2001

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THE ONTARIO HUMAN RIGHTS CODE AND THE RIGHT TO ACCOMMODATION IN THE WORKPLACE FOR EMPLOYEES WITH DISABILITIES

JUDITH KEENE*

RÉSUMÉ
Cet article examine les obligations légales découlant du Code des droits de la personne de l'Ontario en ce qui concerne l'adaptation nécessaire au regard des personnes handicapées dans les lieux de travail. Bien qu'on se concentre sur le milieu du travail, la loi s'applique à d'autres domaines régis par le Code, tels que les services, les installations et le logement. L'auteur se penche sur les décisions de la Cour suprême du Canada et de la Cour d'appel de l'Ontario Colombie-Britannique (Public Service Employee Relations Commission) c. BCGSEU (« affaire Meiorin ») et Entrop v. Imperial Oil Ltd. et conclut que dans la plupart des cas où un employé est défavorisé du fait qu'une adaptation n'a pas été faite pour tenir compte d'un handicap, l'affaire Entrop n'a pas vraiment de conséquences négatives sur celle du plaignant en fonction du Code des droits de la personne de l'Ontario. La norme qui existe en matière d'adaptation demeure appréciable.

There are two main situations in which a disabled person may seek legal advice because of discrimination in employment. In the first, a disabled person is barred from employment, or from promotion, solely because of the employer's mistaken belief that a person with that disability cannot do the job.

The second situation arises where an employee with a disability acknowledges that there are job requirements that he or she is (temporarily or permanently) no longer able to meet, so she or he requires suitable accommodation in the workplace.

This paper addresses the situation of employees who acknowledge that they need accommodation, so I will deal with the first type of case only briefly. If the employee asserts that he or she can do the job as it exists, proof of incapacity lies with the employer. Further, there is authority for the proposition that the employer must assess

* © 2001, Judith Keene, 15 March 2001. Judith Keene is a lawyer with the Clinic Resource Office, Legal Aid Ontario. Opinions expressed herein are those of the author and not those of Legal Aid Ontario. Thanks to Brian Eyolfson of Aboriginal Legal Services of Toronto for his thoughtful editorial and substantive assistance.

1. See discussion of the establishment of a prima facie case of discrimination, below.
2. See J. Keene, Human Rights in Ontario, 2nd ed. (Toronto: Carswell, 1992) at 178-82, which addresses this point.
each case individually, by testing the employee against the actual job requirements,\(^3\) rather than making blanket rules barring people with a specific disability. If the employee "fails" the test, the employer has a duty to inquire about the facts of the employee's medical situation, assess it in relation to the actual job requirements, and accommodate the individual to the point of undue hardship.\(^4\)

**CHARACTERIZING THE COMPLAINT UNDER THE ONTARIO HUMAN RIGHTS CODE**

The *Human Rights Code*, R.S.O. 1990, c. H.19 identifies several specific actions that amount to discrimination.\(^5\) Two are relevant for the purpose of this article; a breach of section 9 through a direct or deliberate action, and constructive discrimination.

The type of discrimination often referred to as "direct" is obvious even to those with little experience in human-rights issues. Examples that come to mind include a decision or rule of the employer that a particular job is not open to women, or to persons with a back injury, or to anyone who has made a Workers' Compensation claim. Historical examples include jobs explicitly segregated on the basis of race or religion.

No provision of the *Code* actually refers to "direct" discrimination. Section 9 reads as follows:

9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

The "Part" referred to is Part I of the *Code*, which sets out the basic rights to be free from discrimination.

Constructive discrimination is discrimination that does not arise from explicit differentiation on a prohibited ground. It occurs when a requirement, qualification or factor

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4. *Thwaites v. Canada (Armed Forces)* (1993), 19 C.H.R.R. D/259, 93 C.L.L.C. at para. 17,025 (C.H.R.T.), application for judicial review dismissed, [1994] 3 F.C. 38, 3 C.C.E.L. (2d) 290, 21 C.H.R.R. D/224, 94 C.L.L.C. at para. 17,040, 49 A.C.W.S. (3d) 1102 (T.D.), (sub nom. *Canada (A.G.) v. Thwaites*), concerned a member of the naval service who was discharged because of Armed Forces assumed that someone infected with HIV would be unfit for service. The board of inquiry found that the *Canadian Human Rights Act* had been breached. The decision contains an interesting review of the progression of caselaw on the issue of risk as it relates to the "reasonable and bona fide" defence (the board concluded that there is a concept of "tolerable risk" and that the analysis must be employment-specific), and the requirement on employers to assess each case individually, rather than making blanket rules about various disabilities. The board ruled that the employer had a duty to inquire about the facts of the complainant's medical situation, assess it in relation to the actual job requirements, and offer reasonable accommodation. For a discussion of the concept of accommodation, see below.

5. See sections 9, 11, 12, and 13.
that is not a prohibited ground of discrimination is imposed on everybody in a situation, and the requirement, qualification, or factor creates an especially onerous burden or a barrier for persons identifiable by a personal characteristic that is a prohibited ground of discrimination. The same phenomenon is often referred to as "adverse effect" discrimination in jurisprudence under section 15 of the *Canadian Charter of Rights and Freedoms*. It is sometimes even referred to as "indirect" discrimination.

Constructive discrimination has been codified since 1981 in section 11 of Ontario's human rights legislation, which is set out below.

In the context of this paper, constructive discrimination arises where an employee's disability renders him or her unable to perform all aspects of employment as he or she used to, but the employer requires a disabled employee to perform the job exactly as he or she used to. In this type of case, the employer's expresses the position by saying, "You're not being fired because you are disabled, you're being fired because you can't do the job."

Because of a recent decision of the Ontario Court of Appeal, there may be some utility in attempting, at the outset, to characterize the type of discrimination at issue. To put it in a nutshell for the moment, if the discrimination can be defined as "constructive," the employer may, on the face of it, have a slightly lighter burden in establishing a defence. However, I suggest that any advantage to the employer in this context is illusory, because in either case the employer must establish accommodation to the point of undue hardship, and this is a stringent test to meet.

**THE STATUTORY PROVISIONS**

There are two provisions of the *Code* that are applicable in cases in which accommodation of disability in employment is at issue. Section 11 provides as follows:

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. R.S.O. 1990, c. H.19, s. 11(1).

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7. *Entrop v. Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18 at paras. 65, 70 (C.A.). This usage is the most confusing, as "indirect" discrimination is more properly used to describe situations in which A gets B to perform a discriminatory act on his or her behalf.

(2) The Commission, the board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. (S.O. 1994, c. 27, s. 65, eff. 17 April 1995)

(3) The Commission, the board of inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship. (S.O. 1994, c. 27, s. 65, eff. 17 April 1995)

Section 17 provides as follows:

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

(3) The Commission, the board of inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship. (S.O. 1994, c. 27, s. 65, eff. 17 April 1995)

Section 11 is a statement of a circumstance in which the Code is breached. It is cited by the complainant in making the complaint, although, because of the exceptions contained in the provision, it has been referred to as a defence. Section 17 is a defence.

The Ontario Court of Appeal, in Ontario Nurses' Assn. v. Orillia Soldiers Memorial Hospital held that the defences set out in section 11 apply to cases of adverse effect discrimination, and section 17 applies to cases of direct discrimination.

**ESTABLISHING A PRIMA FACIE CASE**

There is considerable caselaw that deals with establishing a prima facie case of discrimination; for this purpose, the following quote from O'Malley v. Simpson-Sears, should suffice. In O'Malley, the Supreme Court found that a prima facie case of discrimination

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9. Ibid. at para. 67.
11. See W. Tarnopolsky and W. Pentney, Discrimination and The Law, looseleaf ed. (Toronto: Carswell), B. Vizkelety, Proving Discrimination in Canada (Toronto: Carswell, 1987), and Keene, supra note 2 at 124-41.
is one which covers allegations made and which, if they are believed, is complete
and sufficient to justify a verdict in the complainant's favour in the absence of an
answer from the respondent . . . (at D/3108).

In clear cases of direct discrimination, the employee is refused the job or promotion
because the employer discovers that he or she is disabled. The *prima facie* case usually
focuses on proving the reason for the decision taken by the employer, often through
circumstantial evidence.¹³

In cases of constructive discrimination, the *prima facie* case is met by establishing
that the "requirement, qualification or factor" exists, that it "results in the exclusion,
restriction or preference of a group of persons who are identified by a prohibited
ground of discrimination," and that the complainant is a member of that group.

The onus then shifts to the respondent to establish a defence.¹⁴

**DEFENCES**

Defences to a complaint of direct discrimination are listed in the *Code*. For employ-
ment discrimination on the ground of handicap, the defence is found in section 17.
The effect of section 17 is that there is an exception to the prohibition against
discrimination because of handicap in employment when the complainant "is incapa-
ble of performing . . . the essential requirements" of the employment "because of
handicap." However, the section specifically states that the complainant cannot be
found to be incapable unless the Commission, the board of inquiry or a court "is
satisfied that the needs of the person cannot be accommodated without undue hardship
on the [employer], considering the cost, outside sources of funding, if any, and health
and safety requirements, if any."

In situations in which an employer is contemplating firing because of a handicap-
related inability to perform a job, section 17 requires that the employer be able to
answer the following questions affirmatively:

1. Is the person unable to perform the requirement because of handicap?
2. Is the part of the job that the person is unable to do "essential"?
3. Has there been accommodation short of undue hardship?

In cases of constructive employment discrimination on the basis of disability, the
respondent's burden of proof can be paraphrased from section 11. If there is an
exception listed in the *Code* that allows discrimination in the specific situation, the
respondent must prove that it applies. If not, the employer must establish that the
specific job requirement that is causing the difficulty is "reasonable and *bona fide* in
the circumstances."

¹³. See Keene, *supra* note 2 at 337-41.

¹⁴. For the latest confirmation of this rule from the Supreme Court of Canada, see British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), *supra* note 3.
To establish reasonableness, the respondent must show that the requirement is reasonably necessary to the operation of the business, that there is a rational, objective basis for the requirement, and that there is no reasonable alternative. In Cameron v. Nel-Gor Nursing Home, a human-rights board of inquiry affirmed that not all aspects of a job can be considered essential.

If a requirement does not meet the reasonableness standard, it cannot be maintained as a requirement. Further inquiry into whether it is bona fide or into reasonable accommodation, is unnecessary. In British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U, a particular standard of aerobic capacity was found by the Supreme Court of Canada to fail the "reasonableness" test.

The "bona fide" test, which also has a component of objective reasonableness, has been delineated by the Supreme Court in most of the cases cited herein, most notably in Large v. Stratford. It was recently set out in Meiorin that

the employer must . . . demonstrat[e] that it adopted the particular standard with an honest and good faith belief that it was necessary to the accomplishment of its purpose, with no intention of discriminating against the claimant.

Again, where there is no finding that the requirement is bona fide, inquiry into reasonable accommodation is unnecessary; the requirement cannot stand.

There is considerable caselaw on the meaning of the individual terms reasonable and bona fide, and if either is not established, the adequacy of any accommodation does not save the employer from a finding that the Code has been breached. However, the establishment of reasonableness and bona fides is not sufficient. The employer does not meet the "reasonable and bona fide" test without establishing accommodation to

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18. Meiorin, supra note 17 at para. 83. See also paras. 73-76: "passing the resulting aerobic standard has not been shown to be reasonably necessary to the safe and efficient performance of the work of a forest firefighter . . . the goal should have been to measure whether members of all groups require the same minimum aerobic capacity to perform the job safely and efficiently."

19. Large, supra note 17.

20. Meiorin, supra note 17 at para. 60.
the point of undue hardship. This is clear in the wording of the Ontario Code, and in jurisprudence from other jurisdictions in which the exercise is not so clearly spelled out.21

ACCOMMODATION TO THE POINT OF UNDUE HARDSHIP

Both section 11 and section 17 of the Code require accommodation to the point of undue hardship.

If there is no evidence that accommodation was even considered, the employer has not met the duty to accommodate. If there was evidence that accommodation was considered and rejected, the reasons for the rejection are subject to evaluation to see whether the accommodation at issue would constitute undue hardship. In the absence of such evidence, the Human Rights Commission should appoint a board of inquiry.22

In British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)23 in the context of an absolute ban on the issuance of driver’s licences to persons with a particular vision disability, the Supreme Court of Canada outlined the test that has to be met to justify no accommodation:

"[T]here are at least two ways in which the Superintendent could show that a standard that permits no accommodation is reasonably necessary. First, he could show that no one with the particular disability could ever meet the desired objective of reasonable highway safety. For example, using current technology, someone who is totally blind cannot safely operate a motor vehicle on the highway. Since accommodation of such a person is impossible, it need not be further considered. Alternatively, if the Superintendent could not show that accommodation is totally inconsistent with his goal, he could show that accommodation is unreasonable because testing for exceptional individuals who can drive safely despite their disability is impossible short of undue hardship.

An offer of an inadequate accommodation does not relieve the employer from responsibility under the Code.24 Accommodations proposed by employers that were not considered reasonable in the particular circumstances of the case include:

21. See, for example, British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), supra note 3 at para. 32: "In order to prove that its standard is 'reasonably necessary', the defendant always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost."


23. Supra note 3 at para. 32.

Where a janitor who was a Seventh-Day Adventist objected to working a Friday shift from 3 to 11, an offer that he work a four-day week, with substantial loss in pay.\(^{25}\)

In a similar situation to the above, an offer of "contingent" employment, which would reduce the former salary to half of the former salary.\(^ {26}\)

On the other hand, the employer is not required to supply a perfect solution,\(^ {27}\) as will be discussed below.

**DECIDING WHEN HARDSHIP WOULD BE "UNDUE"**

Some general remarks have been made. Courts and tribunals have accepted that the term *undue* used before *hardship* means that some hardship is "due" and employers are expected to undertake some hardship.\(^ {28}\) All the cases say that the assessment of whether accommodation of an individual would amount to undue hardship must be done case by case.

In sections 11 and 17, the *Code* sets out the following factors: cost, outside sources of funding, and health and safety requirements. Ontario boards of inquiry have rarely had to deal with the assessment of undue hardship, as in most cases no accommodation

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is established, much less accommodation that might go beyond the requirements of the Code.

In Central Alberta Dairy Pool, Wilson J. listed some of the factors that are relevant to an assessment of undue hardship made under Alberta’s human rights legislation (but stressed that this is not a closed list): financial cost, disruption of a collective agreement, size of employer’s operation, safety risks, and who bears risk, and problems of morale of other employees.

Below is a brief discussion of cases that have elaborated upon the Central Alberta Dairy Pool criteria. However, it is important to note at the outset that not all the listed criteria are relevant under the Ontario Code. In a few cases, Ontario boards of inquiry, citing Supreme Court of Canada jurisprudence based on other legislation, have considered factors that do not have a clear connection to “cost, outside sources of funding, and health and safety requirements.” Most of these cases were decided under the predecessor to the present Code, which did not set out specific criteria. The few more recent cases in which factors other than cost, outside sources of funding, and health and safety requirements have been considered are arguably incorrectly decided in this respect.

With this caveat, the following caselaw further defines the Central Alberta Dairy Pool list.

“Financial Cost”

In British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) the Supreme Court of Canada pointed out,

While in some circumstances excessive cost may justify a refusal to accommodate those with disabilities, one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment. This Court rejected cost-based arguments in Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, at paras. 87-94, a case where the cost of accommodation was shown to be modest. I do not assert that cost is always irrelevant to accommodation. I do assert, however, that impressionistic evidence of increased expense will not generally suffice.

Nine days’ paid absence from employment to fulfill religious obligations was considered reasonable in Froese v. Pine Creek School Div.

The substitution of eight days’ work at overtime rates for eight Saturdays at normal rates was considered reasonable in Gohm v. Domtar.

30. Supra note 3 at para. 41.
32. Supra note 28.
Paid absence for all Jewish teachers to observe the High Holy Days was considered reasonable in *Commission scolaire regionale de Chambly v. Bergevin*. 33

A requirement that a health centre install a $20,000 wheelchair ramp was not found to inflict undue hardship. 34

Impressionistic evidence was insufficient to establish that a $75,000 annual extra expense to make a movie theatre accessible was "undue." 35

A university was ordered to provide an interpreter for a deaf student. A cost of $160,000 and the possibility that there might have to be a reduction of some services to other students was not considered "undue." 36

**“Disruption of a Collective Agreement”**

The disruption must be fairly serious to constitute undue hardship, and the person claiming disruption must have clear evidence of the claim. In *Gohm v. Domtar*, 37 an employee whose Sabbath was Saturday asked to be exempted from a job requirement that she work a rotating Saturday shift about eight times a year. She offered to work Sundays, either at the (higher) Sunday rate or at the normal rate.

The employer could have used her on Sundays, but was unwilling to pay the Sunday rate. The union refused to allow her to work Sundays at a normal rate. A human rights tribunal found both the employer and the union had discriminated. The accommodation proposed was not "undue" for either of them. This decision was confirmed by the Divisional Court on appeal. Note that the decision was made pursuant to the pre-1981 *Code*, which had no specific provision that codified constructive discrimination, and therefore did not set out specific criteria for the consideration of undue hardship.

In *Central Okanagan School District No. 23 v. Renaud* 38 liability of both the employer and the union was confirmed by the Supreme Court of Canada in a situation similar to the *Gohm* case. The Court held that a union may become a party to discrimination in two ways. First, it may cause or contribute to the discrimination by participating in the formulation of the work rule that has the discriminatory effect on the complainant—for example, if the rule forms part of the collective agreement. Second, a union may be liable if it impedes the reasonable efforts of an employer to accommodate. If reasonable accommodation is possible only with the union’s co-operation, and the union blocks the employer’s efforts to remove or alleviate the discriminatory effect, it becomes a party to the discrimination.


38. *Supra* note 15.
However, the Court did suggest that the union might meet the undue hardship test if it could show that a proposed accommodation results in "significant interference with the rights of others."39 Interference with the rights of others was considered by an Ontario board of inquiry in a recent decision involving services in residential accommodation.40 Once again, this is questionable, given the wording of the relevant provisions of the Code. It is not clear that disruption of a collective agreement can be cited in cases under the Ontario Code, unless the respondent can link the disruption to costs.

"Size of Employer’s Operation"
In Re Peterborough Civic Hospital and ONA,41 a nurse who was a Jehovah's Witness declined to perform blood transfusion duties and was fired. She was reinstated because the number of nurses available to "hang blood" at any time was sufficient so that the grievor could be exempted from this duty without jeopardy to the safety and care of patients and the efficient operation of the hospital. The arbitrator therefore held that the exemption of the grievor did not constitute undue hardship.

As with disruption of a collective agreement, it is arguable that the size of the employer’s operation is not a factor relevant to sections 11 or 17, except as linked to cost.

"Safety Risks, and Who Bears Risk"
Danger posed to others has been considered by Canadian courts and tribunals largely in the context of age requirements for firefighters, pilots, and bus drivers.42 The cases have focused on what kind of predictive evidence of risk will justify the infringement of human rights. The courts have expressed a strong preference for clear, objectively verifiable evidence of risk, and for assessment of the individual rather than the imposition of blanket rules.

Danger to the individual himself was considered in Thwaites v. Canadian Armed Forces.43 That case concerned a member of the naval service who was discharged because of the Force's assumption that someone infected with HIV would be unfit for service. The tribunal found that the Canadian Human Rights Act had been breached. The decision contains an interesting review of the progression of caselaw on the issue of risk as it relates to the "reasonable and bona fide" defence (the tribunal concluded that there is a concept of "tolerable risk" and that the analysis must be employment-specific), and the requirement for employers to assess each case individually, rather than making blanket rules about various disabilities. The tribunal ruled that the employer had a duty to inquire about the facts of the complainant's medical situation, assess it in relation to the actual job requirements, and consider appropriate accommodation.

43. Supra note 4.
Note that risk is considered at the “undue hardship” stage of the analysis, not at the “reasonable and bona fide” stage.44

"Problems of Morale of Other Employees"
The most recent comment from the Supreme Court of Canada on this issue was in Meiorin:

Although serious consideration must of course be taken of the “objection of employees based on well-grounded concerns that their rights will be affected”, discrimination on the basis of a prohibited ground cannot be justified by arguing that abandoning such a practice would threaten the morale of the workforce: Renaud, supra, at p. 988, per Sopinka J.; R. v. Cranston, [1997] C.H.R.D. No. 1 (QL).45

As noted above, the Supreme Court of Canada in Renaud suggested that a union might meet the undue hardship test if it could show that a proposed accommodation results in “significant interference with the rights of others.” However, in that case there was none of the clear objective evidence required to support a defence under human-rights legislation. The cost of defending a threatened grievance was held not to constitute undue hardship justifying a refusal to accommodate the appellant. The Court noted that objections based on “attitudes inconsistent with human rights” are irrelevant. However, the Court added that the duty to accommodate should not substitute discrimination against other employees for the discrimination suffered by the complainant.

Outside the union situation, there is some acceptance of the idea that others in a group might have to share some of the inconvenience of accommodating their peers. In Janssen v. Ontario Milk Marketing Board,46 the complainant successfully opposed a rule of the Board that had him bearing all of the extra cost of accommodating his Sabbatarian religious requirements. The board of inquiry found that sharing the costs among all of the farmers served by the Board (at a cost of 1 to 2 cents per hectolitre) would not be unreasonable.

Boards of inquiry have frequently rejected claims that refusing to hire or rent to a person of a particular race, sex, etc. could be justified by the negative reaction of other employees, customers, or tenants.47

As with “disruption of a collective agreement” and “size of employer’s operation,” it is arguable (in this case, highly arguable) that “problems of morale” is not a factor relevant to those listed in sections 11 or 17.

44. In British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), supra note 3, at para. 30, the Supreme Court of Canada noted that “the old notion that ‘sufficient risk’ could justify a discriminatory standard is no longer applicable. Risk can still be considered under the guise of hardship, but not as an independent justification of discrimination.”

45. Supra note 17 at para. 80.


OTHER TYPES OF “HARDSHIP”

In *Elliott v. Epp Centres*, an Ontario board of inquiry concluded that failure by a shopping centre to provide designated “handicapped” parking space and to install a ramp constituted constructive discrimination against persons whose disabilities necessitated reliance on a wheelchair for mobility. The board concluded that the requirement that the shopping centre apply for the necessary municipal permits was not undue hardship.

THE MEIORIN AND ENTROP DECISIONS

In *Meiorin*, the Supreme Court of Canada reviewed a particular standard of aerobic capacity set by the employer for its forest firefighters, under British Columbia’s human-rights legislation. The claimant, a female firefighter who had in the past performed her work satisfactorily, failed to meet the aerobic standard after four attempts and was dismissed. The claimant’s union brought a grievance on her behalf.

The evidence adduced demonstrated that, owing to physiological differences, most women have a lower aerobic capacity than most men and that, unlike most men, most women cannot increase their aerobic capacity enough with training to meet the aerobic standard. No credible evidence showed that the prescribed aerobic capacity was necessary for either men or women to perform the work of a forest firefighter safely and efficiently. The arbitrator found that the claimant had established a *prima facie* case of adverse effect discrimination and that the government had not discharged its burden of showing that it had accommodated the claimant to the point of undue hardship. The Court of Appeal allowed an appeal from that decision. The Supreme Court reversed the decision of the Court of Appeal.

The aerobic standard imposed in *Meiorin* was constructive discrimination by most people’s standards. However, the Court noted that the difference between direct and constructive discrimination cannot always be neatly characterized:

> For example, a rule requiring all workers to appear at work on Fridays or face dismissal may plausibly be characterized as either directly discriminatory (because it means that no workers whose religious beliefs preclude working on Fridays may be employed there) or as a neutral rule that merely has an adverse effect on a few individuals (those same workers whose religious beliefs prevent them from working on Fridays). On the same reasoning, it could plausibly be argued that forcing employees to take a mandatory pregnancy test before commencing employment is a neutral rule because it is facially applied to all members of a workforce and its special effects on women are only incidental.

In *Meiorin*, the Supreme Court removed a problem that has existed in some human-rights statutes, such as the *Canadian Human Rights Act*. The problem arises because many human-rights statutes do not contain specific provisions dealing with construc-
tive discrimination. Partly as a function of the wording of the relevant legislation and partly as a result of jurisprudence, a situation had evolved in which an employer had a lighter test for justification in a case of constructive discrimination than in a case of direct discrimination, including no duty to accommodate. The Supreme Court cited seven extremely good reasons why this made no sense, and they promptly righted the situation by imposing the same test for establishing a bona fide occupational requirement in both cases:

Having considered the various alternatives, I propose the following three-step test for determining whether a prima facie discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:

51. The Supreme Court in Meiorin summarized the situation as follows:

19 The conventional approach to applying human rights legislation in the workplace requires the tribunal to decide at the outset into which of two categories the case falls: (1) "direct discrimination", where the standard is discriminatory on its face, or (2) "adverse effect discrimination", where the facially neutral standard discriminates in effect: Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536 at p. 551, 23 D.L.R. (4th) 321 (hereinafter "O'Malley"), per McIntyre J. If a prima facie case of either form of discrimination is established, the burden shifts to the employer to justify it.

20 In the case of direct discrimination, the employer may establish that the standard is a BFOR by showing: (1) that the standard was imposed honestly and in good faith and was not designed to undermine the objectives of the human rights legislation (the subjective element); and (2) that the standard is reasonably necessary to the safe and efficient performance of the work and does not place an unreasonable burden on those to whom it applies (the objective element). See Ontario (Human Rights Commission) v. Borough of Etobicoke, [1982] 1 S.C.R. 202 at pp. 208-09, 132 D.L.R. (3d) 14, per McIntyre J.; Caldwell v. Stuart, [1984] 2 S.C.R. 603 at pp. 622-23, 15 D.L.R. (4th) 1, per McIntyre J.; Brossard (Ville) v. Quebec (Commission des droits de la personne), [1988] 2 S.C.R. 279 at pp. 310-12, 53 D.L.R. (4th) 609, per Beetz J. It is difficult for an employer to justify a standard as a BFOR where individual testing of the capabilities of the employee or applicant is a reasonable alternative: Central Alberta Dairy Pool v. Alberta (Human Rights Commission), [1990] 2 S.C.R. 489 at pp. 513-14, 72 D.L.R. (4th) 417, per Wilson J.; Saskatchewan (Human Rights Commission) v. Saskatoon (City), [1989] 2 S.C.R. 1297 at pp. 1313-14, 65 D.L.R. (4th) 481, per Sopinka J.

21 If these criteria are established, the standard is justified as a BFOR. If they are not, the standard itself is struck down: Etobicoke, supra, at pp. 207-08, per McIntyre J.; O'Malley, supra, at p. 555, per McIntyre J.; Saskatoon, supra, at pp. 1308-10, per Sopinka J.; Central Alberta Dairy Pool, supra, at p. 506, per Wilson J.; Large v. Stratford (City), [1995] 3 S.C.R. 733, 128 D.L.R. (4th) 193, at para. 33, per Sopinka J.

22 A different analysis applies to adverse effect discrimination. The BFOR defence does not apply. Prima facie discrimination established, the employer need only show: (1) that there is a rational connection between the job and the particular standard, and (2) that it cannot further accommodate the claimant without incurring undue hardship: O'Malley, supra, at pp. 555-59, per McIntyre J.; Central Alberta Dairy Pool, supra, at pp. 505-6 and 519-20, per Wilson J. If the employer cannot discharge this burden, then it has failed to establish a defence to the charge of discrimination. In such a case, the claimant succeeds, but the standard itself always remains intact.

52. See, for example, Bhinder v. C.N.R. (1985), 63 N.R. 185 (S.C.C.), and decisions and articles cited in Meiorin, supra note 17 at paras. 28-29 and 31.

53. Meiorin, ibid. at paras. 26-49.
(1) That the employer adopted the standard for a purpose rationally connected to the performance of the job;

(2) That the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

(3) That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.\(^54\)

In *obiter*, the Court included the Ontario legislation in its analysis. In doing so, the Court apparently failed to note the content of Ontario's specific provisions dealing with constructive discrimination, which had been introduced in its 1981 legislation,\(^55\) briefly mentioning only the accommodation requirements in section 24(2).\(^56\) This is presumably a reference to the Code’s reasonable and *bona fide* defence, applicable to direct discrimination in employment based on age, sex, record of offences, and marital status, which is found in section 24(1)(b). The Court understandably did not dwell on legislation other than that of British Columbia; there is no analysis of the policy reasons that Ontario might have both codified constructive discrimination and maintained a difference between direct and constructive discrimination.

What the Supreme Court did in *Meiorin* was not, as commonly reported, to remove the differences between cases of constructive and adverse effect discrimination. Instead, in the context of legislation that did not deal specifically with constructive discrimination, it imposed a uniform “three-step test for determining whether a *prima facie* discriminatory standard is a BFOR” (*bona fide* occupational requirement).\(^57\)

The phrase *bona fide occupational requirement* was removed from the present Ontario *Code* in favour of the phrase *reasonable and bona fide*—a phrase that, not being employment-centred, accords with all of the areas in which the *Code* is operative. If a case identical on the facts to *Meiorin* had been argued on the basis of the existing Ontario *Code*, section 11 on its plain wording would have dictated the same result as the one imposed by the Supreme Court in *Meiorin*.

The Ontario Court of Appeal applied the *Meiorin* decision shortly after its release, in *Entrop v. Imperial Oil Ltd.*\(^58\) In *Entrop*, an employer instituted a comprehensive alcohol- and drug-testing policy for its employees. Although the policy mainly focused on employees in safety-sensitive positions, it also provided for mandatory alcohol and drug testing for all job applicants and all employees in certain listed circumstances.

\(^54\) *Ibid.* at para. 54.

\(^55\) The Ontario cases cited by the Court in *Meiorin* were all cases based on Ontario human-rights legislation in force prior to 1981, the date the present *Code* was enacted.

\(^56\) *Meiorin*, *supra*, note 17 at para. 52.

\(^57\) *Ibid.* at para. 54.

\(^58\) *Entrop*, *supra* note 7.
On a positive test, progressive discipline up to and including dismissal could be imposed. Martin Entrop, an employee of Imperial, had suffered from alcohol abuse in the early 1980s. Although he had not had a drink for over seven years, because he worked in what Imperial Oil classified as a safety-sensitive job, the policy required him to disclose his previous alcohol abuse problem to management. When he disclosed it, he was automatically reassigned to another job. Although he was eventually reinstated to his former position, he filed a complaint with the Ontario Human Rights Commission, alleging that Imperial Oil discriminated against him in employment because of his handicap, contrary to section 5(1) of the Ontario Code. Mr. Entrop was successful before the board of inquiry. The board reviewed both the allegations relating directly to Mr. Entrop and the application of the policy generally. In both cases, the board found direct discrimination, and ruled that Imperial had not established the defence set out in section 17.

Entrop was also successful before the Divisional Court when Imperial appealed the order of the board. Imperial appealed to the Court of Appeal. The Court of Appeal held that Imperial's policies of alcohol and drug testing, of requiring disclosure of past substance-abuse problems by employees in safety-sensitive positions, and of automatically reassigning those employees to non-sensitive positions were discriminatory on the basis of handicap. The Court held that only the alcohol testing could be justified under the Code, and only where the sanction for an employee testing positive was tailored to an employee's circumstances.

Citing Meiorin, Laskin J.A. "imported" section 11 of the Code into the situation in Entrop, acknowledging as he did so that allowing the respondents to rely on section 11 gave them a defence that would not have been available to them otherwise. He also acknowledged that

[i]the wording of the statutory defences available to an employer under Ontario's Code differs from the wording under the British Columbia Code. Section 11 of Ontario's Code sets out in detail the elements of a BFOR; the comparable provision of the British Columbia Code, s. 13(4), provides simply that "subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement." . . . In the case of handicap discrimination, s. 17 of the Ontario Code has no counterpart in the British Columbia Code. The difference in wording in the two statutes raises the question whether the Supreme Court's three-step test for justifying a prima facie discriminatory workplace rule should be applied in this case.59

However, he concluded that it should.

Laskin J.A. did allow that the defences provided for in section 11 should not be available in some cases, but gave very limited examples:

Third, though the language of s. 11 does reflect the distinction between direct and adverse effect discrimination—because it provides a BFOR defence "where a

59. Ibid. at 46-47, para. 77.
requirement...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 prohibited ground of discrimination”—I would limit the situations to which s. 11 does not apply to those few cases that can be “neatly characterized” as cases of direct discrimination. I have in mind the kinds of cases referred by McIntyre J. in Ontario v. Simpson Sears, supra—“No Catholics or no women or no blacks are employed here”—where the requirement expressly includes a prohibited ground of discrimination. So limiting the cases to which s. 11 does not apply is consistent with the reasoning underlying the Supreme Court’s unified approach in Meiorin. The case before us, however, is the kind of case where characterizing whether the discrimination is direct or indirect is problematic and thus where s. 11 should be applied using the Meiorin test.60

Laskin J.A. stated several reasons for applying Meiorin to the Ontario legislation. Among other reasons, he saw much clearer direction than a reading of Meiorin arguably warrants; he appears to indicate61 that McLachlin J in Meiorin referred to Ontario’s section 11, whereas the only reference to the Ontario legislation in that decision is to section 24.62

It appears that another important reason for Laskin J.A.’s application of Meiorin in the case before him was his view that the employer’s actions and policies could be seen as constructive as well as direct discrimination. In this respect, he differed from the board of inquiry:

Though important, characterizing the discrimination as direct or indirect was often difficult. This case is a good example. Is the rule requiring all employees in safety-sensitive positions to undergo random alcohol and drug testing facially neutral because it applies to an entire segment of the workforce, or discriminatory on its face because it targets substance abusers and perceived substance abusers? The Board of Inquiry held that these Policy provisions were discriminatory on their face and constituted direct discrimination on the ground of handicap. In this court, Imperial Oil contended that the Policy was neutral on its face and that if it discriminated at all, the discrimination was indirect. Because the Board found that the discrimination was direct, she held the only defence available to Imperial Oil was under s. 17. Imperial Oil, on the other hand, argued that it could rely on s. 11 of the Code.63

The bottom line in the Entrop situation, and in most other situations in which disabled employees are disadvantaged by a failure to accommodate, is that Entrop has no real negative effect on the complainant’s case under the Ontario Code. It is true that now, under section 11, the employer can attempt to justify disadvantageous treatment by establishing that the job requirements are “reasonable and bona fide.” However, on the plain wording of section 11(2), that cannot be done if the employer cannot establish accommodation to the point of undue hardship.64

60. Ibid. at 48, para. 80.
61. Ibid. at para. 79.
62. See Meiorin, supra note 17 at para. 52.
63. Entrop, supra note 7 at 43-44, para. 70.
The same cannot be said of other situations covered by the Code. One example is race discrimination in employment, for which the Code as written provides no defence. Another, in the area of accommodation, is discrimination on the ground of receipt of public assistance. It is to be hoped that such situations will always be so clearly characterizable as "direct" as to fit within the narrow exception cited by the Court of Appeal, or else clearly constructive. Otherwise, we could have the distasteful spectacle of respondents adducing stereotypes as "facts" to support a "reasonable and bona fide" defence.

Such a situation would clearly be contrary to public policy. In the 1981 Code, the Ontario legislature made some clear policy decisions. In addition to the incorporation of explicit provisions dealing with constructive discrimination, the legislation provides defences to a prima facie case of discrimination in some cases, and not in others. In some cases the defences are limited to specified situations; in others, they are variations on the "reasonable and bona fide" defence. The point is that, in all examples in which a defence is not provided for in the Code, there are demonstrable policy reasons behind the omission. For example, there is no "reasonable and bona fide" defence against a prima facie case of race discrimination in the workplace, nor against a case of discrimination on the ground of receipt of social assistance in housing, nor is there any logical reason why defences in such cases should exist. A defence arguably should not be inserted by interpretation, short of a successful argument under the Charter.

Obviously lower courts and tribunals in Ontario are bound by Entrop in cases that are not distinguishable. In cases in which a defence would be supplied that is unavailable on a plain reading of the Code, the major implications for counsel are two.

First, courts and tribunals sometimes show a tendency to simplify by ignoring evidence of direct discrimination where elements of constructive discrimination exist in the case before them. This occurred recently in the Kearney case.65 This tendency should obviously be resisted as far as possible.

64. See Jeppesen v. Ancaster (Town), [2001] O.H.R.B.I.D. No. 1, (Ont. Bd. Inq.) online: QL (OHRB) in which a board of inquiry, applying Entrop, concluded that the requirement that a firefighter have the degree of visual acuity needed to drive an ambulance discriminated against a complainant with a vision disability. See particularly the remarks of the Board at para. 116.

65. Kearney v. Bramalea Inc. (No. 2) (1998), 34 C.H.R.R. D/1 at D/34 (Ont. Bd. Inq.), aff'd Ontario (Human Rights Commission) v. Shelter Corp., [2001] O.J. No. 297 (Ont. Div. Ct.). In Kearney, the Board of Inquiry found that the use of rent-to-income ratios/minimum income criteria violates sections 2 (1), 4, 9, and 11 of the Code, on the grounds of sex, marital status, citizenship, place of origin, family status and receipt of public assistance, whether used alone or in conjunction with other selection criteria or requirements. A frustrating aspect of the Kearney decision was that, although it cited section 9, the board confined its analysis to whether the impugned practice constituted constructive discrimination under section 11 of the Code. The complainants had argued that, on the facts, the practice was also a deliberate and direct attempt to ensure that persons on social assistance be excluded. However, the board declined to rule on that argument, since it had already found an infringement of section 11. Had the board found that there was direct discrimination against recipients of social assistance, (or any of the other grounds at issue), there would have been no need to reconsider any evidence justifying the practice,
Where a case is distinguishable from *Entrop*, it might also be worthwhile to point out that, in *University of British Columbia v. Berg*, the Supreme Court declined to import a defence into human-rights legislation where none existed, even where the fact situation, which involved safety, was compelling. Lamer C.J., for La Forest, L’Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, and Iacobucci JJ., stated,

> Unlike many human rights codes, the British Columbia Act at the relevant time did not contain any defence to a finding that a complainant had been denied accommodations, services or facilities on prohibited grounds. That is, it was not open to the respondent School to argue that the treatment of the complainant, although based on a prohibited ground of discrimination, was nevertheless reasonably justified . . .

Some concluding remarks are in order. An important feature of the Act at the time of Berg’s complaint was its absolute prohibition of discrimination. That is, there was no provision allowing a defence where the denial of a service or facility was based on prohibited grounds of discrimination, yet could be justified with reference to competing interests, such as safety. I believe that the School and its representatives acted in good faith, and thought that there were good reasons for acting as they did. Dr. Rodgers might reasonably have had concerns about giving Berg a key not because of her mental disability itself, but because of the safety issues raised by the incident. Similarly, faculty members might have denied the rating sheet because they felt they could not give Berg a useful or positive recommendation. Under the amended s. 3, these issues would, no doubt, have been the focus of the evidence and argument before the member-designate, instead of the issue on these appeals.

However, the absence of a defence provision in the Act as it stood at the time of Berg’s complaint should not lead us, as I think it did the Court of Appeal in this case, to interpret s. 3 in an overly restrictive fashion. The Act must be allowed its full scope of application, and its particular operation in situations such as this, if undesirable, is a matter for legislative attention. The recent amendments to the Act show that such responses are always possible.

**ACCOMMODATION: DUTIES OF THE EMPLOYER AND THE EMPLOYEE**

Obviously, where the employer has no reason to suppose that the employee needs accommodation for reasons related to personal characteristics listed in the *Code*, he or she does not breach the *Code* by failing to accommodate. Having said that, however, the employer has no defence of ignorance where the need is obvious or where the employee has given some indication of his or her difficulty to management.

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68. But see *Re Ottawa Civic Hospital and ONA* (1995), 48 L.A.C. (4th) 388. At 398, the arbitrators conclude that there can be a breach of the *Code* if an employer fires an employee in ignorance of the disability that caused problems, and refuses to reinstate a disabled employee once the disability becomes known to the employer.
69. Despite cases such as *Bonner v. Ministry of Health* (1992), 16 C.H.R.R. D/485 (Ont. Bd. Inq.) and
As already noted, once alerted to the need, the employer has a duty to inquire about the facts of the complainant's medical situation, assess it in relation to the actual job requirements, and consider reasonable accommodation. Since the duty to accommodate rests on the employer, there is no requirement that the employee suggest how accommodation might be made.

If the employee suggests an accommodation, the employer must give it appropriate consideration. The employer cannot insist that the accommodation be perfect or foolproof. An employer who demanded that the employee's physician certify the safety of the proposed accommodation and that the employee waive any right to sue the employer in case of further damage to health was found by the Ontario Divisional Court to have breached the Code.\(^1\)

When accommodation is requested, many employers react by saying, "If I do it for you, I'd have to do it for everybody." The first response could well be the serious question, "Why not?" Most accommodations are neither expensive nor onerous, and many benefit more than the individual who requested the accommodation. As for expensive and onerous accommodations, the answer to the employer's question is that there is no such obligation where there is no claim under the Code.

The employee has some duties as well, summarized by the Supreme Court in *Renaud* as follows:

> Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this Court in *O'Malley*. At page 555, McIntyre J. stated:

> Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.

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\(^70\) See discussion of corporate liability in *Keene*, supra note 2 at 243-46 and 379-80.

To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.

This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in O'Malley. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

Although there is a duty to accept accommodation when it is reasonable, arriving at an agreement may require negotiation, with some trial and error. In Hotel-Dieu Hospital v. ONA, a part-time nurse's employment was terminated pursuant to a provision in the collective agreement, which provided that a regular part-time nurse could be terminated if she was absent from work due to illness for a period of 30 months. When the nurse was first absent, the hospital proposed an alternative position that would have accommodated her needs, but she declined because her doctor misinformed her that the proposal was unacceptable. The nurse grieved her termination. The Board found that the hospital had met its legal obligation to accommodate, but concluded that the termination was not appropriate in light of the grievor's reliance on her doctor's misinformation. The Board ordered the grievor reinstated. The Board's decision was confirmed on appeal.

SUMMARY OF LEGAL RESPONSIBILITIES

To sum up, when an employee experiences difficulty in doing his or her job because of "handicap" as defined in the Code, the employer has a responsibility

1. to initiate the accommodation process by inquiring into the employee's current medical condition and capabilities.

2. to review the requirements of the complainant's job to confirm what is essential. If any requirement is not imposed in good faith or is not strongly and logically connected to a business necessity, it cannot be maintained.

73. (1996), 89 O.A.C. 249 (Div. Ct.).
3. to review the remaining elements of the job. If any of the essential elements cannot be performed by the complainant without accommodation, to consider what accommodation might enable the complainant to perform the essential elements, and

4. to offer the necessary accommodation unless to do so would cause undue hardship.

It is the employee's duty "to facilitate the search" for accommodation by supplying the employer with relevant information. The employee may also be obliged to accept accommodation that, while not perfect, is reasonable in the circumstances.