REASONABLE ACCOMMODATION IN THE WORKPLACE

Consultation Memorandum No. 2

November 1995

ALBERTA LAW REFORM INSTITUTE

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PREFACE AND INVITATION TO COMMENT

This is a Consultation Memorandum. The Institute's purpose in issuing a Consultation Memorandum at this time is to allow interested persons the opportunity to consider these issues and to make their views known to the Institute. Any comments sent to the Institute will be considered when the Institute determines what final recommendation, if any, it will make.

The reader's attention is drawn to the questions which are set out in highlight boxes. It would be helpful if comments would refer to these questions by number where practicable, but commentators should feel free to address any issues as they see fit.

It is just as important for interested persons to advise the Institute that they approve the proposals as it is to advise the Institute that they object to them, or that they believe that they need to be revised in whole or in part. The Institute often substantially revises tentative conclusions as a result of comments it receives. The proposals do not have the final approval of the Institute's Board of Directors. They have not been adopted, even provisionally, by the Alberta government.

Comments on this Memorandum should be in the Institute's hands by **March 15, 1996**. Comments in writing are preferred. Our address is:

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REASONABLE ACCOMMODATION IN THE WORKPLACE

Consultation Memorandum

I. Introduction

A. Purpose of Memorandum

In this project we propose to reform the duty of accommodation in the workplace. Our purpose is to help increase participation in the workforce by disabled persons and members of other minority or disadvantaged groups. To this end we propose a duty of accommodation that would prohibit the exclusion of such persons from particular jobs where it is reasonably possible to provide accommodations that allow them to perform the necessary work. We have also considered the needs of those who would be required to provide the accommodations—employers, and in some cases, unions. We have recognized that the requirements we impose will sometimes involve a cost or other burden. To ensure that this burden is not undue, we propose that it be limited appropriately. We have also tried to develop a more defined duty of workplace accommodation. It is to the advantage of both employers and employees to have the law clear enough that it is not necessary to seek legal advice or litigate to test whether its requirements have been met.

The success of the proposals depends on their being acceptable and workable from the standpoint of all the groups that are directly affected by them. The purpose of this Memorandum is to consult with these groups. We want to know how our proposals would affect them, whether they are adequate, acceptable, and sufficiently clear, and whether there are issues or solutions that we have failed to consider. We wish to hear from the disabled community and other employee groups that might experience discrimination whether the changes we have proposed would serve their needs. We also need the views of employers as to how to limit the duty of accommodation so as not to interfere unduly with the goals of an enterprise. Finally, we want to hear from unions as to how to limit the duty so as not to interfere unduly with the rights of other employees.

This Memorandum is prepared by ALRI staff, and the views expressed in it have not been finally approved by the ALRI's Board. We will provide the results of our consultation to the Board as the basis for its further discussion of the issues raised.

B. Reasons for the Project

1. The impetus for reform: access to the workplace for the disabled and others

The impetus for reform of Alberta's law has come from the disabled community. The disabled, even those who desire and are able to work under appropriate conditions, are vastly under-represented in the workplace.[1] Discriminatory work rules sometimes prevent them from participating even though if accommodations were made, they could do the required work. An example of such a discriminatory rule is the blanket exclusion from particular jobs of persons with conditions such as diabetes or multiple sclerosis.[2]

In contrast to human rights law in several other provincial jurisdictions, the Alberta Individual's Rights Protection Act places no express duty of accommodation on employers. Though a limited duty of accommodation does arise under the case law, it does not cover all discriminatory work rules. The result is that in some cases employees can be excluded from performing jobs even in situations where it would be possible to accommodate their particular need so as to allow them to perform the job, without causing undue hardship.

Representatives of groups with particular disabilities have urged reform. To meet their needs and those of others potentially affected by discrimination, we propose an express duty of accommodation in the workplace. This duty would prohibit the exclusion of disabled persons and members of other minority or disadvantaged groups from particular jobs where it is reasonably possible to accommodate their needs. It would protect against all types of discriminatory rules (both direct and "adverse effect"),[3] and would require the employer to consider

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[1] According to Statistics Canada, in 1991 there were 2.3 million working-age Canadians with a mental or physical disability, and slightly fewer than half of them were unemployed. While severe handicaps prevented many of these persons from working, 41% of those not in the labour force considered themselves capable of at least part-time work. [See Government of Canada, *Improving Social Security in Canada, Persons with Disabilities: A Supplementary Paper*, Minister of Supply and Services Canada, 1994.]

[2] The types of workplace accommodations that could be made for persons with these conditions are discussed further below.

[3] See pages 4-5 for definitions of these terms.

accommodation at the individual level.[4] The duty we propose is broader in scope than that which applies in Alberta at present.

This reform would help particular disadvantaged individuals. It would also benefit society, by helping create a climate of respect for the dignity and worth of all citizens, in which all citizens are enabled to contribute to the development of the community.

2. Appropriate limitations on the duty of accommodation

We have also recognized the interests of those to whom we look to provide workplace access. The duty of accommodation is imposed on employers, and where applicable, on unions. To be effective the duty must be workable from the standpoint of these groups. It must be limited so as not to impose an undue burden on the goals of an enterprise, or the rights of other employees. We propose that this limitation be "to the point of undue hardship". We list and where possible describe the factors relevant for assessing whether that point has been reached. In developing this list, we have tried to balance the goals of eliminating discrimination from the workplace against the interests of employers and unions in being able to make decisions about the management of an enterprise freely.

3. Clarity in the law

The other element we think is essential to enhanced workplace access is clarity in the law. Clarity serves every interest. It allows employees to know what they can rightfully demand, and employers to know when they are meeting their legal obligations, without resort to litigation. We propose that the duty of accommodation be defined, and examples given of the types of accommodations that would be required. We also recommend an exhaustive list of factors for assessing whether a particular accommodation is required. Finally, we put forward for consideration the idea of a quantifiable standard for the cost factor.

4. Government set to re-open Individual's Rights Protection Act

The Minister of Community Development Gary Mar has recently announced the government's intention to introduce changes to the Individual's Rights Protection Act. This government initiative creates an opportunity to make recommendations

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[4] This is in contrast to existing law pertaining to direct discrimination, under which an employer is to consider whether there is a reasonable alternative, applicable to all employees, to a discriminatory rule, but is not required to ask whether the needs of any particular individual can be accommodated. The significance of this distinction is discussed further below.

for necessary changes relating to workplace accommodation. We have advised the Minister of our project and the procedure we plan to follow, and he has indicated an interest in receiving the proposals which we will draft following our consultation.

C. Consultation with Affected Groups: Procedure

In the ALRI Board's view, consultation with all affected groups is a key element in this project. The Board has accordingly decided to circulate this Memorandum to affected groups. This Memorandum explains the existing law. It illustrates how the existing law can affect persons who seek employment in the face of discriminatory rules. It describes the law of some other jurisdictions that have express provisions for workplace accommodation, and compares this to our law. It reviews the various ways of limiting the duty of accommodation. It also sets out the various options that exist for better defining the nature of the duty. It sets out our tentative recommendations on these issues.

We will circulate this Memorandum to those who would be affected by the proposed changes. We have heard from particular sectors of the disabled community, but wish to have the views of broader range of individuals with disabilities, or groups representing them. We will also consult organizations of employers and employee unions. As well, we will seek the views of lawyers who act for any of the foregoing. We ask our readers to give us their comments and advice.

This Memorandum consists of a series of questions. Under each question, we will set out the considerations and arguments that we think are relevant, and then state our tentative proposals. Then we will invite comment.

Having consulted those affected, we will prepare recommendations and issue a report.

D. Terminology

In this Memorandum we use some terms that are not in general use. We will explain them here.

Bona fide occupational requirement (BFOR)

This is a work rule that is imposed in good faith and is reasonably necessary to assure the efficient, economical and safe performance of the job.

Direct discrimination

This is where a work rule discriminates by reference to a particular attribute or characteristic possessed by particular persons or groups. An example is a rule that no one over age 60, or no one with epilepsy, can hold a particular job. The rule discriminates on its face.

"Adverse effect" discrimination

This refers to a discriminatory rule that is neutral on its face, but has an adverse effect on persons by virtue of some attribute they possess. An example is a rule that requires persons to wear a helmet on the work site. This has an adverse effect on persons whose religious belief requires that they wear turbans.

II. Discussion of Issues

A. Duty to Accommodate

Question 1.

Should the Individual's Rights Protection Act contain an express duty of accommodation?

(a) Should the duty apply to both direct and "adverse effect" discrimination?

(b) Should the duty require accommodation of an individual's particular needs?

(c) Should "accommodation" be defined and\or examples given?

1. Introduction

This part of the Memorandum (part A) deals with whether a duty of accommodation should be enacted, and what form a legislated duty should take. The next part (part B) deals with how the duty should be limited.

In this part we will begin by briefly sketching the structure of the law of workplace accommodation—how it fits into human rights law. Next we will look more closely at the law of Alberta, and how the courts have interpreted our legislation. We will see that the courts have said that under our legislation the duty applies in relation to only one of the two possible types of discrimination (adverse effect discrimination). We will then consider how the non-application of the duty to the other type of discrimination (direct discrimination) can have a negative effect on access to the workplace for persons with disabilities. We will consider one case that, though it holds some promise for increased workplace access, does not adequately deal with the problem, for reasons we will describe. We will then turn to describe the law of some other jurisdictions. We will consider legal regimes that have an express and more general duty of accommodation, in some cases, with a definition of "accommodation", a list of the types of accommodations that are contemplated, and an express requirement to consider accommodation at the individual level. We will compare this to our own law, and note the calls for reform to make our legislation more like that of the other jurisdictions. We will conclude this part with our recommendations.

2. Human rights, discrimination in the work place, and the duty to accommodate

All federal and provincial human rights legislation prohibits discrimination in employment on specified grounds, such as race, gender, or disability. However, these prohibitions are not absolute. Where a work rule discriminates against persons with particular attributes, it may be a permissible exception to the rules against discrimination, if it tries to ensure adequate performance of the work. An example of a rule that may be a permissible exception is one that excludes from jobs with a safety risk persons with a medical condition that can cause unpredictable episodes of incapacity. For some of the permissible exceptions, however, there is also a duty on employers to try to accommodate the needs of those against whom the rule would discriminate. In the example given, an accommodation might be to have the person exempted from the duty that carries the risk, or allow the person to work with a buddy, or test the particular individual to assess the likelihood of an incapacitating episode given his or her level of ability to manage the disease.[5]

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[5] Beyond reasonableness, courts have stated no limitation on the types of accommodation that may be required. The possibilities include the following: provision of adaptive technologies; alteration of physical premises; alteration of job duties, temporarily or permanently; alteration of work schedules; provision of part-time work; acceptance of absences; transfer to a different position, temporarily or permanently; modification of training practices; provision of helpers such as readers

(continued...)

Whether or not such an accommodation would be required varies from one jurisdiction to another under Canadian law. At present, though some of these accommodations would be required in other jurisdictions, they would not be required under Alberta law.

3. The law in Alberta: a limited duty to accommodate

We will first describe the duty of accommodation as it exists under Alberta law. We will then compare it to existing and proposed laws in some other jurisdictions.

Section 7 of the Individual's Rights Protection Act is as follows:

> 7(1) No employer or person acting on behalf of an employer shall
>
> (a) refuse to employ or refuse to continue to employ any person, or
>
> (b) discriminate against any person with regard to employment or any term or condition of employment
>
> because of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry or place of origin of that person or of any other person.
>
> ...
>
> (3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

a. The interpretation of Alberta and like legislation

Alberta's section 7 prohibits discrimination, but excepts work rules based on a bona fide occupational requirement (BFOR). Though the subsection makes no express mention of the duty to accommodate, the courts have fashioned a limited duty. During the last decade, the Supreme Court of Canada has interpreted this and like legislation several times. In doing so, it has drawn a distinction between "adverse effect" discrimination and direct discrimination (affirming that both types are prohibited),[6] and created different rules for each. These rules are:

- A work rule that discriminates by adverse effect will be upheld if it is rationally connected to the performance of the job. However, the employer **has**

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[5](...continued)
or interpreters.

[6] In *Ontario (Human Rights Commission) v. Simpsons-Sears*, [1985] 2 S.C.R. 536, the court held that intention to discriminate is not necessary to prove that the legislation was contravened. The legislation prohibits not only directly discriminatory rules (for example, "No Catholics, or women, or diabetics employed here") but also rules that are neutral on their fact but have a discriminatory effect on certain groups (for example "Only Sundays are days off"; this discriminates against those who observe a religious day of rest on Saturdays).

a duty to accommodate the employees upon whom the rule has an adverse effect, but only up to the point of undue hardship.[7]

- For a rule that discriminates directly, if it is a bona fide occupational requirement, it will be upheld. The test for "bona fide occupational requirement" is whether the rule

    - is imposed honestly, in good faith, and in the sincerely held belief that it is in the interests of the adequate performance of the work, and

    - is related in an objective sense to performance of the employment in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the safety of the employee, fellow employees, or the public.[8]

If the rule meets both parts of this test, **no accommodation is required**.[9]

In the result, where a work rule discriminates directly, but is permissible because it is a BFOR, the employer need not inquire whether an accommodation would allow the employee to perform the work satisfactorily.[10] The degree of protection for the individual can thus be greater for cases of unintentional "adverse effect" discrimination than for direct discrimination.

b. Illustrations of the effect of the absence of a duty to accommodate: the position of disabled persons

Three cases decided between 1987 and 1989 illustrate the potential effect of discriminatory rules on disabled employees where there is no duty of accommodation. All three cases involved people with insulin-dependent diabetes, all of whom complained of workplace discrimination under the Canada Human Rights

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[7] *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489.

[8] *Ontario (Human Rights Comm.) v. Etobicoke*, [1982] 1 S.C.R. 202.

[9] *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489.

[10] There is authority that even for direct discrimination, the employer must ask whether there is any reasonable alternative to the discriminatory rule. However, the majority of the Supreme Court has clearly rejected the view that the search for reasonable alternative rules requires an employer to consider whether the particular employee affected by the rule could have been accommodated.

Act.[11] In each case the complaint was decided in a manner that failed to meet the complainant's needs.

In the first of the cases, CNR trackman Wayne Mahon had been laid off. He was not re-employed because a medical exam revealed he had diabetes. The Human Rights Tribunal hearing the case found that there was a slight risk of a neuroglycopenic reaction in a situation which might lead to injury of the employee, fellow employees, or the public (about 1 chance in 10,000). In spite of this, the tribunal reinstated Mr. Mahon on the basis that much human activity involves some risk. The tribunal thought the level of risk was acceptable and worth taking to provide full equality of opportunity in employment for the disabled.

The Federal Court of Appeal overturned the decision.[12] The court found that the rule excluding those with diabetes from the job was a bona fide occupational requirement. The elimination of even a small risk of serious damage qualified the requirement as a BFOR. In reaching this conclusion, the court relied on the *Bhinder* case,[13] in which the Supreme Court had upheld the requirement for a safety helmet because non-compliance would expose the employee to a "greater likelihood of injury—though only slightly greater".[14]

The second decision involved a supply technician with the Canadian Navy, Donald Gaetz. Mr Gaetz was diagnosed with diabetes some 5 years after starting employment. He became well-versed in the care and management of diabetes, and though he occasionally suffered mild reactions, could readily control his symptoms. He had no difficulties performing his duties, and was in fact actively involved in several athletic activities. Nevertheless not long after his diagnosis, he was notified that his medical category was being downgraded, and he was discharged from the Forces on medical grounds.

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[11] This statute has provisions respecting discrimination in employment and the BFOR defence that are similar to Alberta's section 7.

[12] *Re Canadian Pacific Limited and Canadian Human Rights Commission* (1987), 40 D.L.R. (4th) 586.

[13] *Re Bhinder and Canadian National Railway Co.*, [1985] 2 S.C.R. 561.

[14] *Ibid.*, at 584.

The Human Rights Tribunal hearing the case[15] adopted the test for a BFOR set out at page 8 above. It also noted the Supreme Court's ruling that a limitation that reduces a risk, even if only by a very small amount, can qualify as a BFOR. The tribunal concluded that the medical restriction placed upon the complainant qualified as a BFOR. In its view the "real risk factor" in the case, especially having regard to the military context of the position, was more than a possibility. There was therefore no requirement to accommodate Mr. Gaetz, either by making the minor adjustments that would accommodate his condition, or by finding other suitable employment within the Armed Forces, and the tribunal upheld the discharge.

The last of the three cases involved CNR brakeman and yardman Michael Doyle. Mr. Doyle was diagnosed with diabetes four years after starting employment. He was briefly hospitalized, and then returned to work, maintaining control of his illness through insulin therapy. Mr. Doyle revealed his medical condition to the employer when he applied for sickness insurance benefits. A blanket policy restricting the employment of persons with insulin-dependent diabetes in certain positions was then in effect. The employer unilaterally imposed conditions on the complainant's employment. He was removed from his position as brakeman and yardman, restricted from performing certain tasks, and limited to particular specialized positions. The result was that Mr. Doyle could work only a four-day week. Some three years later, the employer changed its policy regarding handicapped persons. It began to base any restrictions on persons with diabetes on individual medical assessments. Mr. Doyle's individual assessment found him to be fit for duty. He was restored to his former position, and was thereafter promoted to foreman.

Mr. Doyle made a claim to the Canadian Human Rights Commission for the loss of income in the intervening years. The Commission set down the complaint for an inquiry. However, the CNR applied to the Federal Court for an order of prohibition preventing the tribunal from hearing the complaint. CNR argued that prior human rights cases involving diabetes had settled any issue that might arise, and that the tribunal was acting beyond its statutory authority. The Federal Court accepted this argument. In a judgment that was very critical of the actions of the Commission, it granted the order of prohibition.

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[15] *Gaetz v. Canadian Armed Forces* (1988), 89 C.L.L.C. 17,014.

The cases just described left disabled persons seeking redress of unfair treatment in their occupations facing an objective standard they could not surmount. Tribunals or courts were to ignore individualized testing as an alternative to imposition of a discriminatory rule, even where medical criteria existed that would allow such testing. Medical evidence establishing that a particular individual could carry out some or all of the job duties safely and effectively, or could manage the disease by diet or medication, was also to be ignored. The BFOR defence as then interpreted did not acknowledge that there is an acceptable level of risk in any activity. And finally, it did not provide for any accommodation for those persons in relation to whom there was a valid concern about functional ability.

c. Recent developments: some comments by the court that could enhance workplace access

As advocates for persons with disabilities have acknowledged, a 1990 decision of the Supreme Court of Canada contains comments regarding direct discrimination that go some distance toward alleviating some of the problems just described. This case, *Central Alberta Dairy Pool*,[16] actually involved "adverse effect" discrimination, but the court also made some comments about direct discrimination.[17]

The first such comment was that where a rule discriminates directly, employers must try to find a reasonable alternative to it. The court said that in determining whether such a rule is *bona fide*, the tribunal or court is to consider whether any practical alternative existed to a rule that did not take into account individual differences. Turning back to the disability cases just reviewed, this could require an employer who has excluded an employee under a blanket rule to explain why individual testing was impractical. For some disabilities, such as diabetes, testing standards or protocols exist (though this depends on the state of medical technology and understanding, and thus will vary from one disability to another). For an employee suffering from such a disability, if testing is practical, a BFOR defence might fail on this account.

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[16] [1990] 2 S.C.R. 489.

[17] The court's comments are therefore extraneous to the reasoning upon which the decision was based. For this reason, they are less authoritative than had the conclusions in the case been based upon them. There are also some useful comments in the minority judgment, but these are not the law.

In the second comment in *Central Alberta Dairy Pool*, the majority disapproved of its own earlier ruling[18] that if a work rule eliminates any degree of safety risk, no matter how slight, it qualifies as a BFOR.[19] Under the post-*CADP* law, where the increase in risk associated with a particular disability is small, the employer may be unable to justify a rule on the ground of safety.[20]

However, the result in *Central Alberta Dairy Pool* stops short of requiring accommodation at the individual level for cases of direct discrimination. There is no requirement that before excluding an employee from a job on the basis of a rule that qualifies as a BFOR, the employer must make an effort to accommodate the individual. Thus an employee can be excluded even where certain accommodations—such as eliminating non-essential duties, providing physical aids, or re-scheduling to allow some absences—would allow the employee to perform the job satisfactorily. The employer need not have assessed the employee's abilities in light of accommodations that could have been provided short of undue hardship. The majority in *CADP* was clear that accommodation at the individual level is not required.[21]

The position that individual accommodation is not required for cases of permissible direct discrimination has been restated very recently by the Supreme Court of Canada. In *Large v. City of Stratford*[22] the court agreed that there is a requirement on the employer to look for reasonable alternatives to a discriminatory rule. It also said that this required the employer to show that it was impractical to test those in the group discriminated against to determine whether they possess the characteristics prohibiting them from doing the job. However, the court disagreed

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[18] *Re Bhinder and Canadian National Railway Co.*, [1985] 2 S.C.R. 561.

[19] In Wilson J.'s view, the small risk which Mr. Bhinder took upon himself by not wearing a helmet failed to meet the test set out in *Ontario (Human Rights Comm.) v. Etobicoke*, [1982] 1 S.C.R. 202, of being reasonably necessary for the safety of the employee, fellow employees, or the public.

[20] In some more recent decisions, rules that excluded certain categories of disabled persons on the basis of a perception of risk were struck down. It was held that risk must be determined relative to the individual, rather than applying a blanket standard to all persons in a group. See *Re Canadian Pacific Limited and Brotherhood of Maintenance of Way Employees* (1989), 7 L.A.C. (4th) 1; *Hines v. Registrar of Motor Vehicles, et al.*, Unreported decision, Davison, J., Sept. 9, 1990, N.S.T.D.

[21] In the minority judgment, Mr. Justice Sopinka incorporated the duty to accommodate into the test for a BFOR. However, he meant only that there is a duty to look for an alternative to a discriminatory rule, not to accommodate the individual employee.

[22] [1995] S.J.C. No. 80, October 19, 1995.

with the court below that the search for reasonable alternatives required the adjustment of duties for particular employees, to make application of the discriminatory rule unnecessary in the particular case. In the court's view such a requirement was an impermissible extension of the principles in the earlier decisions.[23]

The *Large* case is also relevant to the issue at hand because it illustrates what may result where there is no duty to accommodate and the discrimination is based on another of the prohibited grounds—in this case, discrimination on the basis of age. Mr. Large was a police officer who was obliged to retire at the age of 60 under a mandatory retirement policy. The human rights tribunal found that the risk of cardiovascular disease and lack of aerobic capacity associated with Mr. Large's age category lent support to the reasonableness of the retirement rule. It also found that individual testing for the presence of these factors was not practical. However, the tribunal ruled that the risk could be avoided by accommodating Mr. Large by minor adjustments to his job duties, to avoid situations where aerobic capacity was likely to be a factor. The tribunal emphasized that only a small part of the potential duties of a police officer required an level of aerobic performance greater than the capacity of persons over age-60, and that persons who were ill and thereby less fit had in fact been accommodated in the past. It concluded that the adjustment of job duties was a reasonable alternative to the discriminatory mandatory retirement policy. Both the Ontario Divisional Court and the Ontario Court of Appeal upheld this ruling. However, the Supreme Court of Canada reversed it, in part on the basis, as just noted, that requiring an individual accommodation was not permissible under the law. This case shows that in the absence of a duty of accommodation for cases of direct discrimination, there is no requirement for even a minor adjustment of duties, whether or not they are essential to performance of a job.

There are, moreover, a number of problems with the reasoning in the cases that distinguish between direct and "adverse effect" discrimination, and apply different rules for each type. The *CADP* decision has been criticized on the ground that the distinction between adverse effect and direct discrimination is not prescribed by the legislation. Neither is there a rational basis for making the BFOR

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[23] The court referred specifically to *Bhinder v. Canadian National Railways Co.*, [1985] 2 S.C.R. 561;, *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, [1989] 2 S.C.R. 1297; and *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489.

rule apply to the one type of discrimination, and the duty to accommodate to the other.[24]

Second, some argue that the ruling in the *CADP* case and some other recent cases inappropriately water down the test for upholding an "adverse effect" work rule. The original test was that the rule be "reasonably necessary for the performance of the job". Under *CADP*, the test for a rule that discriminates by adverse effect is only that it be "rationally connected" to job performance. The contrary argument is that no discriminatory rule should be upheld that is not reasonably necessary in terms of economy, efficiency or safety.[25]

Finally, it can be difficult to characterize discrimination as either direct or "adverse effect" in cases involving disabled persons. For example, a rule can be described either as "No deaf people need apply" or "The duties of the job involve answering the telephone." The requirement to accommodate in either case would eliminate semantic-based wrangles about characterization.[26]

In summary, the *CADP* case goes some distance in the direction of increased workplace access. However, as affirmed in the *Large* decision, it falls short of requiring the employer to consider whether the individual employee could be accommodated without undue hardship. The latter would require a legislative enactment.

4. The law in some other jurisdictions: Ontario, proposed federal law, the Americans with Disabilities Act

In contrast, Ontario legislation provides the following:

- Regarding persons with handicaps: persons may be excluded from a job if they are incapable of performing its essential duties because of handicap. However, the person may not be treated as incapable of performing the

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[24] See Etherington, B., "Central Alberta Dairy Pool: The Supreme Court of Canada's Latest Word on the Duty to Accommodate" (1992) 1 C.L.L.J. 312 at 325.

[25] *Ibid.*, at 324.

[26] Lepofsky, M. David, "The Duty to Accommodate: A Purposive Approach" (1992) 1 C.L.L.J. 1 at 18.

essential duties of a job because of handicap, unless the person's needs cannot be accommodated without undue hardship on the person responsible for accommodating those needs.

- Regarding discrimination in relation to certain other prohibited categories (age, sex, record of offences or marital status): persons are not to be excluded from employment on the basis that a particular status under one of these categories is a BFOR, unless the circumstances of the person cannot be accommodated without undue hardship on the person responsible for accommodating those circumstances.

- In any case of "adverse effect" discrimination, persons are not to be excluded from employment unless the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs.

These laws requires the employer to assess the ability of a person to perform a job in light of accommodations that could be provided without causing undue hardship.

An express duty of individual accommodation is also found in proposed federal legislation introduced in 1993, Bill C-108. Though this Bill never went beyond first reading, the federal government has announced that it intends to once more take up the issue of accommodation in the workplace. Bill C-108 contained a statement of purpose as follows:

> 2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an equal opportunity with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

The Bill provided further that an employee is not to be excluded from employment on the basis that a discriminatory rule is a bona fide occupational requirement unless it is "established that accommodation of the needs of the individual or group of individuals affected would impose undue hardship on the person who would have to accommodate those needs". The proposed enactment goes on to provide that the "section applies regardless of whether it results from direct discrimination or adverse effect discrimination".

Moving further afield, the United States has legislation dealing solely with the rights of disabled persons, and requires employers to help employees overcome the effects of a handicap. The Americans with Disabilities Act, Title I, protects "a qualified individual with a disability" from discrimination regarding any term, condition, or privilege of employment. An employee is a "qualified individual with a disability" if, "with or without reasonable accommodation", he or she "can perform the essential functions of the ... position" in question. "Reasonable accommodation" is defined. It consists of any alteration in the work environment that enables a disabled employee to enjoy equal employment opportunities with non-disabled employees. Examples of reasonable accommodation are listed in the statute. These include:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

The laws just reviewed impose an express duty of individual accommodation. Alberta legislation does not. Such a duty would require an employer who is contemplating the exclusion of an employee or potential employee from performance of a job, on the ground that the employee possesses an attribute that is a prohibited ground under the legislation and is thus unable to perform the job satisfactorily, to make the following inquiry: is there any measure which the employer can take (short of undue hardship) that will enable the employee to perform the job satisfactorily? If there is such a measure, the employee must be considered for the job as though the accommodation had been made.

The American legislation presented is unique in that it helps to determine what is to be done by defining "accommodation", and by giving examples of the types of changes that are contemplated.

5. Calls for reform

The presence of an express duty to accommodate individual needs, applicable to direct as well as "adverse effect" discrimination, would help to remove discriminatory barriers to employment for persons with disabilities. It would also help those who might experience direct discrimination on the basis of gender, family status, age, and so on. For this reason, for those jurisdictions without an

express duty, including Alberta, there have been many calls for reform. These have come from representatives of the disabled, from members or staff of human rights commissions, and from academic commentators.[27]

6. Our tentative recommendation

RECOMMENDATION 1.

We recommend the enactment of legislation creating an express duty of accommodation.

(a) The duty should apply to both "adverse effect" and direct discrimination.

(b) The duty should require the employer, before excluding an employee on the basis of a rule that discriminates on a prohibited ground, to consider whether any accommodation can be made (short of undue hardship) that allows the employee to perform the duties of a job.

(c) Accommodation should be defined (eg. as any alteration in the work environment that would enable a member of a group against which discrimination is prohibited to enjoy equal employment opportunities with other employees), and/or a list of types of accommodations (as in the Americans with Disabilities Act)[28] should be provided in the statute.

WE INVITE COMMENT

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[27] Examples include the following: Corry, D., for National Advocacy Council, Canadian Diabetes Assoc., "How Governments Can Prevent Discrimination, and How They Can Encourage It: The Canadian Experience", Paper Presented to the 14th Congress of the International Diabetes Federation, Washington, D.C., June 1991; Pentney, W.F., Canadian Human Rights Comm., "The Duty to Accommodate and Equality: An Argument for a Purposive Approach", Paper presented to CBA Conference: Human Rights in the Workplace: The Duty to Accommodate, Calgary, April 7, 1995; Canadian Disability Rights Council, "Discussion Paper, in response to An Invitation by the Department of Justice to Research the Issue of Accommodation, Undue Hardship, and Systemic Discrimination Under the *Canadian Human Rights Act*", February, 1993; Malloy, Anne M., "Disability and the Duty to Accommodate" (1992) 1 C.L.L.J. 23; Etherington, B., "Central Alberta Dairy Pool: The Supreme Court of Canada's Latest Word on the Duty to Accommodate" (1992) 1 C.L.L.J. 312; Lepofsky, M. David, "The Duty to Accommodate: A Purposive Approach" (1992) 1 C.L.L.J. 1. An argument has also been made that the Charter of Rights mandates universal accommodation. See "Malloy, Anne M., "Disability and the Duty to Accommodate" (1992) 1 C.L.L.J. 23 at 41.

[28] See page 16.

B. Limitations on the Duty of Accommodation

Question 2.

(a) Should the limitation be "to the point of undue hardship" (as is generally the case)?

(b) Should there be a list of factors to be considered in assessing undue hardship? What factors should be considered?

(c) Should this list be exhaustive or non-exhaustive?

(d) Should there be a quantifiable formula for the cost factor?

1. Introduction

In this part of the Memorandum we assume that an express duty of accommodation will be enacted, and we go on to ask how the duty should be limited. We consider what factors should be taken into account in deciding whether a particular accommodation must be provided, and how these factors should be described. Choosing and defining the factors determines the limits of the duty. A defined and exhaustive list of factors also makes the law clearer.

We will begin this part with the recognition that the burden inherent in the duty falls on employers, and in some cases on unions, and that the interests of these groups must be balanced against the goal of eliminating workplace discrimination. We will consider data on the kinds of accommodations that are commonly required, and on average costs. We will then survey a number of jurisdictions to see how the duty has been limited, especially with regard to cost. In this survey, we find a wide range of approaches—from requiring the employer to expend no more than a "de minimis" cost at one end, to requiring the employer to do anything short of that which affects the essential nature or viability of the enterprise at the other. We will then review the case law in Alberta that, in the absence of an express duty, determines how far the employer and union must now go to accommodate, and what factors are to be considered in assessing whether the duty has been met. Next we will list and discuss all of the possible factors that might be taken into account, drawn from legislation in other jurisdictions and the statements of the courts. Finally, we will summarize an argument for a quantifiable standard for financial undue hardship put forward by American commentator Steven Epstein. We will

conclude this part with our recommendations about the appropriate limits for the duty.

2. Accommodation as a duty of private citizens: assigning and limiting the burden

Human rights legislation involves the balancing of competing interests, both private and public. In the context of the workplace, the interests on the one hand are the freedom of employers to make decisions about the management of an enterprise (including financial decisions), and of a union and employer to negotiate working conditions freely. The competing interests are first, the private interest of individual citizens to be free from discrimination. Second, there is a public interest in the creation of a climate of respect for the dignity and worth of all citizens, in which all citizens are enabled to contribute to the development of the community.[29] The duty of workplace accommodation limits the management freedom of private citizens who are entrepreneurs, and indeed imposes positive obligations upon them, to try to ensure freedom from discrimination and equal access to the workplace for other private citizens.

a. Cost-free accommodations

The balancing of competing interests is not so difficult where the duty on the employer requires that something be done differently, but does not involve much effort or financial cost. For example, an employer may be prohibited from acting on a personal racial or religious prejudice in the hiring process, or may be required to allow an employee to assume some degree of safety risk to him or herself. Such requirements are not onerous. In such cases, the private and public benefits from accommodations might readily be said to outweigh the liberty interests of the employer or union. The same is true even where enforcement requires some degree

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[29] In the words of McIntyre J. in *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536,

> The [Ontario Human Rights] Code accords the right to be free from discrimination in employment. While no right can be regarded as absolute, a natural corollary to the recognition of a right must be the social acceptance of a general duty to respect and to act within reason to protect it. In any society the rights of one will inevitably come into conflict with the rights of others. It is obvious then that all rights must be limited in the interest of preserving a social structure in which each right may receive protection without undue interference with others. This will be especially important where special relationships exist, in the case at bar the relationship of employer and employee. In this case, consistent with the provisions and intent of the *Ontario Human Rights Code*, the employee's right requires reasonable steps toward an accommodation by the employer.

of effort or inconvenience, for example, scheduling changes or reassignment of duties involving trading some duties with other employees. Minor interference or inconvenience might be regarded as the price to be paid for true equality in society.[30]

Research has shown that most accommodations require minor cost expenditure, or none at all. Data on the average financial costs of accommodation is not available for Canada. However, there is abundant data in the United States, and no factors come to mind that would make this data irrelevant to Canada. The available surveys reveal that for those disabled employees for whom accommodations are required, the vast majority involve little or minor cost:

> Costs to businesses for reasonable accommodations are expected to be less than $100.00 per worker for 30% of workers needing an accommodation, with 51% of those needing an accommodation requiring no expenses at all. A Louis Harris national survey of people with disabilities found that among those employed, accommodations were provided in only 35% of the cases.[31]

Following enactment of the Americans with Disabilities Act, the Equal Employment Opportunities Commission concluded that Title I will not have a "significant economic impact" on a substantial number of small business entities.[32]

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[30] As Mr. Justice McIntyre said in *Renaud v. Central Okanagan School District No. 23*, [1992] 2 S.C.R. 970 (S.C.C.), "Minor interference or inconvenience is the price to be paid for religious freedom in a multicultural society".

[31] Senate Committee on Labour and Human Resources, The Americans With Disabilities Act of 1990, S. Rep. No. 101-116, 101st Cong., 1st Sess. 8 (1989) at 89, cited in Epstein, Steven B., "In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act" (1995) 48 Vand. L. R. 391 at 428. See also the following surveys cited in Epstein at note 179: U.S Department of Labor, *Employees Accommodations Study* (1992) at 20, 29 (finding that less than one-half of disabled workers require accommodations; 51.1% of accommodations are cost-free; 18.5% cost $1-99; 11.9% cost $100-499); U.S. Gov't Accounting Office, *Reports on Costs of Accommodations*, Report No. B-237003 (1990) (reporting that 51% of accommodations cost nothing, 30% cost less than $500; 8% cost more than $200); Daniel Finnegan, *et. al.*, *The Costs and Benefits Associated with the Americans with Disabilities Act* 38 (1989) (finding that the average cost of accommodations per disabled employee that requires accommodations is $200); Frierson, J.G., *Employer's Guide to the Americans with Disabilities Act* (BNA 1992) at 103-04 (citing JAN, *In the Mainstream*, Min. Report #4 (July-Aug. 1988) (finding that 31% of accommodations are cost-free; 19% cost less than $50; 19% cost between $50 and $500; 19% cost between $500 and $1000; 12% cost between $1,000 and $5,000).

[32] In analyzing the costs of the ADA's reasonable accommodation requirement, the EEOC concluded that the average cost of accommodation under the ADA for every disabled employee (including those not needing accommodations) would be $261. (See Epstein, as cited in note 31, at note 185 and accompanying text.)

The low cost of average accommodations is a very important consideration in support of a wider duty, particularly from the perspective of employers.

b. *Accommodations involving significant costs*

However, the proscription of discrimination can also involve, whether expressly by statute, or by the interpretation of legislation, the imposition of a positive duty to expend money or appreciable effort to accommodate employees. For example, it may require a quantifiable expense, such as paying the cost of individualized medical assessments or providing treatment facilities, providing physical aids or assistants, re-scheduling or re-assigning work that involves hiring and paying additional employees, or allowing a safety risk that increases insurance costs. Accommodation may also involve accepting a loss of income, for example where an employer loses business because some customers are prejudiced against employees with characteristics that require accommodation.

In cases such as those just described, requiring the employer to accommodate in essence shifts a burden borne by some disadvantaged citizens onto other particular private citizens. It is clear that the duty to accommodate and any attendant burden must fall, at least initially, on the employer (and union where applicable). The prohibition on discrimination must apply at the point at which it would arise. In the context of the workplace, it is the employer or union that must be prohibited from discriminating; where non-discrimination requires accommodation, it is the employer or union (and to some degree other employees) that must accommodate. However, there is room for disagreement about how heavy this privately-borne burden ought to be—how far must the employer go in expending cost or effort? Generally, the extent of the duty is described as "to the point of undue hardship". However, the wide range of opinion is reflected in the widely disparate content of "undue hardship" in different jurisdictions, and in different contexts within jurisdictions.

3. Undue hardship: survey

In the United States, the duty to accommodate arises in two contexts: under the prohibition against religious discrimination in Title VII of the 1964 Civil Rights Actas amended in 1972,[33] and under the Americans with Disabilities Act. The

[33] The duty to reasonably accommodate added by the 1972 amendment does not apply to the other forms of discrimination proscribed by Title VII.

former, as interpreted by the U.S. Supreme Court,[34] represents the narrowest of possible interpretations of undue hardship. The Supreme Court held that it was undue hardship to require an employer to bear more than a "*de minimis*" cost to substitute or replace workers in order to give an employee Saturdays off. The court also said that neither an employer nor a union is obliged to take accommodating steps inconsistent with an otherwise valid collective bargaining agreement, and it gave almost complete deference to the seniority provisions in the agreement.[35]

The opposite extreme for defining undue hardship is found in the position taken by the Ontario Human Rights Commission in its *Guidelines for Assessing Accommodation Requirements for Persons with Disabilities*.[36] The Ontario Code specifically limits the factors to be considered for assessing undue hardship to cost and health or safety. In the section entitled "Standards for Undue Hardship", the guidelines first note that factors such as "business inconvenience" or "undue interference with the enterprise" are absent from the legislation.[37] The guidelines allow that decreased productivity or efficiency can be taken into account, but only as an element of cost, providing the resulting costs are quantifiable. The guidelines go on to assert that customer preference or third party preference cannot be considered as an element in undue hardship, in this case making no exception

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[34] See *Trans World Airlines Inc. v. Hardison*, 432 U.S. 63 (1977).

[35] The Equal Employment Opportunities Commission responded to this ruling by issuing revised *Guidelines on Discrimination Because of Religion*. These guidelines provide that while regular payment of premium wages for substitutes may constitute undue hardship, "... the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing reasonable accommodation ... [and] that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a *de minimis* cost". (The Supreme Court has said that the Commission's Guidelines are entitled to "some deference" [*Trans World Airlines v. Hardison* at p. 76, n. 11.]) In contrast to the position in *Hardison* that more than a *de minimis* cost automatically constitutes undue hardship, the EEOC also takes a comparative approach to undue hardship, in the sense that it takes into account the size and operating cost of the enterprise and the number of persons seeking accommodation.

[36] As section 11(3) of the Ontario Code reveals, it was contemplated that the standards for "undue hardship" would be enacted by regulation. When the Ontario government failed to do this, the Commission stepped in. The Guidelines have no binding effect. They have been applied in some arbitral decisions, but have not yet been addressed by the courts. In the United States, similar guidelines issued by the EEOC have been accorded "some deference" by the Supreme Court.

[37] The Guidelines note that "business inconvenience" was removed from the *Code* during legislative debates on amendments to it.

where these prohibited factors have a quantifiable cost.[38] With respect to collective agreement terms, the guidelines provide that such terms cannot act as a bar to providing accommodations that the legislation would otherwise require.[39] Finally with respect to costs, the guidelines provide as follows:

> Costs will amount to undue hardship if they are:
>
> 1. quantifiable;
> 2. shown to be related to the accommodation; and
> 3. (a) so substantial that they would alter the essential nature of the enterprise, or
> (b) so significant that they would substantially affect the viability of the enterprise.[40]

It is notable that while some of the guidelines reflect court rulings, others have no apparent grounding either in the case law or in the legislation itself.[41]

A survey of Canadian human rights legislation reveals a wide middle ground between the two extremes. As already noted, Ontario's legislation excludes any

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[38] The guidelines assert that this position is in accord with established human rights case law that third party preferences do not justify discrimination. There are several court rulings that an adverse effect on employee morale will not be regarded as a factor where this is a function of discriminatory attitudes held by the other employees. With regard to the more general statement in the guidelines, which embraces customer preferences, the position is supported in a number of human rights commission decisions. However, the only court decision on the issue reaches the opposite conclusion. (See *Canada Safeway Limited v. Manitoba Food and Commercial Workers Local 832* (1984), 5 C.H.R.R. D/2133.)

[39] This is again in accord with cases that hold that collective agreement terms cannot justify discrimination that is not otherwise permissible. However, the cases also provide that a union is justified in refusing a proposed accommodation that would have a substantial adverse effect on the rights of other employees. See further below at pages 26-27. Thus while the very fact that a rule is a term in a collective agreement should not justify it, where a term establishes other employees' rights, its violation could constitute undue hardship.

[40] The guidelines state that the same test applies whether one person would benefit from the accommodation, or large numbers of people. They also specify the types of costs that will be considered (ie. capital and operating costs, costs of additional staff time, and any other quantifiable and demonstrably related costs, but not speculative costs). The guidelines also contain a discussion of the steps that must be taken by the employer to offset the costs of accommodation, and provide for a phasing-in of accommodations where this is required to ameliorate hardship.

[41] The idea that undue hardship is reached only at the point where the nature of the enterprise is fundamentally altered, or its viability is substantially affected, can be found in the initial draft of the Americans with Disabilities Act. The early version provided that "[t]he failure or refusal ... to make reasonable accommodations ... shall not constitute an unlawful act of discrimination on the basis of handicap if such ... accommodation would fundamentally alter the essential nature, or threaten the existence of, the program, activity, business or facility in question." This was labelled by business interests as the "bankruptcy provision", and vigorously opposed. (See Epstein, *supra,* note 31, at 423.)

factors other than cost and health or safety as relevant to the assessment of undue hardship. However, this legislation does not on its face require that the cost factor meet the stringent tests set out in the Human Rights Commission's interpretation of it. The legislation also specifies that assessment of the cost factor is to take into account any outside sources of funding.[42]

The Yukon Territory Human Rights Act provides as follows:

> s. 7(1) Duty to provide for special needs. Every person has a responsibility to make reasonable provisions in connection with employment, accommodations and services for the special needs of others where those special needs arise from physical disability, but this duty does not exist where making the provisions would result in undue hardship.
>
> (2) For the purpose of subsection (1) "undue hardship" shall be determined by balancing the advantages and disadvantages of the provisions by reference to factors such as
>
> (i) safety,
> (ii) disruption to the public,
> (iii) effect on contractual obligations,
> (iv) financial cost
> (v) business efficiency.[43]

Turning to American legislation, the Americans with Disabilities Act requires employers to help employees overcome the effects of their handicap, to the point of undue hardship.[44] The ADA defines undue hardship as follows:

> (A) In general.—
> The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).
>
> (B) FACTORS TO BE CONSIDERED.—
> In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include-
>
> (i) the nature and cost of the accommodation needed under this Act;
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses or

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[42] See Appendix A for the full text of the relevant Ontario legislation.

[43] A number of jurisdictions have legislation that empowers the human rights tribunal, in cases in which a complaint has been substantiated, to order that accommodation measures short of undue hardship be taken. In the context of this type of legislation, some of these jurisdictions allow a consideration of "business inconvenience" as a factor separate from cost in determining whether the order would constitute undue hardship. See, for example the Canadian Human Rights Act, which allows the tribunal to order such accommodation "as it is satisfied will not occasion costs or business inconvenience constituting undue hardship." See also the legislation in Saskatchewan and Manitoba.

[44] An employer can also refuse to accommodate where accommodation would require the elimination of an essential function of the job.

> resources, or the impact otherwise of such accommodation upon the operation of the facility;
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type and location of its facilities; and
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

In this legislation, the inclusion of "significant difficulty or expense" suggests that something akin to business inconvenience is permissible. Like the Ontario Commission Guidelines, the ADA also expressly requires that account be taken of the size and financial resources of the overall enterprise as well as of its particular facilities.[45] The ADA also suggests that the costs of accommodation should if possible be spread throughout the whole of an enterprise, thus reducing the degree of hardship for any particular branch or unit.[46]

4. The law in Alberta: case law defining "undue hardship"

Alberta's legislation does not mention accommodation. Therefore it does not mention undue hardship, nor any factors to be taken into account in determining undue hardship. In Alberta, we are left entirely to the guidance provided by the case law. In this section we summarize the cases that provide the content for "undue hardship" under Alberta law.

O'Malley:[47] The duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant short of undue hardship. In other words, the duty is to take such steps as may be reasonable to accommodate without unduly interfering in the employer's business

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[45] The Ontario Commission Guidelines note that larger enterprises will be more likely able to absorb accommodations, noting that 65% of all paid employment in the province is in businesses employing more than 100 people.

[46] The Ontario Commission Guidelines provide that the appropriate basis for evaluating the effect of a cost is to the company as a whole, not to an individual branch or unit in which the person with a disability works. They also require the costs to be distributed as widely as possible.

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

and without causing undue expense to the employer.[48]

Central Alberta Dairy Pool:[49] The following factors are relevant in assessing undue hardship, but are not exhaustive:

- financial cost;
- disruption of a collective agreement;
- problems of morale of other employees;
- interchangeability of the work force and facilities;
- the size of the employer's operation (this may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances);
- with regard to safety, both the magnitude of the risk and the identity of those who bear it are relevant considerations.

Renaud:[50] This case rejected the American *de minimis* test, and adopted a purposive approach. It asserted that an employer must exert more than mere negligible effort to accommodate, and that some hardship on the employer is acceptable. It also considered the following particular factors:

- the effect on other employees: more than minor inconvenience is required; there must be actual interference with the rights of other employees, which is not trivial but substantial
- the effect on employee morale: this factor must be applied with caution; the objections of employees based on well-grounded concerns that their rights will be affected must be considered; objections based on attitudes inconsistent with human rights are an irrelevant consideration
- disruption of a collective agreement: the employer and union cannot contract out of human rights legislation; the agreement does not absolve the parties from the duty to accommodate, but it can be relevant in assessing the degree of hardship caused by interference with its terms; a substantial departure from the normal operation of the conditions and terms of employment in the

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[48] The court also imposed a duty on the employee to cooperate in the accommodation process. It said that where reasonable steps taken by the employer do not result in full accommodation, the complainant may have to take some accommodating steps on his own part. As well, it placed the onus of showing that accommodation could not be effected without undue hardship on the employer.

[49] *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489.

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

result in a loss of profit where customer bias results in loss of clientele. For example, a law firm may have clients who prefer dealing with a male lawyer. Tribunals dealing with this issue have said that this type of consideration, based on the very attitudes against which the legislation is directed, cannot sustain a claim of undue hardship. However, it must be recognized that the result is that the employer must assume the cost of others' discriminatory attitudes in place of the employee. It is hard to say in principle why the employer should bear a substantial loss of profit because of customer preference, even when that preference is discriminatory.

• **Size and resources of enterprise / interchangeability of workforce and facilities / potential for spreading costs:** The Supreme Court of Canada has accepted these types of factors as relevant. Common sense suggests that the greater the resources of an enterprise, the less hardship any particular accommodation will impose. However, it has been argued that this reasoning would lead to requiring accommodation in each individual case in a large business. For this reason, some have urged that cost-hardship should be assessed not relative to the total resources of an enterprise alone, but relative to its resources divided by the total number of its employees. See further at pages 30-34.

The size and interchangeability factors also seem clearly relevant to hardship. Greater numbers of employees allow greater ease in rescheduling, reassigning work, and so on, or potentially higher use of equipment or assistants, thereby easing hardship. Conversely, a large facility may be more difficult to adapt for accessibility.

• **Outside sources of funding / potential for recovering costs**: Where a cost of accommodation or part of it is recoverable, there seems no reason to include the recovered cost in assessing undue hardship. Recovery could be by way of an income tax deduction, by application for a contribution from a fund or program, or by business practices that will take advantage of the accommodation for other purposes, or use it to enhance profitability.

Consideration should also be given to the ability of the employee to take steps to enable him or herself to perform the work necessary for the job. For example, an employee who requires a computer capable of reading materials may own or be willing to purchase this equipment for use in the job, or to contribute to the

collective agreement may constitute undue interference in the employer's business

- the duty to accommodate of unions: any significant interference with the rights of other workers that arises from an accommodation will ordinarily justify the union in refusing to consent to a particular accommodation; the test of undue hardship will often be met by a showing of prejudice to other employees if proposed accommodating measures are adopted.

Bergevin:[51] The established factors are to be applied with flexibility, taking into account matters such as the size of the enterprise, or the state of the economy.

5. Possible factors, and comments

This section sets out the various factors that have been put forward as relevant to "undue hardship" in the statutes and cases. The factors that are accepted as relevant help determine the extent of the duty. The longer the list, the more defences are available to an employer who is trying to sustain a discriminatory rule. From the perspective of those wishing to enhance access to the workplace, this is an argument for making the list short and exhaustive. From the perspective of employers, an exhaustive list should be comprehensive.

The legislation could also specify the type of proof necessary to show hardship—for example, demonstrable (rather than speculative), or quantifiable (for cost).[52]

The following factors could be included in Alberta legislation:

- **Financial cost:** This factor is clearly essential. It could be defined by describing the degree of cost-related hardship, for example, "so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect the viability of the enterprise" (as in the Ontario guidelines), or some lesser degree. A quantifiable standard for costs has also been suggested. This is discussed more fully at pages 30-34.

The matter of customer preference and cost raises a difficult issue. For some enterprises, hiring a person with one of the attributes listed in the legislation may

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[51] *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525.

[52] The Ontario Guidelines provide that undue hardship must be demonstrated by objective evidence, and specify the types of evidence that should be considered—facts, figures, scientific data, and so on, rather than merely impressionistic evidence or arguments based on stereotypes.

purchase. In such a case, the employer should be required to assess the person as so equipped, or to assess hardship taking into account the employee contribution.[53]

• **Business convenience / efficiency:** The Supreme Court of Canada has set out "undue interference in the operation of the employer's business" as a relevant factor. As noted, Ontario specifically excluded "business convenience" as a separate factor, but according to the Guidelines, it may be included in the "cost" category (if quantifiable). The reason for the exclusion was to ensure that only demonstrable, and not speculative, hardship would meet the test. However, as already noted, the legislation can make this clear by simply saying it.

• **Health / safety:** This could be further broken down to include separate categories such as risk to the employee in question (the Ontario guidelines require that the employee be allowed to assume risk unless it involves a quantifiable cost), and risk to other employees or the public. It could also specify that a very minor risk does not meet the standard, or describe the degree of risk required (eg. serious, significant, such as outweighs the benefits of enhancing equality). There could also be a requirement that the degree of risk be assessed only after reasonable accommodations have been made to reduce risk.[54]

• **Effect on contractual obligations / on collective agreement:** The case law is fairly clear that although the fact that a rule is a collective agreement term does not save it, accommodation that adversely affects rights of other employees may constitute undue hardship, and the presence of rights in a collective agreement can add force to this argument. Some legislation (eg., Yukon) includes "effect on contractual obligations" as relevant. Listing this factor might suggest that the presence of the rule as a term in an agreement justifies it.

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[53] Under the Americans with Disabilities Act, where cost is the issue in measuring undue hardship, an unreasonable accommodation can be made reasonable if the individual with the disability is willing to pay the portion of the cost that constitutes undue hardship.

[54] The Ontario guidelines provide that the risk to be taken into account is that which remains after accommodations have been made to reduce risk; they also provide that other risks tolerated within the enterprise or by society as a whole are to be considered.

The proposed federal legislation in Bill C-108 specifically provides that employers and employee organizations cannot enter into collective agreement provisions that constitute discrimination under the Act.[55]

Accommodation could also affect other types of contracts, for example, insurance contracts, or leasing agreements that contain restrictive provisions concerning work on particular days. Conceivably an accommodation that requires breaking such contract terms might cause hardship. However, this is probably adequately captured by the "business convenience" factor.

• **Effect on rights of other employees / substantial interference therewith:** The case law is clear that a significant prejudicial effect justifies a union in refusing to take or consent to particular measures. Presumably the employer could also rely on this ground to show hardship, as an interference with the management of the enterprise (unless this type of factor were excluded).

• **Disruption to the public:** This factor is especially relevant to the government as employer. However, disruption to the public could also arise in private employment situations, for example, in the case of a private utility company, or an airport check-in. However, again, the factor is probably captured in the term "business convenience / efficiency".

6. A quantifiable standard for the cost factor?

As was noted earlier, American employers' groups have lobbied for a precise and quantifiable standard under the Americans with Disabilities Act, that will enable them to know what their obligations are. In "In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act", Steven Epstein, an American academic, makes a convincing argument for such a standard, and develops a formula. Because the concepts of reasonable accommodation and undue hardship in Canadian law are derived from American statutes relating to discrimination and judicial

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[55] Section 10 of the Bill states:

> **10.** It is a discriminatory practice for an employer, employee organization or employer organization
>
> (a) to establish or pursue a policy or practice, or
>
> (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,
>
> that deprives or tends to deprive an individual or class of individuals of any employment opportunities or benefits on a prohibited ground of discrimination.

interpretations thereof, this proposal is relevant to our consideration of the law of undue hardship. The following is a summary of this article:

The author proposes a quantifiable standard for financial undue hardship based on the resources of the employer and the number of employees.[56] Under the Americans with Disabilities Act (ADA), private employers are required to accommodate the disabilities of job applicants and employees to the point of undue hardship. The Equal Employment Opportunity Commission has promulgated implementing regulations that define undue hardship as "a significant difficulty or expense", and further, as any accommodation that would be "unduly costly, extensive, substantial, or disruptive, or would fundamentally alter the essential nature or operation of the business".[57]

The author argues that the existing standard has failed to meet the intention of the Act to provide "clear, strong, consistent, enforceable" standards. The standard is too vague to sufficiently define the legal rights and obligations of employees and employers. Businesses are liable for failure to meet the duty the Act imposes, but are given no method for determining the extent of the accommodations they must supply. Likewise employees have no way to tell what accommodations they can rightfully demand. Where an employer claims undue hardship, the employee can test the validity of the claim only by litigation. In the author's view, the goal of the Act—to integrate disabled people into the workplace—is frustrated when implementation of the standard requires litigation.[58]

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[56] The proposal centres on the "cost" component of undue hardship. The ADA also contemplates administrative undue hardship, but the content of the latter is left aside for the purposes of the article.

[57] In addition to the factors listed in the Act itself, the regulations add some other factors to be taken into account. These include:

- the impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties, and the impact on the facility's ability to conduct its business;
- the number of present and future employees who will benefit from the accommodation;
- the terms of a collective bargaining agreement; and
- the availability of alternate sources of funding.

[58] The author notes that some limited guidance as to what degree of expense is "significant", and therefore an undue hardship, is provided in committee reports preceding enactment of the ADA. For example, the reports include examples of undue hardship provided in regulations under the ADA's precursor the Rehabilitation Act. They also indicate that more is required than the "readily achievable" provision under the section dealing with public accommodation, and more than the "de minimis" standard under Title VII of the Civil Rights Act's prohibition against religious discrimination. The reports also cite a Circuit Court decision in which a fairly extensive

(continued...)

Mr. Epstein points to the efforts on the part of the business lobby, and some members of Congress, to amend the Act to create a more precise standard. Two amendment proposals were rejected: the first to limit accommodations to 5% of the annual net profit for businesses with gross annual receipts of $500,000 or less; the second to limit a given accommodation to 10% of an employees annual salary (the latter failed by a margin of 213-187).

The author goes on to consider and discount several reasons for rejection of a precise standard. One is the view that the courts have already adequately defined the standard. This view is countered by an examination of the cases that reveals that there have been very few cases dealing with financial costs, and that these are inconsistent. Further, the existing cases relate to the predecessor statute that dealt with public employers or those with major government contracts. Different considerations apply where private funds are involved. Another reason is the view that an adequate standard will be developed by the courts. As to this, the author contends that history suggests otherwise, and that courts will not develop widely-applicable standards when dealing on a case-by-case basis. The third argument is that flexibility is required because individual needs vary greatly. Mr. Epstein responds that the precise standard which he advocates focuses on the resources of employers rather than on the nature of the accommodation needed. Under this standard, flexibility is required for the choice of accommodation, but not for its cost.

The author constructs his standard on the basis of two principles. The first is the "fairness principle", under which the goal of private business of maximizing profit is fairly balanced against society's requirement that employers accommodate employees with disabilities. Fairness is achieved where the employer is not required to accommodate beyond the point at which the profit-maximizing goal is threatened by the duty. Under this principle, the greater the employer's resources, the greater the scope of accommodations that do not threaten the goal.

The second principle is the "equalizing principle". All employees are entitled to the same financial level of accommodation irrespective of their position or salary. This is to avoid "doubling up" of discrimination—a decrease in legal entitlement as the need for financial assistance increases, and the screening-out of employment opportunities for lower-paid workers.

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[58](...continued)
accommodation was required (half-time readers for blind income-maintenance workers).

The standard chosen is calculated as follows. The best measure of the employer's resources is the net income of the business. To avoid the distortion created where a single request for accommodation is measured against a company's total resources, the company-wide profit is "individualized" by dividing it by the average number of full-time employees. The resulting calculation is the "per capita profit share". The maximum required accommodation is 50% of the this figure, a proportion that in the author's view strikes a fair balance between the employer's profit-maximizing goal and society's goal of equalizing access to the workforce.

The author goes on to demonstrate that the result has a minimal effect on the average employer. He assumes (based on surveys and a projected increase in numbers expected to accompany the enactment of the ADA) that 15% of the workforce is comprised of people with disabilities, and that 50% of these will require accommodations. Even if each employee needs the maximum expenditure required under the standard, the employer would spend only 3.75 percent of its annual net income on reasonable accommodations.

The standard is further modified by requiring a ceiling and lower limit (ie. more than *de minimis*) that would take into account unprofitable years and "bonanza" periods. (The article presents a table with arbitrarily chosen limits tied to net working capital.)

In the next part of the article Mr. Epstein tests his model for precision and functionality. First he applies an analytical framework developed by C. Diver, and second, he tests his formula relative to corporate data from ten randomly-selected American corporations, ranging from a small blood-products manufacturing firm operating at a loss, through Wendy's and K-Mart, all the way to Microsoft. He concludes that the formula is workable, and provides fair results by ensuring that a company's resources are not unduly diminished by reasonable accommodation costs. In his concluding section, the author urges Congress to address the shortcomings of the existing vague standard of undue hardship by creating a transparent and accessible formula that meets the principles of fairness and equality.

The article written by Mr. Epstein presents a very persuasive argument for a quantifiable standard. Because such a standard has not been tried in practice, the author cannot contend that it is practical. However, there seems no question that an objective and predictable standard is highly desirable. It may be worthwhile to

recommend that a formula along the lines suggested by Mr. Epstein be developed and tested in Alberta.

7. Our tentative recommendation

RECOMMENDATION 2.

The duty of accommodation should be limited as follows:

(a) Accommodation should be required to the point of undue hardship.

(b) A list of factors for assessing "undue hardship" should be provided, which includes the following:

- **quantifiable and demonstrable financial cost**
- **size and resources of enterprise [relative to the number of employees] / interchangeability of workforce and facilities / potential for spreading costs**
- **outside sources of funding / potential for recovering costs**
- **business convenience / efficiency**
- **significant health / safety risk [to other employees or the public]**

Our list does not include three of the factors that were discussed above.

- **effect on contractual obligations / on collective agreement**

- effect on rights of other employees / substantial interference therewith
- disruption to the public

but we invite comment on the inclusion of these factors.

(c) The list should be exhaustive.

(d) We make no recommendation at this time respecting a quantifiable formula for the cost factor, but invite comment on this issue.

Appendix A

ONTARIO HUMAN RIGHTS CODE
Chapter H.19

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

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

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

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

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

(3) The Commission, a board of inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

14.—(1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

(2) The Commission may,

(a) upon its own initiative;

(b) upon application by a person seeking to implement a special program under the protection of subsection (1); or

(c) upon a complaint in respect of which the protection of subsection (1) is claimed,

inquire into the special program and, in the discretion of the Commission, may by order declare,

(d) that the special program, as defined in the order, does not satisfy the requirements of subsection (1); or

(e) that the special program as defined in the order, with such modifications, if any, as the Commission considers advisable, satisfies the requirements of subsection (1).

(3) A person aggrieved by the making of an order under subsection (2) may request the Commission to reconsider its order and section 37, with necessary modifications, applies.

(4) Subsection (1) does not apply to a special program where an order is made under clause (2)(d) or where an order is made under clause (2)(e) with modifications of the special program that are not implemented.

(5) Subsection (2) does not apply to a special program implemented by the Crown or an agency of the Crown.

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

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

(3) The Commission, a board of inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

(4) Where, after the investigation of a complaint, the Commission determines that the evidence does not warrant the appointment of a board of inquiry because of the application of subsection (1), the Commission may nevertheless use its best endeavours to effect a settlement as to the duties or requirements.

24.—(1) The right under section 5 to equal treatment with respect to employment is not infringed where,

(a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place or origin, colour, ethnic origin, creed, sex, age, marital status or handicap employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment;

(b) The discrimination in employment is for reasons of age, sex, record of offences or marital status if the age, sex, record of offences or marital status of the applicant is a reasonable and *bona fide* qualification because of the nature of the employment;

(c) an individual person refuses to employ another for reasons of any prohibited ground of discrimination in section 5, where the primary duty of the employment is attending to the medical or personal needs of the person or of an ill child or an aged, infirm or ill spouse or other relative of the person; or

(d) an employer grants or withholds employment or advancement in employment to a person who is the spouse, child or parent of the employer or an employee.

(2) The Commission, a board of inquiry or a court shall not find that a qualification under clause (1)(b) is reasonable and *bona fide* unless it is satisfied that the circumstances of the person cannot be accommodated without undue hardship on the person responsible for accommodating those circumstances considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

(3) The Commission, a board of inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.