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Employer Obligations to Reinstate Injured Workers: Relating Human Rights Legislation to Section 54b of the Workers Compensation Act, R.S.O. 1980, 539, as Amended by S.O. 1989, c.47

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EMPLOYER OBLIGATIONS TO REINSTATE INJURED WORKERS:

Relating Human Rights Legislation to Section 54b of the *Workers' Compensation Act*, R.S.O. 1980, 539, as amended by S.O. 1989, c.47

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A. INTRODUCTION

Ontario is Canada's most prosperous province, yet 50% of persons with disabilities living in Ontario between the ages of 15-64 have total incomes of less than $10,000 a year.[1] The economic disadvantage experienced by persons with disabilities is just one consequence of the discrimination that exists against them, discrimination which is so "systematically practised" and "so widespread and so insidious as to be almost imperceptible."[2]

Nowhere is this discrimination more clearly seen than in the area of employment. The labour force participation rate in Ontario of persons with disabilities is only 38.9%, compared with 77.8% for the rest of the population.[3] Yet, what these figures do not reflect is the personal and social tragedy of so many people being excluded from employment. Discriminatory barriers in employment stigmatize persons with disabilities by preventing them from making an economic contribution to society. As the Parliamentary Committee on Equality Rights noted:

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1. Office for Disabled Persons, *Statistical Profile of Disabled Persons in Ontario Volume II*, (Toronto: Office for Disabled Persons, 1990) at 18. This data was based on disabled persons who responded to Statistics Canada's 1986 Health and Activity Limitation survey.

2. Canadian Human Rights Commission, *Annual Report - 1988*, (Ottawa: Canadian Human Rights Commission, 1989).

3. Canada Employment and Immigration Commission, *Employment Equity Availability Data Report on Designated Groups from the 1986 Census of Canada*, (Ottawa: Canada Employment and Immigration Commission, 1988) at Table 14-Ontario. The definition of persons with disabilities for this data is based on persons with disabilities who indicated they are limited in the kind or amount of work that they can perform.

> "Employment constitutes a key area in which the right to equality and the equal benefit of the law must be achieved. Employment is one way for Canadians to become fully contributing, independent members of society."[4]

Indeed, the push for employment equity legislation by groups representing persons with disabilities is not only a response to the moral claim that "we are of equal worth regardless of differences in gender, race, ethnicity, or disability",[5] but it is an acknowledgment of the significance of work to individuals. Our society places such an important emphasis on work that it is the means by which "most of us secure much of our self-respect and self-esteem."[6] Yet for persons with disabilities, we compound the existing stigma of being disabled by denying them the opportunity to participate in the one activity through which many people derive their sense of self-worth, while simultaneously confining a majority of them to a life in poverty.

Injured workers who become disabled[7] experience the same stigma and disadvantage faced by persons who are disabled by other causes. Discrimination in society against persons with disabilities, regardless of cause of disability, or whether the discrimination is intentional or systemic, plays no favourites—all disabled persons are victimized and deprived of their equal opportunity to participate as fully contributing members of our society.

Two recent initiatives by the Ontario Government represent the first significant attempt to tackle some of the employment barriers that face persons with disabilities. In April 1988, amendments were proclaimed to the *Ontario Human Rights Code, 1981* (the *Code*) which require employers to accommodate the needs of persons with disabilities in

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4. Parliamentary Committee on Equality Rights, *Equality for All*, (Ottawa: 1985) at p.103.

5. Judge Rosalie Abella, *Equality in Employment: A Royal Commission Report*, (Ottawa: Minister of Supply and Services Canada, 1984) at 3.

6. D.M. Beatty, *Labour is not a Commodity*, in B.J. Reiter and J. Swan, ed., *Studies in Contract Law*, (Toronto: Butterworths, 1979) at 318.

7. Abt Associates of Canada, *Status Report: Persons with Disabilities*, (Toronto: Ministry of Citizenship Working Group on Employment Equity, 1989) at p.19. 23% of Ontario's population of persons with disabilities became disabled as a result of an accident at work or elsewhere.

employment unless to do so causes undue hardship.[8] In 1989, Bill 162 was passed which makes significant amendments to the *Workers' Compensation Act* (the *Act*), including the requirement that employers reinstate injured workers in certain situations.[9]

The 'success' of these initiatives will be determined by the interpretation of 'the duty to accommodate and undue hardship' and whether effective mechanisms exist for their enforcement. However, it should be said that even if these initiatives are successful in removing barriers to employment for certain individuals, the systemic employment barriers that confront persons with disabilities, and the pervasive discrimination that they face in all facets of society, will not be removed through the piecemeal approach that these initiatives represent.[10]

In the absence of employment equity legislation, the extent to which the reinstatement provisions of the *Workers' Compensation Act* (the *Act*) can be used to assist disabled workers in retaining employment is unclear. The focus of this paper is to outline a standard for interpreting the duty to accommodate and undue hardship under the *Act* and the *Code*, to highlight the flaws in the process for enforcement, and to suggest an alternative approach for addressing the systemic barriers that exist for persons with disabilities.

B. THE WORKERS' COMPENSATION ACT— SECTION 54B REINSTATEMENT RIGHT:

The obligation of an employer under the *Act* to re-employ an injured worker only extends to workers employed continuously for at least one year prior to the date of the injury.[11] In order for an injured worker to avail him or herself of this right, the Board must determine that the worker is "medically able to perform the essential duties of the worker's pre-injury employment or is medically able to perform suit-

8. *Ontario Human Rights Code, 1981*, S.O. 1981, c.53; as am. S.O. 1984, c.58, s. 39; and S.O. 1986, c.64, s. 18.

9. *Workers' Compensation Act*, R.S.O. 1980, c.539, as am. by S.O. 1989, c.47.

10. William Black, *Employment Equality: A Systemic Approach*, (Ottawa: University of Ottawa, 1985).

11. *Supra*, note 9 at s. 54(b)(1).

able work."[12] Where the Board has previously determined that an injured worker is able to perform suitable work, the Board can upgrade its assessment of the capacity of the worker and determine that the worker can perform the essential duties of the worker's pre-injury employment.[13]

Once the Board has made the determination that the worker is able to perform the essential duties of the pre-injury employment, or suitable employment, it must notify the employer.[14] The employer, upon receiving the Board's notice that the worker is able to perform the essential duties of the pre-injury employment:

> "shall offer to reinstate the worker in the position held on the date of injury or offer to provide the worker with alternative employment of a nature and at earnings comparable to the worker's employment on that date."[15]

If the Board has determined that the worker cannot perform the essential duties of pre-injury employment, but finds that the worker is medically able to perform suitable work, then on giving the employer notice in accordance with s.s.54b(3), the employer shall:

> "offer the worker the first opportunity to accept suitable employment that may become available with the employer."[16]

Section 54b(6) imposes a duty on the employer to accommodate the "work or the workplace to the needs of the worker", to the extent that the accommodation does not cause the employer undue hardship. This section implicitly requires the Board to consider whether or not the employer can accommodate the needs of the injured worker without undue hardship when determining whether or not the injured worker can perform the essential duties or suitable employment under s.s.54b(2).

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12. *Ibid.* s. 54b(2)(a).

13. *Ibid.* s. 54b(2)(b).

14. *Ibid.* s. 54b(3).

15. *Ibid.* s. 54b(4).

16. *Ibid.* s. 54b(5).

In addition to the requirement that the worker be employed continuously for one year prior to the date of injury, the reinstatement provisions only apply during a time limited period, up to a maximum of two years after the date of injury to the worker.[17] Further, the reinstatement provisions do not apply in respect of employers who employ regularly fewer than 20 workers;[18] classes of employers and workers as exempted by regulations;[19] and do not displace the seniority provisions of a collective agreement.[20] For employers engaged in the construction industry, they are only required to re-employ workers who perform construction work as prescribed by regulations.[21]

Under the reinstatement provisions, an employer will be presumed not to have fulfilled the employer's obligations if the worker is terminated within six months of reinstatement.[22] In addition, a worker may apply to the Board for a determination of whether the employer has fulfilled the employer's obligations to the worker under s.54b.[23] On finding that the employer has not fulfilled its obligations, the Board may:

> "(a) levy a penalty on the employer of a maximum of the amount of the worker's net average earnings for the year preceding the injury; and
>
> (b) make payments to the worker for a maximum of one year as if the worker were entitled to compensation under section 40, and subsection 40 (2) and (3) apply to the payments with such modifications as the circumstances may require."[24]

In the interim policy guidelines released by the Board, pending the enactment of regulations, it has attempted to address a variety of issues that arise out of the reinstatement provisions. One critical issue for the successful application of s.54b is the interpretation of 'the duty to accommodate and undue hardship'.

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17. *Ibid.* s. 54b(8).
18. *Ibid.* s. 54b(16)(a).
19. *Ibid.* s. 54b(16)(b).
20. *Ibid.* s. 54b(15).
21. *Ibid.* s. 54b(9).
22. *Ibid.* s. 54b(10).
23. *Ibid.* s. 54b(11).
24. *Ibid.* s. 54b(13)(a)(b).

An example of the duty to accommodate may be useful for illustrating how this section can be applied. Ronald White was a clerk with the Liquor Control Board of Ontario. He injured his back while lifting cases of liquor, as he was required to do by his job description. After a period of rehabilitation, Mr. White was ready to return to work, however, there were limits placed on the weights he could lift and the length of time he could be lifting. The employer initially took the position that he had to perform 100% of the functions in his job description. He lodged a complaint with the Human Rights Commission, alleging it was discriminatory that he not be permitted to return to work in "light duties". In essence, he indicated that the 5% of his job which involved heavy lifting should be removed from his job description and additional duties assumed, such as stocking shelves and serving as cashier, substituted in its place. These duties were already included in his job description.

Following three days of hearing, the Board of Inquiry ordered, on consent, that Mr. White be reinstated. The terms of the Order relevant to the issue of job restructuring, one type of accommodation, are as follows:

1. The LCBO shall return Ronald White to work forthwith to his position of "Clerk III" with the LCBO on the basis that:

    (a) the LCBO will not require Mr. White to engage in prolonged heavy lifting nor in prolonged frequent turning and bending during the discharge of his tasks as a Clerk III. More particularly:

        (i) Mr. White shall not be required to participate in the unloading process; and

        (ii) Mr. White is capable of servicing the stock, replenishing display racks and taking cases to the showroom area provided that:

            (a) When he picks up a case he is able to confront the case;

            (b) he is required to lift cases weighing less than 50lbs. from a height above his shoulders, subject to his medical restrictions;

            (c) he is able to transport cases using a buggy; and

            (d) he does not perform this type of work continuously and, when he does perform this work, he

> works at a pace consistent with his disability and medical conditions.

In addition, he was given full compensation, retroactive to the date his doctor decided he had been capable of returning to work.[25]

With respect to the duty to accommodate under s.54b(6), the Board has indicated in its interim guidelines that "the determination of whether an injured worker can perform the essential duties of the pre-injury job, or whether work available with the employer is suitable, will be made in light of any accommodation required to be undertaken by the employer."[26] This approach to the duty to accommodate incorporates the approach to be used under the *Code* for determining whether or not a disabled person is capable of performing the essential duties of a position.[27]

However, s.54b has a slightly different emphasis from the *Code* in that "essential duties" is important for determining whether the worker is reinstated to "pre-injury employment or alternative employment" or "suitable employment that may become available with the employer". If the worker's needs cannot be accommodated without undue hardship with respect to the essential duties of the pre-injury employment, the employer must offer the worker suitable employment that becomes available—only when the employer cannot offer suitable employment because the cost of accommodating the needs of the worker would result in undue hardship, does the worker lose his or her right to reinstatement. In other words, the *Workers' Compensation Act* guarantees an injured worker the right to return to work, unless the cost of making the worker productive would result in an undue hardship.

As for the standard for determining whether or not the accommodation would result in undue hardship, the Board has indicated it will have regard[28] to the guidelines on accommodation produced by the

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25. *White v. Liquor Control Board of Ontario* (August 1985), Order of Frederick Zemans [unreported].

26. Ontario Workers' Compensation Board, *Interim Guidelines on Reinstatement - Accommodation under s. 54b(6)*, (Toronto: Workers' Compensation Board, 1990).

27. *Supra*, note 8 at s. 16.

28. Ontario Workers' Compensation Board, *Interim Guidelines on Reinstatement - Undue Hardship under s. 54(b)(6)*, (Toronto: Workers' Compensation Board, 1990).

Ontario Human Rights Commission.[29] In that the *Act* does not mandate the Board to prescribe standards for assessing what is undue hardship, it would appear that the legislative intent of s.54b(6) is to incorporate into the *Act* the standard for undue hardship under the *Code*. Support for this is found in the remarks made by the Minister of Labour, Gregory Sorbara, before the Standing Committee on Resources Development, and the notes that accompanied his remarks, when introducing amendments to Bill 162. The Minister expressed his view that the standard for undue hardship under the *Act* should be the same as that under the *Code*.[30]

Given the legislative intent under the *Act*, the extent to which employers will be required to reinstate workers will ultimately depend on how the duty to accommodate and undue hardship is interpreted. For that, we must turn to the interpretation of the equivalent sections in the *Code*.

C. THE DUTY TO ACCOMMODATE AND UNDUE HARDSHIP UNDER THE ONTARIO HUMAN RIGHTS CODE

In September 1989, the Ontario Human Rights Commission released its "Guidelines for Assessing Accommodation Requirements for Persons with Disabilities".[31] It is submitted that the approach proposed by the Commission for the interpretation of the duty to accommodate and undue hardship should be adopted by boards of inquiry and the courts as it is entirely consistent with the history and evolution of the *Code*, and the purpose which underlies it.

1. EQUAL OPPORTUNITY AS A PRINCIPLE WHICH UNDERLIES THE CODE

The history and evolution of human rights in Ontario shows that the fundamental purpose which underlies the *Code* is the promotion and

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29. Ontario Human Rights Commission, *Guidelines for Assessing Accommodation Requirements for Persons with Disabilities*, (Toronto: Ministry of Citizenship, 1989).

30. Ontario Ministry of Labour, *Material on Proposed Government Amendments to Bill 162, An Act to Amend the Workers' Compensation Act*, (Toronto: released by the Ministry of Labour May 25, 1990).

31. *Supra*, note 29.

protection of equal opportunity. Equal opportunity is a principle which is concerned with enabling "a person to choose and pursue his or her own goals and purposes in life."[32] In other words, equal opportunity is concerned with "equality of self-definition and self-government, or equality in liberty and autonomy for short."[33] In a decision under the *Canadian Human Rights Act*, the importance of this principle was described in these terms:

> "Equality of opportunity" is a value of a pluralistic society which believes in the inherent or fundamental freedom of all members of society to achieve self-development and self-realization."[34]

In 1982, the protection of the *Code* was extended to persons with disabilities. With this enactment, the provincial government took the first step in recognizing that disabled persons were morally deserving of equal respect and consideration in Ontario society. Following the decision in *O'Malley*,[35] which recognized the concept of adverse impact discrimination and the duty to accommodate under the old *Code*, the next logical step occurred in 1988, when the amendments on accommodation were proclaimed. By prohibiting discriminatory treatment against persons with disabilities, and by requiring that the needs of persons with disabilities be accommodated unless to do so resulted in undue hardship, the *Code* established a framework which has as its intent the removal of barriers that prevent persons with disabilities from achieving self-realization. Without the duty to accommodate, the principle of equal opportunity that the *Code* promotes would have been an empty shell for persons with disabilities.

The inclusion of the duty to accommodate has opened the doors to society for persons with disabilities; the deaf have the right to interpreters at work or closed-captioned videos for entertainment at home,

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32. David Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code*, (Kingston and Montreal: McGill-Queen's University Press, 1986) at 3.

33. *Ibid.* at 3.

34. *Mahon v. Canadian Pacific Limited* (1985), 85 C.L.L.C. 16,201 at 16,205 (Cdn. Human Rights Tribunal), reversed on other grounds (1987), 8 C.H.R.R. D/4263 (Fed. C.A.).

35. *Re Ontario Human Rights Commission et al. v. Simpsons-Sears Limited* (1985), [1986] 23 D.L.R. (4th) 321 (S.C.C.).

the blind can require that print-media be provided to them in accessible form, and wheelchair users have the right to accessible transit. The door has been opened, persons with disabilities are receiving their first tastes of freedom, and becoming aware that just maybe they too can share the same dreams and aspirations of the non-disabled. Unfortunately, it is a fragile freedom—whereas it is now inconceivable that the Berlin Wall will ever be resurrected- persons with disabilities face the prospect that the door to their own society will be shut once again. Whether the door will stay open, or be shut, depends on the interpretation of undue hardship under the *Code*, and whether the vision of equal opportunity that underlies the *Code* is respected.

How our vision of equal opportunity has evolved is critical in determining the approach which should be adopted by courts and tribunals when interpreting the duty to accommodate and undue hardship provisions of the *Code*.

In recent Ontario history there has been a succession of anti-discrimination legislation beginning with the *Racial Discrimination Act*, S.O. 1944, c.51; the *Fair Employment Practices Act*, S.O. 1951, c.24; the *Female Employees Fair Remuneration Act*, S.O. 1951, c.26; the *Fair Accommodation Practices Act*, S.O. 1954, c.28; the *Ontario Anti-Discrimination Commission Act*, S.O. 1958, c.70; and the *Ontario Human Rights Code*, S.O. 1961-62, c.93 which consolidated the previously mentioned statutes.[36]

The legislative intent behind these statutes was to provide that in certain spheres of activity certain people should be free from experiencing certain kinds of discrimination in their dealings with other people. In the Legislative Assembly, Premier Frost stated:

> "It is our belief that, as a people in Ontario, all men, of whatever race, colour or creed, must be accorded equity and the fundamental rights of the human person; equity and respect to man's dignity; equity before the law; and equity in rights of employment."[37]

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36. Also see J. David Baker, "The Changing Norms of Equality in the Supreme Court of Canada", (1987) 9 Supreme Court Law Review 497.

37. Ontario, Legislative Assembly, *Debates* vol.XXIX at A-10 (13 March 1951).

In the early days of anti-discrimination legislation, the discourse was concerned with freedom,[38] which was quite understandable given the desire to implement legislation which would conform with the spirit of the 1948 Universal Declaration of Human Rights, and a reaction to the growth of communism both at home and abroad.[39] However, this discourse should not obscure the realization that these Acts, and in particular the 1962 Code were ultimately concerned with the principle of equal opportunity.

The Minister of Labour, in a speech to the Legislative Assembly confirmed this when he stated:

> "With us in Ontario it has always been a basic principle that everyone should have an equal opportunity to direct his life toward what he thinks will be the most rewarding objectives. The legislation now before us is, I believe, a major step forward in assuring everyone in this province an equal opportunity toward this end."[40]

Anti-discrimination legislation was intended, at that time, to provide for equal opportunity by limiting the impact of attitudinal discrimination, thereby lessening "artificial barriers denying equality of opportunity."[41]

Although limited in scope and application, an important principle can be drawn from these early attempts to deal with discrimination. The purpose of human rights legislation was to enable individuals to participate in society free from restraints which were considered contrary to principles of freedom, dignity, equal opportunity and ultimately democracy.[42] Of particular importance was the notion that persons should have the opportunity to participate in the development of Ontario as a province. Discrimination was not only an affront to per-

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38. *Ibid.* at A-7; and T.M. Eberlee & D.G. Hill, "The Ontario Human Rights Code", (1963-64) 15 U.T.L.J. 448.

39. J.C. Bagnall, *The Ontario Conservatives and the Development of Anti-Discrimination Policy 1944-62*, (Ph.d thesis, Queen's University, 1984) [unpublished], discusses the concerns which contributed to the development of the *Fair Employment Practices Act.*

40. K.W. Warrender, Ontario, Legislative Assembly, *Debates* at 419 (14 December 1961).

41. K.W. Warrender, Ontario, Legislative Assembly, *Debates*, at 554 (22 February 1962).

sonal dignity, but an impediment to the economic well-being of the province.[43]

Speaking in the Legislative Assembly during the debate on the Human Rights Code, Premier Robarts implicitly referred to the link between equal opportunity and the economic and social well-being of the province, when he stated:

> "I would point out to you what we are trying to accomplish with legislation of this type. There are two principal and closely interrelated purposes. The first is to make secure in law the inalienable right of every person, and the second is to create at the local community level in our society a climate of understanding and mutual respect among all our people, so that every person, new Canadian no less than native born, will be afforded the unhampered opportunity to contribute his maximum to the enrichment of our society, of our province and our nation."[44]

Further confirmation that human rights legislation was concerned with the promotion and protection of equality of opportunity is found five years later with the introduction of a bill to prevent discrimination in employment because of age. In introducing this legislation, the Minister of Labour said:

> "One of the principles upon which all the members of this House are united is the importance of assuring to the people of this province the fullest measure of equality of opportunity. This principle has been and is being forwarded in many ways, not the least of which is through the legislation now placed before the House."[45]

Boards of Inquiry have also acknowledged that this purpose underlies human rights legislation.[46] In *Singh v. Security Investigation Services Ltd.*, Chairperson Cumming wrote in his judgment:

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43. Bagnall, *supra*, note 39. Bagnall's main thesis is that anti-discrimination legislation was crucial as one element in a strategy to guarantee Ontario's economic development through the recruitment of non-British immigrants, at a time when there was difficulty in getting skilled immigrants to come to Canada. The parallels with today are striking, one of the primary government justifications for employment equity is so that labour market shortages can be ameliorated by including in the labour market people who have previously been excluded, including persons with disabilities.

44. Ontario, Legislative Assembly, *Debates* at 559 (22 February 1962).

45. H.L. Rowntree, Ontario, Legislative Assembly, *Debates* at 589 (16 February 1966).

46. *Gordon v. Papadropoulos* (May 1968), (Ont. Bd. of Inquiry) [unreported].

> "The policy underlying this legislation is to provide the many religious, racial and ethnic groups of Ontario, a culturally plural society, with both equality of respect and equality of opportunity."[47]

The *Ontario Human Rights Code, 1981* expressly incorporated the concept of equal opportunity into the *Code*. The preamble to the *Code* contains the following statement of policy:

> "WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;
>
> AND WHEREAS it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province;
>
> AND WHEREAS these principles have been confirmed in Ontario by a number of enactments of the Legislature and it is desirable to revise and extend the protection of human rights legislation in Ontario..."[48]

The legislative history, and legal interpretation, of early anti-discrimination initiatives shows unequivocally that human rights legislation has as its purpose the elimination of certain types of discriminatory barriers that restrict or deny equality of opportunity.

In addition, recognition must be given to the changes that have occurred with respect to our understanding of the barriers that face persons who aspire to equal opportunity. As far back as 1961, it was acknowledged in Ontario that "new needs" may become apparent requiring changes in the *Code*.[49] Indeed, from 1961 up until, and including the overhaul of the *Code* in 1981, the grounds of protection were extended from race, creed, colour, nationality, ancestry or place

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47. *Singh v. Security Investigation Services Ltd.* (1977), at 17 (Ont. Bd. of Inquiry) [unreported].

48. *Supra*, note 8.

49. Ontario, Legislative Assembly, *Debates* at 419 (14 December 1961).

of origin, to include ethnic origin, citizenship, sex, age, marital status, family status, handicap, receipt of public assistance and record of offenses. Further, when one examines the activities to which protection of the *Code* is extended, it is clear that they are linked to the premise of equal opportunity. By prohibiting discrimination in the provision of services, goods and facilities;[50] the occupancy of accommodation;[51] the right to contract on equal terms;[52] employment;[53] and membership in trade unions, trade or occupational associations and self-governing professions[54] the Code seeks to ensure that all individuals have the equal opportunity to participate in society's most important activities.

It is clear that our approach to promoting and protecting equal opportunity has evolved based on the needs of groups which face barriers to participation in society, and who are disadvantaged as a consequence of those barriers. This evolution is further manifested in the development which other concepts contained in the *Code* have undergone.

In part one of the *Code* individuals have "the right to equal treatment without discrimination."[55] As part of the evolution to a more sensitive protection from discriminatory barriers, the symbolic and legal meaning of "the right to equal treatment without discrimination", is significant. In the first decision under the 1981 *Code*, Chairperson Cumming stated that the new *Code* "emphasizes affirmatively the rights of the individual, rather than simply implicitly affirming such rights by prohibiting the conduct of the discriminator."[56] Such an approach to human rights is consistent with a legislative scheme that is more concerned with the impact of the discrimination on its victims, than punishing the discriminators,[57] in other words promoting the objective of achieving equal opportunity over the punishment of people who deny it.

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50. *Supra*, note 8 at s. 1.

51. *Ibid.* at s. 2.

52. *Ibid.* at s. 3.

53. *Ibid.* at s. 4.

54. *Ibid.* at s. 5.

55. *Ibid.* at ss. 1-5.

56. *Cameron v. Nel-Gor Castle Nursing Home* (1984), 5 C.H.R.R. D/2170 at 2174 (Ont. Bd. of Inquiry).

57. *Supra*, note 35 at 329.

The significance of this language is further enhanced by the recognition in Canada that equal treatment does not always mean identical treatment. It may also mean different treatment.[58] Indeed, the concept of the duty to accommodate is based on this premise,[59] for it is now recognized that identical treatment can result in serious inequality.[60] This language, and its interpretation by the courts, represents a rejection of the formal norm of equality, a norm associated with the concept of identical treatment.[61] It confirms that the 1981 *Code* is primarily concerned with the removal of barriers that prevent a substantive realization of the equal opportunity to participate in the community.

This approach to equal opportunity, and by extension the requirement that the needs of persons with disabilities be accommodated, including allocating resources of advantaged members of society for that purpose, finds support from an article, "Justice and Equality",[62] by Gregory Vlastos. After elaborating on his example of the visitor from Mars who questions the distribution of police resources that are allocated to X who is threatened by Murder, Inc. Vlastos writes:

> "So we can see why the distribution according to personal need, far from conflicting with the equality of distribution required by a human right, is so linked with its very meaning that under ideal conditions equality of right would coincide with distribution according to personal need. Our visitor misunderstood the sudden mobilization of New York policemen in favour of Mr. X, because he failed to understand that it is benefits to persons, not allocation of resources as such, that are meant to be made equal; for then he would have seen at once that unequal distribution of resources would be required to equalize benefits in cases of unequal need. But if he saw this he might then ask, 'But why do you want this sort of equality?' My answer would have to be: Because the human worth of all persons is equal, however unequal may be their merit."[63]

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58. *Andrews v. Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1 (S.C.C.) at 13; *R. v. Big M Drug Mart Ltd.*, [1985] 18 D.L.R. (4th) 321 at 347.

59. Supra, note 5 at 3.

60. *Supra*, note 58 at 10.

61. *Supra*, note 36 at p.501.

62. G. Vlastos, *Justice and Equality*, in R. Brandt, ed., *Social Justice*, (N.J.: Prentice Hall, 1962) at 31.

63. *Ibid.* at 42-43.

Differential treatment for persons with disabilities, by accommodating their needs, is nothing more than an allocation of resources intended to ensure that persons with disabilities have the equal benefit of equal opportunity. By imposing a duty to accommodate persons with disabilities under the *Act* and the *Code*, the legislature has decided that employers, service providers and landlords have the primary responsibility for ensuring that persons with disabilities enjoy the equal benefit of equal opportunity.

It should be stated that if employers, service providers and landlords were cognizant of the exclusionary impact of their decision-making, many of the barriers that face persons with disabilities could be eliminated through inclusive planning which focuses on accessibility for all. True equality will not be achieved by removing barriers that are constantly being created, rather it will be achieved when the barriers are not built in the first place.

The evolution in the concept of discrimination takes this protection even further—no longer does human rights legislation only protect people from direct discrimination, it is equally concerned with actions which have an unintended effect. As Mr. Justice McIntyre noted in *Andrews*:

> "discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or 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."[64]

The concepts contained within human rights legislation, such as the right to equal treatment and the meaning of discrimination, have evolved. They do so in response to the changes in our conception of equal opportunity and desire to remove barriers that prevent people from fully participating in the community. The interpretation of these concepts should not dictate the vision of equal opportunity being promoted by the *Code*; on the contrary, their interpretation should reflect the principles and purpose which underlies it. Similarly, the interpretation of the duty to accommodate and undue hardship should not

64. *Andrews*, *supra*, note 58 at 18.

determine the vision of equal opportunity. Both concepts must be interpreted in accordance with the purpose of the legislation which is to maximize the promotion and protection of equal opportunity.

By identifying the promotion and protection of equal opportunity as the fundamental purpose which underlies human rights legislation, it clarifies the context within which human rights legislation should be interpreted. The Supreme Court of Canada has adopted this approach in its leading decision on the interpretation of human rights legislation.[65] Mr. Justice McIntyre describes it as follows:

> "To begin with, we must consider the nature and purpose of human rights legislation. The preamble to the Ontario Human Rights Code provides the guide and is worth quoting in full... There we find enunciated the broad policy of the Code and it is this policy which should have effect. It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the court to recognize in the construction of a human rights code the special nature and purpose of the enactment... and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than ordinary— and it is for the courts to seek out its purpose and give it effect."[66]

The Supreme Court of Canada has provided clear direction for interpreting the provisions of the *Code*. Boards of Inquiry and the courts should seek to give liberal effect to the meaning of the *Code* by ensuring that the substantive provisions are interpreted in a manner which maximizes the promotion of equality of opportunity to participate, while minimizing the impact of the limitations and exemptions to this principle that exist within the *Code*. Only by extending this approach to the interpretation of the duty to accommodate and undue hardship will persons with disabilities have the equal benefit of equal opportunity.

2. THE DUTY TO ACCOMMODATE AND UNDUE HARDSHIP

Prior to the amendments to the *Code*, the Supreme Court of Canada had held in *O'Malley*, that a duty to accommodate did exist under the *Code*. Mr Justice McIntyre stated:

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65. *Supra*, note 35.

66. *Ibid. at 328-329.*

> "Accepting the proposition that there is a duty to accommodate imposed on the employer, it becomes necessary to put some realistic limit upon it. 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, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer."[67]

The decision in *O'Malley* was a significant milestone for human rights legislation in Ontario. Not only did it incorporate an adverse impact analysis into the concept of discrimination, but it recognized that the duty to accommodate existed in human rights legislation. Despite its significance, it must be stated unequivocally that the approach to the duty to accommodate and undue hardship outlined by Mr. Justice McIntyre is no longer valid in Ontario.

In 1986, after the Supreme Court's decision, the Ontario Legislature amended the *Code*. A legislated duty to accommodate persons with disabilities was made explicit. Section 16(1a) reads as follows:

> "(1a) 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."

A comparable objective is contained in section 10(2) covering cases of constructive discrimination.

Section 16(1a) contains three factors which are to be considered in assessing whether an accommodation would result in undue hardship: a) the cost of the accommodation; b) outside sources of funding for the accommodation; and c) health and safety requirements.

By specifying the factors to be considered in determining whether an accommodation could be made without undue hardship, the Ontario Legislature rejected two elements contained in Mr. Justice McIntyre's test. First, the Legislature did not use the language of "reasonable accommodation", language which up until that time was widely used. In its place, it substituted the concept of "accommodation without

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67. *Ibid.* at 335.

undue hardship". This language is absolute -the only justification for not making an accommodation is when to do so would result in an undue hardship. The balancing of interests under the *Code* is decisively tilted in favour of complainants by this language, the result being that the interests of the respondent need only be considered when an undue hardship results. This is entirely consistent with the *Code*'s purpose of ameliorating conditions of disadvantagement, even when doing so imposes burdens on advantaged members of society.[68]

Secondly, after intense debate, and with the support of all parties in the legislature, the inclusion of "business inconvenience" as a ground for determining undue hardship was removed.[69] The change was intended to significantly increase the obligation placed on respondents. As such, undue interference in the employer's business or business inconvenience should not be considered a factor in determining undue hardship.

To-date, there are no reported decisions based on this section. However, to provide guidance to service providers, landlords and employers, as well as to persons with disabilities, the Ontario Human Rights Commission decided that it would issue guidelines containing its interpretation of the duty to accommodate and undue hardship.

In developing its interpretation of this section, the Commission engaged in extensive consultation with business, labour and community groups. The product of this consultation was the Commission's guidelines. The guidelines contain nine sections which encompass such issues as: standards for accommodation;[70] standards for assessing undue hardship;[71] respecting the dignity of persons with disabilities;[72] and demonstrating undue hardship.[73]

The guidelines contain a coherent framework for determining whether an accommodation could be made without undue hardship. Persons

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68. *Supra*, note 8 at s. 13.

69. Ontario, Legislative Assembly, *Debates* at pp.4060-4 (9 December 1986).

70. *Supra*, note 29 at 5.

71. *Ibid.* at 7-15.

72. *Ibid.* at 16-17.

73. *Ibid.* at 18-19.

with disabilities are to be accommodated in a manner which respects their dignity, maximizes their integration and promotes their full participation in society.[74] The scope of this duty to accommodate is limited only to the degree that the accommodation would result in an undue hardship either because of cost[75] or for health and safety reasons.[76] In addition, the respondent must establish that the needs of the person with a disability cannot be accommodated by alternative means where on first analysis the accommodation would result in an undue hardship.[77]

To establish that the cost of the accommodation would result in an undue hardship, the respondent must show that the costs of the accommodation "would alter the essential nature or would substantially affect the viability of the enterprise responsible"[78] for the accommodation. With respect to undue hardship because of health and safety requirements, the respondent must show that "the degree of risk which remains after the accommodation has been made outweighs the benefit of enhancing equality for disabled persons."[79]

It is submitted that the Commission's interpretation of the cost standard should be adopted by boards of inquiry and the courts. It is the only standard which is consistent with the legislative purpose that underlies the *Code*: the promotion and protection of equal opportunity. To achieve this objective, the duty to accommodate recognizes that advantaged members of society have to bear the full cost of providing accommodation so to assist disadvantaged persons or groups in achieving equal opportunity. How these advantaged members pay for the cost is not an issue, although the Commission recognizes the array of options available in the private sector for financing more costly accommodations. The limitation on this principle is where it would alter the essential nature or substantially affect the viability of the

74. *Ibid.* at 5.

75. *Ibid.* at 8.

76. *Ibid.* at 12.

77. *Ibid.* at 16-17.

78. *Ibid.* at 8.

79. *Ibid.* at 12.

enterprise. Any standard less than this would be to ignore the *Code*'s purpose and its legislative framework.

The second standard which has to be met relates to health and safety requirements. The interaction between health and safety requirements and human rights legislation continues to be problematic for persons with disabilities. The standard proposed by the Commission is that undue hardship will be shown to exist where the degree of risk which remains after the accommodation outweighs the benefits of enhancing equal opportunity. As with the cost standard, the standard proposed by the Commission is consistent with principles of equal opportunity.

It should be stated that in determining whether or not an undue hardship will exist because of health and safety considerations, recognition should be given to the concept of "dignity of risk." This concept allows disabled persons to decide whether or not they wish to assume health and safety risks that they alone face. As part of the concept, employers should be required to explain any potential risk to the disabled person that would arise due to the employment of the disabled person, and allow that person to decide if he or she will assume the risk.[80] Clearly, this is a concept which also allows disabled persons to refuse to accept a position when they do not want to assume a higher risk to their health and safety than faced by coworkers. In the context of reinstatement under the *Act*, injured workers should not be forced to accept reinstatement to a position when they believe that an accommodation (which has not been made) is required to ensure that they face no higher risk of injury than other workers, or where no accommodation is possible that will alleviate the risk.

Through its guidelines, the Commission has provided an interpretation of the duty to accommodate and undue hardship which will facilitate persons with disabilities being able to choose and pursue their own goals and purposes in life, thereby enabling them to have the equal benefit of equal opportunity. To accomplish this objective, the Legislature decided that the cost for achieving equal opportunity would be borne by respondents, unless it would result in an undue hardship. Consistent with the framework of the *Code* to promote the amelioration of disadvantagement, the standard for undue hardship recognizes that in situations where an accommodation is required,

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80. *Ibid.* at 13.

advantaged members of society will have to bear the cost of the accommodation.

The purpose of this approach is to allow persons with disabilities to become autonomous, having a choice as to where they can work or shop, or the form of entertainment they engage in, the type of education they can receive or to travel to places that have been inaccessible. It allows persons with disabilities to experience what advantaged members of society take for granted and will enable persons with disabilities to choose their own goals and purposes in life. Without this high standard for undue hardship, barriers will remain, and persons with disabilities will continue to be denied the recognition and respect that they morally deserve. A low threshold for establishing undue hardship will close the door to freedom for persons with disabilities.

D. INTERACTION BETWEEN S.54B AND THE ONTARIO HUMAN RIGHTS CODE:

To this point it has been argued that the interpretation of undue hardship under the *Act* should be the same as the interpretation under the *Code*, and the standard to be adopted should be that proposed by the Ontario Human Rights Commission in its guidelines on accommodation and undue hardship. Such a standard clearly promotes and protects the right to participate of persons with disabilities, including injured workers.

Through the application of the duty to accommodate, and the Commission's standard on undue hardship, employers will be required to provide at minimum the following types of accommodation: a) human support services such as attendant care, readers for the blind and interpreters for the deaf; b) communication services such as converting print to braille or enlarged print; c) technical aids and devices; d) workstation and building modifications; e) job restructuring of not only the disabled worker's position but also co-workers; and f) the modification of employment policies and practices.

Given the broad range of accommodation that is required, and the high standard for showing undue hardship, it should be the rare case when the Board determines that the needs of the worker cannot be accommodated and that he or she is unable to perform the pre-injury or suitable employment. Board officials should be actively involved in monitoring the worker's rehabilitation, recommending modifications to the work or worksite and determining in the first instance when a

worker has a right to be reinstated. In addition, when the cost of an accommodation would result in an undue hardship, the Board should offer to pay for part of the cost of the accommodation.

However, one possible limitation may arise with respect to suitable employment, depending on whether it is given a broad or narrow interpretation. In its interim policy guidelines the Board states: "suitable employment is any job which the worker has the necessary skills to perform, is medically able to perform and which does not pose a health or safety hazard to the worker or fellow workers."[81] The Board has indicated that for the purposes of determining whether the worker has the skills for the suitable employment, the vocational and educational history of the worker should be considered.

Clearly, the issue arises as to who will be responsible for the vocational rehabilitation of the injured worker so that he or she can perform the duties of suitable employment. Without proper skills and training, it is unlikely that reinstatement in suitable employment will be successful. Under the *Act*, if the worker is receiving or has received s.40 benefits, the Board must offer a vocational rehabilitation assessment and where necessary provide vocational rehabilitation. Where it is determined that the worker cannot perform the essential duties of the pre-injury employment, the Board should analyze other positions available within the employer's workforce of comparable pay and provide the worker with appropriate training. The Board must ensure that injured workers have the opportunity to be fully productive. The right to reinstatement with respect to suitable employment should include a duty on the employer to restructure a position around the disabled worker, unless the employer can show that the worker would not be productive in any capacity. Without this requirement, the suitable employment provision will not be given its full effect.

Despite the high standard that should be applied for interpreting the duty to accommodate and undue hardship, several flaws exist with respect to the process by which injured workers can protect their right to work under both statutes. It is ironic that the Board, which is ideally suited by its mandate, and resources available to it, to ensure the

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81. Ontario Workers' Compensation Board, *Interim Guidelines on Reinstatement – Suitable Employment*, (Toronto: Workers' Compensation Board, 1990).

82. *Supra*, note 24.

speedy reinstatement of injured workers, does not have the authority to order reinstatement under s.54b. The Board can only financially penalize the employer, a penalty which may be modest at best.[82] In effect, the injured worker's right to reinstatement under the *Act* may be determined solely by whether it is cheaper for the employer to refuse to reinstate than make the accommodation, without any regard for the worker's sense of dignity and self-worth.

Mandatory reinstatement is only available under the *Code*,[83] and unfortunately this process is slow. The Commission's current complaint backlog makes speedy resolution possible only in cases where conciliation results in a settlement. It seems improbable that cases brought by injured workers to the Commission will be settled quickly; if the employer has refused to reinstate under the *Act*, rejected mediation and been penalized by the Board, it is hard to envisage an employer settling a complaint. Given that it can take several years before a case goes before a Board of Inquiry, the actual protection available to injured workers under both the *Act* and the *Code* may not be satisfactory.

Despite these flaws, on first being denied reinstatement the injured worker would be well advised to make an application to the Board as well as a complaint to the Commission. Under the *Code*, such a complaint would not be dismissed unless the legal issue to be determined is precisely the same as under the *Act*,[84] unlikely in that the *Code* is solely concerned with whether discrimination has occurred and s.54b is only concerned with whether the injured worker should be reinstated. In fact, the possibility of dual complaints appears to have been contemplated by the government when it used different language to define the capacity test, established rigid time frames in the *Act* and left a broader range of remedies under the *Code*. Further, by pursuing a remedy under both the *Act* and the *Code* the injured worker is more likely to be fully compensated for any damages experienced as a result of the refusal to reinstate.

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83. Under s. 40(1)(a) of the *Code*, *supra*, note 8, a Board of Inquiry has the power to order the hiring or reinstatement of a complainant who has been discriminated against.

84. *Ambro Holdings v. Purcell* (1986), (Ont. Div. Ct.)[unreported decision]; *Re Metropolitan Commissioners of Police and Ontario Human Rights Commission* (1979), 27 O.R. (2d) 48 (Div.Ct.); and *Burke v. Canadian Human Rights Commission* (1988), 9 C.H.R.R. D/4824 (Fed. C.A.).

In addition, in some instances the *Code* will be the only protection available to an injured worker. One distinction of note between the two pieces of legislation is the contrasting degree of paramountcy to be accorded the obligation to accommodate. A disabled person cannot contract out of his/her rights under either piece of legislation. Nevertheless, the reinstatement rights contained in section 54b of the *Act* are expressly subordinated to the seniority provisions of collective agreements. Human rights legislation, on the other hand, has been found to be "quasi-constitutional"[85] and to be paramount not only to private agreements (e.g., collective agreements) but also other pieces of legislation which do not specifically indicate a contrary intention.

While the *Act* represents a first attempt to respond to the position of disadvantage that many injured workers find themselves in, and incorporates the concept of duty to accommodate and undue hardship from human rights legislation, the *Act* relies primarily on the goodwill of employers in order for the injured worker to be reinstated. To overcome this flaw, and strengthen the effectiveness of the legislation, the Board and Commission should explore working together. To begin with the Board must apply the standard for undue hardship proposed by the Commission. Secondly, the Commission should notify employers that failure to reinstate injured workers after being given notice by the Board that the injured worker is able to return to work, and upon the filing of a complaint by the injured worker or the Board, will result in a fast-track investigation by the Commission and the appointment of a Board of Inquiry if no settlement is agreed upon. Thirdly, and perhaps most importantly, boards of inquiry and the courts must interpret the duty to accommodate and undue hardship in a manner which is consistent with the broad policy purposes that underlie the *Code*, and should apply the standard developed by the Commission in its guidelines.

E. CONCLUSION:

Clearly, with its recent initiatives in the area of workers' compensation and human rights legislation, the Ontario government has decided that as a matter of policy there are many disabled people who are capable of working but currently lack the opportunity. Further support

85. *Winnipeg School Division No.1 v. Craton*, [1985] 2 S.C.R. 150.

for this is bolstered by reforms in the area of social assistance,[86] where the major thrust of the reform is to ensure that disabled people are better off working than on welfare.

Through its initiatives in the area of human rights and workers' compensation legislation, the province has decided that employers have the primary obligation for ensuring that persons with disabilities enjoy the equal benefit of equal opportunity in employment. By establishing a high standard for the duty to accommodate and undue hardship, the Commission is trying to ensure that this commitment to equal opportunity becomes a reality.

Unfortunately, the process for achieving equal opportunity through human rights legislation is haphazard, and it is not clear whether courts will be willing to recognize the legitimate claims of disabled persons to equal opportunity and require respondents to allocate the level of resources that will be required in certain situations in order to accommodate the needs of persons with disabilities.

To address the inequalities that exist in employment, and to guarantee persons with disabilities the equal opportunity to participate, legislation is required that addresses the systemic barriers that exist in education and employment. Mandatory employment equity legislation which establishes goals and timetables for the hiring of persons with disabilities, and stringent penalties for failure to comply, is the only way to redress the position of disadvantage that is experienced by most persons with disabilities.[87] Similarly, legislation in the area of education and skills development should be passed which would require that organizations remove the barriers that prevent persons with disabilities from participating in these programs.

Employment equity legislation provides a coherent and systematic method for removing the barriers that deny persons with disabilities the equal opportunity to participate. Such legislation is a logical extension of the policy direction represented by the *Act* and the *Code* because:

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86. For example, the Ministry of Community and Social Services has introduced a program designed to make it easier for social assistance recipients to be part of the workforce. See Ontario, Ministry of Community and Social Services, *Supports to Employment Program.*

87. *Supra*, note 5; also see Cathy Walker, "The Employment Rights of People with Disabilities", (1990) 20 Rehabilitation Digest 14.

i) it ensures the fair distribution amongst competitors of the obligation to accommodate;

ii) it encourages employers to act proactively to use scarce resources to remove systemic barriers which exclude large groups of disabled people, rather than reactively in response to expensive and adversarial litigation for individual cases;

iii) it rewards the kind of progressive recruitment and flexible management which will not only ensure improved job opportunities for disabled people, but will maximize their productivity and safety.[88]

By adopting employment equity legislation, many of the deficiencies that arise out of the *Act* and the *Code* will be resolved.

88. See generally, J. David Baker, *Anticipating the Next Generation of Equality Issues in Employment for Disabled People in Canada*, in *Human Rights in Canada into the 1990's and Beyond*, (Ottawa, University of Ottawa, forthcoming).