

Reasonable Accommodation and the Rights of Persons with Disabilities

Persons with disabilities are a significant minority in Canada today. Recent figures show that more than two million Canadians qualify as either mentally or physically disabled. Although discrimination against disabled persons has been discouraged since biblical times,⁽¹⁾ only recently has protection from such discrimination been guaranteed in law. These legal protections are espoused by the Mission Document of the Correctional Service of Canada, which sets out in several of the Strategic Objectives⁽²⁾ its commitment to employment equity for staff and to meeting the needs of individual offenders. This article will discuss the concept, recently enunciated by the Supreme Court of Canada, that a prohibition of discrimination is not simply an obligation not to discriminate (a negative obligation) but is also an obligation to take reasonable, positive steps to create equality (a positive obligation).

Historically, many jurisdictions have avoided legislating protection against discrimination on the grounds of disability. Even the recent *United Nations Convention on the Rights of the Child*, adopted last year, did not include physical or mental disability as prohibited grounds of discrimination in its equality provision until the last draft.⁽³⁾ This reluctance does not seem to be due to a lack of evidence of the need for protection against such discrimination.⁽⁴⁾ Rather, it is usually expressed as being due to concerns about the difficulties of distinguishing between two situations. One is where a mental or physical disability may actually prevent an individual from satisfactorily performing a job and thus be justifiable as a "Bona Fide Occupational Requirement." The other situation is where decisions are made on the basis of stereotyped assumptions about the abilities of individuals belonging to a particular group - assumptions that may not reflect the real abilities of specific individuals and so could amount to discrimination. Human Rights Codes The protections given to disabled persons in employment and the provision of goods and services vary considerably from jurisdiction to jurisdiction. These protections are still very new in Canada. New Brunswick, in 1976, was the first province to prohibit discrimination specifically because of "physical disability." All other Canadian jurisdictions followed this example. By 1981, the International Year of Disabled Persons, only Newfoundland and Ontario had yet to pass such legislation, which they have since done.

With regard to mental disabilities, in 1978, Quebec was the first province to add to its Charter the term "handicapped persons" which included persons suffering from either "a physical or mental deficiency." Again, the other Canadian jurisdictions followed suit, and Alberta now remains the sole jurisdiction which does not prohibit discrimination on this basis.

Many of these Human Rights Codes provide definitions for the terms "physical disability" and "mental disability." Despite some differences, physical disability usually includes any physical disability, infirmity, malformation or disfigurement caused by bodily injury, birth defect or illness including epilepsy, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or any physical reliance on a guide dog, wheelchair or other remedial device.⁽⁵⁾ Mental disability usually includes mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities.⁽⁶⁾

It must be recognized that mental and physical disability as a ground for discrimination is distinct from

other grounds in two regards. First, the terms encompass a large range of disabilities with many varying degrees of disability within each. Second, because of this range of disability, there is also a range of necessary adjustments to the work force and to the workplace, many of which may be quite minor. Charter In 1982, the *Canadian Charter of Rights and Freedoms* entrenched the equality rights of disabled persons in our Constitution. No other country has given disabled persons constitutional protection in this manner. Section 15 of the *Charter*, which came into force on 17 April 1985, states:

15. Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Discrimination Disabled persons, as any other group, interact with the Correctional Service of Canada in many ways - as employees, visitors, volunteers and inmates. Discrimination against individuals on the basis of physical or mental disability is prohibited by law. Discrimination has been defined by the Supreme Court of Canada, as cited in *Law Society of B. C. v. Andrews*,⁽⁷⁾ as: ...a distinction, whether intentional or not, but based on grounds of personal characteristics of the individual or group which has the effect of imposing burdens, obligations and disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.

This definition includes not only intentional, overt discrimination but also unintentional discrimination or so-called "systemic" or "adverse effect" discrimination. Thus, discrimination may be found by a court to exist even where there is no intention to discriminate on the face of a statute or policy -for example, where the law in question purports to treat all persons in exactly the same manner. In these circumstances, the Supreme Court of Canada has said that it will also examine the effect of any law or policy to determine if there is a differential impact on groups of people, caused because the purported equal treatment did not take into account that the people it affects did not all start at the same point or level and so that the equal treatment exacerbated the already existing inequalities. Reasonable Accommodation The courts have clarified that the protection against discrimination does not only include a liability for both intentional discrimination and unintentional discriminatory effects, but also "a duty on the part of those to whom the legislation applies to institute reasonable positive measures to meet the special needs of those who, by reason of disability, religious affiliation, or other protected characteristic, cannot be adequately served by accommodations or arrangements suitable for the majority."⁽⁸⁾ Failure to "reasonably accommodate" such special needs will also amount to discrimination.

The concept of reasonable accommodation is a necessary extension of the concept of protection against discrimination. Any prohibition of discrimination, in order to be effective, must attempt not only to eradicate all deliberate discrimination but also to address any institutionalized barriers to equality - sometimes something as simple as not being able physically to use a building because of the absence of a wheelchair ramp or the lack of adequate and accessible washroom facilities.

The workplace and many services will remain closed to minorities if these barriers are not addressed by requiring reasonable proactive steps to accommodate different needs. The first case to recognize this concept was *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*⁽⁹⁾ In this case, Mrs. O'Malley was a member of the Seventh Day Adventist faith which prohibits adherents from working on Friday evenings and Saturdays. Her employer, Simpsons-Sears Ltd., argued that it was not

intentionally discriminating by requiring her to work on Friday evenings and Saturdays as a term of full-time employment but that the obligation was a result of customer demand and was a term of employment for all employees. The Supreme Court of Canada held that, even though the concerns of the employer were genuine, Simpsons-Sears had discriminated against Mrs. O'Malley by not making reasonable adjustments to normal work schedules in order to accommodate her special needs.

Similarly, in the case of *Re Saskatchewan Human Rights Commission et al. and Canadian Odeon Theatres Ltd.*,⁽¹⁰⁾ the Court of Appeal of Saskatchewan found that, even where the company's argument was based on obeying fire regulations, it was discriminatory for the cinema management to insist that wheelchair patrons sit in the first row of regular seats if they did not wish to leave their wheelchairs. The Court held that the protections against discrimination would be "illusory" if the owners of public facilities did not have an additional positive duty to "make them accessible to persons who possess protected characteristics."

The recent case of *Alberta Human Rights Commission v. Central Alberta Dairy Pool et al.*⁽¹¹⁾ continues in this direction. In that case, the Supreme Court of Canada concluded that, where a policy creates an adverse effect on individuals (in this case a Seventh Day Adventist who could not work on Easter Monday), "the onus was on the respondent employer to show that it made efforts to accommodate the religious beliefs of the complainant up to the point of undue hardship."

There is no case law at present extending the duty to "reasonably accommodate" to section 15 of the *Charter*. However, it seems possible that the courts may also find such a duty under the Charter. In *Law Society of B.C. v. Andrews*,⁽¹²⁾ it was stated that "[i]n general, it may be said that the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination under s[ection] 15⁽¹⁾." Undue Hardship The standard of reasonable accommodation is linked to a test of "undue hardship." In other words, the employer is only liable to take such reasonable steps to accommodate the special needs of an individual as will not amount to undue hardship for that employer. In *Central Alberta Dairy Pool*,¹³ the Supreme Court of Canada did not find it necessary to provide an exhaustive definition of undue hardship. It did, however, indicate that it would include such factors as "financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of workforce and facilities." In the private sector, this test of undue hardship may involve many variables, such as in the case of an employer who has only one employee and may not be able to accommodate without significant inconvenience or even an inability to accommodate his or her own special needs.

In the case of the government, however, undue hardship may well be a difficult test to meet as it is unlikely that the courts will be sympathetic. In addition, it may be difficult to show that a given financial cost is undue or that the work force or facilities cannot be adapted, particularly where the inconvenience of other employees is minimal because of the large numbers of staff. (Where there are large numbers of staff, the inconvenience to each individual who has to make the accommodation is smaller. For example, covering a Saturday shift to make up for a Seventh Day Adventist would cause less inconvenience to employees in a company with large numbers of staff, where the shift could be rotated among employees, than in a company with only a few staff members.) These issues remain to be determined by the courts

on a case-by-case basis. Affirmative Action and Employment The main concern of disabled persons is access to employment and services. With regard to employees, the Correctional Service of Canada is committed to the Employment Equity program of Treasury Board to hire more visible minorities and more persons with disabilities, as further supported by Strategic Objective 3.13 of its Mission Document. This program includes numerical targets and operational measures to improve the employment situation of disabled persons. Although the necessary standard of reasonable accommodation is not yet clear, some positive measures must be taken in order to ensure the full participation of disabled individuals who can successfully perform a job with some reasonable accommodation, such as with the many new technological aids now available.

In the United States, case law under the *Civil Rights Act* of 1964 quickly eroded the concept of "undue hardship" and reduced it to a point where only minimal costs were required. This has recently been changed by legislation with the new *Americans with Disabilities Act* which imposes a duty to accommodate unless the costs "would fundamentally alter the essential nature or threaten the existence of the respondent's enterprise."⁽¹⁴⁾ The Ontario Human Rights Commission has indicated that its guidelines will likely adopt the higher standard reflected in the recent American legislation but this issue has yet to be settled.⁽¹⁵⁾

Similarly, with regard to physical access to buildings, the *Obstacles* report of the Special Committee on the Disabled and the Handicapped, produced in February 1981, contained 130 recommendations on a variety of concerns, including such structural adaptations to existing federal buildings as wheelchair ramps and braille elevator signs, to allow access for persons with disabilities.

The Correctional Service of Canada is also affected by the issue of access to programs by disabled persons, both as inmates within the institutions and as visitors. Reasonable accommodation within programs is even more important due to the Correctional Service of Canada's objective of safe reintegration of offenders. Conclusion As the Toward Equality response notes, the Federal Government has made a commitment to "policies designed to effect the full participation of disabled persons in Canadian society and the economy."⁽¹⁶⁾ Achieving this full participation to the extent of each individual's own merits and abilities will take more than merely ensuring that overt discrimination no longer exists. Reasonable positive steps must be taken to ensure that disabled individuals have the same full access to employment, programs and services as all other Canadians.

The following summaries and extracts from opinions, reports and other documents are provided for the information and convenience of the reader. However, as the extracts are incomplete, the reader should refer to the actual opinion or document or consult with Legal Services at National Headquarters concerning the specific interpretation or applicability of any opinion or decision cited. If you have questions about these or any other related matters, please contact Mark H. Zazulak, General Counsel, Department of Justice, Legal Services, Correctional Service of Canada, National Headquarters, 4A-340 Laurier Avenue West, Ottawa, Ontario K1A 0P9.

RECENT DECISIONS

In *Wong*, the Supreme Court of Canada held that unauthorized video surveillance by police of suspected

illegal gambling in a hotel room was an unreasonable search and seizure under section 8 of the *Charter* and was not justified under section 1 of the *Charter*. The Court further stated that the consideration of whether an individual has a "reasonable expectation of privacy" will depend on the particular factual context of the video surveillance.

In *Treasury Board v. Public Service Alliance of Canada*, the Federal Court of Appeal held that the contracting out of certain functions previously performed by indeterminate employees violated the Workforce Adjustment Policy. The Court agreed with the finding of the Public Service Staff Relations Board that the employer has an obligation under the Policy to the bargaining agent not to contract out jobs that had been and could be performed by indeterminate employees.

(1)*Book of Leviticus, 19:14: "Thou shalt not curse the deaf nor put a stumbling-block before the blind," as cited in M.D. Lepofsky and J.E. Bickenbach, "Equality Rights and the Physically Handicapped" in Bayefsky and Eberts (Eds.), Equality Rights and the Canadian Charter of Rights and Freedoms. (Toronto: Carswell, 1985).*

(2)*Core Value 1: "We respect the dignity of individuals, the rights of all members of society, and the potential for human growth and development"; Strategic Objective 2.1: "To ensure that the needs of individual offenders are identified at admission, and that special attention is given to addressing mental disorders."; Strategic Objective 2.3: "To provide programs to assist offenders in meeting their individual needs, in order to enhance their potential for reintegration as law-abiding citizens."; Strategic Objective 2.4: "To ensure that offenders are productively occupied and have access to a variety of work and educational opportunities to meet their needs for growth and personal development" Strategic Objective 3.13: "To actively support policies of bilingualism and employment equity."*

(3)*See generally: L.M. Hitch, "Non-Discrimination and the Rights of the Child: Article 2," New York Law School Journal of Human Rights, 47 (7, 1989): 62.*

(4)*The Chief Commissioner of the Canadian Human Rights Commission in testifying before one of the Joint Parliamentary Committees studying the proposed Charter; as cited in Lepofsky and Bickenbach, supra, note 1, at p.336, stated that 21% of all complaints filed with the Commission concerned this ground. The unemployment rate was cited at between 70% and 80%.*

(5)*See, particularly, the Canadian Human Rights Act, s. 20, and the Saskatchewan Human Rights Act, s. 2(n).*

(6)*See, for example, the definition contained in the Regulations under the United States Rehabilitation Act of 1973, as amended in 1978 [92 Stat. 2982 (1978) codified as 29 U.S.C., S. 794(a)].*

(7)*[1989] 1 S.C.R. 143.*

(8)*Dale Gibson, The Law of the Charter: Equality Rights. (Toronto: Carswell, 1990): 133.*

(9)*[1985] 2 S.C.R. 536.*

(10)*(1985) 18 D.L.R. (4th) 93.*

(11)*Supreme Court of Canada, unreported, 13 September 1990.*

(12)*Supra footnote 7.*

(13)*Supra footnote 11.*

(14)*For an interesting look at the new United States legislation and its history, see: E.P. Kelly and R.J.*

Aalberts, "Americans With Disabilities Act Undue Hardship for Private Sector Employers?", *Labor Law Journal*, 41 (1990): 675.

⁽¹⁵⁾See generally: D. Baker "Anticipating the Next Generation of Equality Issues in Employment for Disabled People in Canada," in R.L Cholewinski (Ed.), *Human Rights in Canada: Into the 1990s and Beyond*. (Ottawa: Human Rights Research and Education Centre, University of Ottawa, 1990): 41.

⁽¹⁶⁾Canada. *Toward Equality, the Response to the Report of the Parliamentary Committee on Equality Rights*, (1986)35.