decisively shaped and expanded the reach of the accommodation duty. A High Law has been developed by the Supreme Court of Canada through a series of aspirational rulings on human rights that has created a dynamic and demanding accommodation duty. In turn, this High Law has been transmuted by labour arbitrators

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<sup>162</sup> *Ibid.* at para. 30.

and human rights tribunals into a vibrant, effective and substantial body of Low Law rulings which have profoundly altered the practice of industrial relations and human resources in workplaces across the country.