

**CONSULTATION**  
**ON**  
**UNDUE HARDSHIP STANDARD AND VOLUNTARY ASSUMPTION OF RISK**

**Purpose of consultation**

The purpose of this consultation is to solicit your views on revisions to the *Guidelines on Assessing Accommodation Requirements for Persons with Disabilities*. There are two substantive issues that are being considered for revision at this time. As well, the Commission is seeking your input as to any issues that should be addressed in the *Guidelines*.

**1. The Undue Hardship Standard**

The first issue involves the standard of undue hardship as interpreted by the *Guidelines*. To constitute undue hardship, the Commission is of the view that either the accommodation would have to alter the essential nature of the enterprise or would substantially affect its viability. This standard was reached following consultation with the various community groups and individuals in the preparation of the 1989 *Guidelines*.

A 1993 Board of Inquiry decision in *Barber v. Sears Canada* (1993) 22 C.H.R.R. D/409, at par. 37 stated that the *Guidelines* "set an even higher standard and one which goes beyond that of the *Code*." No court has as yet specifically endorsed the *Guidelines*' standard for undue hardship.

On the other hand, the 1993 Supreme Court decision in *Eldridge* did set out some clear obligations in the area of what constitutes "undue hardship".

*The obligation to make reasonable accommodation for those adversely affected by a facially neutral policy or rule extends only to the point of "undue hardship"; see Simpsons-Sears, supra, and Central Alberta Dairy Pool, supra. In my view, in s. 15(1) cases this principle is best addressed as a component of the s. 1 analysis. Reasonable accommodation, in this context, is generally equivalent to the concept of "reasonable limits"[in a s.1 analysis].*

These decisions could influence the interpretation of similar cases under the *Code*.

The Commission has the following options:

- i) The Commission could continue to apply the current interpretation of undue hardship;
- ii) The Commission could revise its Guidelines to reflect the "reasonableness" standard set out in *Eldridge*.

**Question 1:**

***Which of the above options would you support and can you tell us why?  
Is there another option or analysis that you would support?***

## **2. Voluntary assumption of risk**

The second significant policy issue relates to the voluntary assumption of risk.

The *Code* provides that there are three factors that may be considered in determining whether an undue hardship defense is available: (1) cost (2) outside sources of funding and (3) health and safety. There is no "carve out" or exception for health or safety considerations when the health or safety danger is limited to the person with a disability himself or herself.

The *Guidelines*, on the other hand, prohibit the consideration of health and safety risks when those risks are limited to the person with a disability. The *Guidelines* indicate that the employer, housing provider or service provider must explain the potential risk to the individual and allow the person to decide if he or she will assume that risk. If the individual is prepared to assume the risk, the person responsible for making the accommodation cannot claim undue hardship.

The Commission has the following options:

- i) The Commission could apply an interpretation the *Code* that would provide an undue hardship defence for health or safety considerations even when the danger is limited to the person with a disability himself or herself. For this to apply, the risk or increase in risk would have to be significant, demonstrable and quantifiable.
- ii) The Commission could continue to apply the *Guidelines* as they now read *i.e.* when the individual is prepared to assume the risk, the accommodation must be provided. Under this option, the employer would allow the individual to assume the risk, regardless of its extent.

**Question 2:**

***Which of the above options would you support and can you tell us why? Is there another approach that you would prefer?***

**3. General Comments**

**Question 3:**

***Do you have any other comments about the Guidelines or recent developments in disability issues that you would like to bring to the attention of the Commission?***

The Commission is interested in receiving your response by letter, e-mail or telephone interview and I look forward to hearing from you by **May 25<sup>th</sup>, 1999**.

The *Guidelines* are attached for your perusal.

Thank you for your participation.

Maria Williams  
Policy Analyst  
Policy and Education Branch  
Tel. 416-314-4528  
Fax: 416-314-4533  
e-mail: maria.williams@ohrc.on.ca