

2. What is disability?

Defining disability is a complex, evolving matter. The term “disability” covers a broad range and degree of conditions. A disability may have been present at birth, caused by an accident, or developed over time. Section 10 of the *Code* defines “disability” as:

1. any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
2. a condition of mental impairment or a developmental disability,
3. a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
4. a mental disorder, or
5. an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*.

“Disability” should be interpreted in broad terms.^[17] It includes both present and past conditions, as well as a subjective component, namely, one based on perception of disability.^[18] It is the OHRC’s position that anticipated disabilities are also covered by the *Code*.^[19] This would apply where a person does not currently have a disability, but they are treated adversely because of a perception that they will eventually develop a disability, become a burden, pose a risk, and/or require accommodation.^[20] The focus should always be on the current abilities of a person and the situation’s current risks rather than on limitations or risks that may or may not arise in the future.^[21]

Although sections 10(a) to (e) of the *Code* set out various types of conditions, it is clear that they are merely illustrative and not exhaustive. It is also a principle of human rights law that the *Code* be given a broad, purposive and contextual interpretation to advance the goal of eliminating discrimination.

A disability may be the result of combinations of impairments and environmental barriers, such as attitudinal barriers, inaccessible information, an inaccessible built environment or other barriers that affect people’s full participation in society.

The United Nations’ *Convention on the Rights of Persons with Disabilities (CRPD)* recognizes that “disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.”^[22]

This approach, often called the “social approach” to disability, or the “social model” of disability^[23], is also reflected in Supreme Court of Canada decisions. In a landmark human rights case, the Court used an equality-based framework of disability that took into account evolving biomedical, social and technological developments, and emphasized human dignity, respect and the right to equality. The Court made it clear that disability must be interpreted to include its subjective component, as discrimination may be based as much on perceptions, myths and stereotypes, as on the existence of actual functional limitations. The Court said:

[A] “handicap” may be the result of a physical limitation, an ailment, a social construct, a perceived limitation, or a combination of all these factors.

Indeed, it is the combined effect of all these circumstances that determines whether the individual has a “handicap” for the purposes of the *Charter*.^[24]

The focus should be on the effects of the distinction, preference or exclusion experienced by the person. In another case,^[25] the Supreme Court of Canada confirmed that “social handicapping,” that is, society’s response to a real or perceived disability, should be the focus of the discrimination analysis.

Example: A human rights tribunal found that a person with multiple physical disabilities was discriminated against when she was denied a first-floor apartment that would have accommodated her. Her physical disability prevented her from cleaning and maintaining her apartment. Her landlord assumed that this was due to mental health issues and that the building was not appropriate for her because of her physical and perceived mental health issues. He thought that she should instead live in a long-term care home. The HRTTO rejected this assumption and said that the landlord imposed a “socially constructed” disability on her.^[26]

The social model of disability articulated by the Supreme Court of Canada has been followed in many appellate court^[27] and HRTTO decisions.

^[28]Disabilities may be temporary,^[29] sporadic or permanent.

Example: In one case, the HRTTO stated, “I...disagree with the assertion that in order to constitute a disability, the condition must have an aspect of permanence and persistence.” In that case, the HRTTO found that injuries resulting from a slip and fall that took almost three weeks to heal, and a miscarriage, both constituted disabilities within the meaning of the *Code*.^[30]

In many cases, they may not be visible to the average onlooker. People's experience of disability may result from bodily or mental impairments, or from limitations arising from impairments that affect people's ability to function in certain areas of living.^[31] However, people may not experience any limitations even when they have a medical diagnosis or experience impairment.^[32]

Human rights decision-makers and organizations should consider how people with disabilities define their own experiences and related needs, as part of understanding someone's disability for the purposes of the *Code*.^[33] At the same time, when determining if someone has had their rights violated under the *Code*, a human rights decision-maker may find it reasonable for an employer, service or housing provider to seek out objective information about the person's disability-related needs. This could include information setting out the person's needs and limitations from a third party, such as a medical professional.^[34]

2.1 Ableism, negative attitudes, stereotypes and stigma

An "ableist" belief system often underlies negative attitudes, stereotypes and stigma toward people with disabilities. "Ableism" refers to attitudes in society that devalue and limit the potential of persons with disabilities. According to the Law Commission of Ontario:

[Ableism] may be defined as a belief system, analogous to racism, sexism or ageism, that sees persons with disabilities as being less worthy of respect and consideration, less able to contribute and participate, or of less inherent value than others. Ableism may be conscious or unconscious, and may be embedded in institutions, systems or the broader culture of a society. It can limit the opportunities of persons with disabilities and reduce their inclusion in the life of their communities.^[35]

Ableist attitudes are often premised on the view that disability is an "anomaly to normalcy," rather than an inherent and expected variation in the human condition.^[36] Many in the disability rights movement have pointed out that people without disabilities are merely "temporarily able-bodied." As one author writes,

...[E]veryone is subject to the gradually disabling process of aging. The fact that we will all become disabled if we live long enough is a reality many people who consider themselves able-bodied are reluctant to admit.^[37]

The view that disability is an abnormality has been used to rationalize the exclusion, neglect, abuse and exploitation of people with disabilities in various different contexts. It may also inform paternalistic and patronizing behaviour toward people with disabilities.^[38]

Discrimination against people with disabilities is often linked to prejudicial attitudes,^[39] negative stereotyping,^[40] and the overall stigma^[41] surrounding disability. All of these concepts are interrelated. For example, stereotyping, prejudice and stigma can lead to discrimination. The stigma surrounding disability can also be an effect of discrimination, ignorance, stereotyping and prejudice.

In its own consultations with people with disabilities, the Law Commission of Ontario reported:

...many participants talked about the suspicion and often contempt with which persons with disabilities are treated when seeking services and supports. Services which are designed to assist persons with disabilities in meeting their basic needs or improving their autonomy, independence and participation may in practice be implemented through an adversarial mindset, which assumes that those seeking services are attempting "to game" the system, or obtain benefits to which they are not entitled. This is particularly the case for persons with disabilities who are also poor.^[42]

People with disabilities may also be stereotyped as "child-like" and unable to make decisions in their own best interests, or perceived to be a "burden" on society. Where stigma, negative attitudes and stereotyping result in discrimination, they will contravene the *Code*.

Example: In one case, a human rights tribunal found that the respondents willfully and recklessly discriminated against a woman who was blind when they cancelled an apartment viewing without notifying her, later refused to let her enter the unit, and generally treated her rudely. The tribunal found that the respondents discouraged the woman from renting the apartment, after learning she was blind and had a guide dog, and told her the area was "unsafe" for her.^[43]

Organizations have a legal obligation under the *Code* to not discriminate against people with disabilities, and to eliminate discrimination when it happens. These obligations apply in situations where discrimination is direct and the result of a person's internal stereotypes or prejudices. They also apply when discrimination is indirect and may exist within and across institutions because of laws, policies and unconscious practices.

Stigma, negative attitudes and stereotypes can lead to inaccurate assessments of people's personal characteristics. They may also lead institutions to develop policies, procedures and decision-making practices that exclude or marginalize people with disabilities.

Example: After coming back from a disability-related leave, an employee returned to modified duties. Even though his doctor cleared him to go back to work full-time, his employer placed him in a lower, part-time position at a lower pay rate. He was eventually terminated from his employment. The HRTO found that the employer violated the *Code* when it decided to place the employee in a lower-paying position based on its belief about his ability to perform in the workplace, and continued to refuse to provide full-time work, even though full-time work was

supported by his doctor. The employer relied on “non-expert opinion” and “stereotypes.” It incorrectly relied on assumptions that the employee could not withstand the pressures of his job, and that his performance would be unreliable because of his past medical condition.

[44]

Organizations must take steps to make sure that negative attitudes, stereotypes and stigma do not result in discriminatory behaviour toward or treatment of people with disabilities.

2.2 Non-evident disabilities

The nature or degree of disability might render it “non-evident” or invisible to others. Chronic fatigue syndrome and back pain, for example, are not apparent conditions. Other disabilities might remain hidden because they are episodic. Epilepsy is one example. Similarly, environmental sensitivities can flare up from one day to the next, resulting in significant impairment to a person’s health and capacity to function, while at other times, this disability may be entirely non-evident. Sometimes, a person’s disability may be mislabeled and misunderstood.

Example: People who are deaf, deafened or hard of hearing are often misperceived as having mental health disabilities, even where this is not the case. [45]

Other disabilities may become apparent based on the nature of the interaction, such as when there is a need for oral communication with a person who has hearing loss or a speech and language disability, or there is a need for written communication with someone who has a learning disability. A disability might reveal itself over time through extended interaction. It might only become known when a disability accommodation is requested or, simply, the disability might remain “non-evident” because the individual chooses not to divulge it for personal reasons.

Example: A woman with breast cancer chose not to tell her employer of her condition until she was preparing to start treatment and required flexibility in her work schedule to attend medical appointments.

Regardless of whether a disability is evident or non-evident, a great deal of discrimination faced by people with disabilities is underpinned by social constructs of “normality” which in turn tend to reinforce obstacles to integration rather than encourage ways to ensure full participation. Because these disabilities are not “seen,” many of them are not well understood in society. This can lead to behaviour based on misinformation and ignorance.

2.3 Mental health disabilities and addictions

Although mental health disability is a form of non-evident disability, it raises particular issues that merit independent consideration. Section 10 of the *Code* expressly includes mental health disabilities. The courts have confirmed that addictions to drugs or alcohol are protected by the *Code*.

[46] People with mental health disabilities and addictions face a high degree of stigmatization and significant barriers. Stigmatization can foster a climate that exacerbates stress, and may trigger or worsen the person’s condition. It may also mean that someone who has a problem and needs help may not seek it, for fear of being labelled.

The distinct and serious issues faced by people with mental health disabilities and addictions prompted the OHRC to hold a province-wide consultation specifically on discrimination based on mental health. In 2012, the OHRC published its findings in a consultation report entitled *Minds That Matter*.

[47] The OHRC relied on these findings, as well as on developments in the law, international trends and social science research to inform its [Policy on preventing discrimination based on mental health disabilities and addictions](#) (*Mental Health Policy*), which was released in 2014. [48]

The OHRC’s *Mental Health Policy* provides user-friendly guidance to organizations on how to define, assess, handle and resolve human rights issues related to mental health and addiction disabilities. It also addresses:

- different forms of discrimination based on mental health disabilities and addictions
- rights at work, in rental housing, and when receiving services
- organizations’ responsibilities to prevent and eliminate discrimination
- how to create environments that are inclusive and free from discrimination
- how the duty to accommodate applies to people with mental health or addiction disabilities.

For information specifically related to discrimination based on mental health disabilities and addictions, please refer to the OHRC’s *Mental Health Policy*.

2.4 Evolving legal definition of disability

Human rights law is constantly developing, and certain conditions, characteristics or experiences that are disputed as disabilities today may come to be commonly accepted as such due to changes in the law reflecting medical, social or ideological advancements.

Conditions that were questioned in the past have now been accepted as disabilities within the meaning of the *Code*. For example, when the OHRC published its 2001 *Disability Policy*, environmental sensitivities [49] were just beginning to be recognized as a human rights issue. In Ontario, the HRTO

has held in at least one case that environmental sensitivities can be a disability within the meaning of the *Code*.

Example: A woman with multiple chemical sensitivities who was living in a multi-unit apartment building was made ill by exposure to fumes given off by chemicals used in paints and varnishes at the building. As a result, she was prevented from accessing areas where the fumes were present, including her own bedroom. Presenting medical documentation from her doctor, the woman asked her housing provider to accommodate her by using less toxic materials and by granting her a temporary unit transfer, but it refused to do so. The HRTO confirmed that multiple chemical sensitivities are a disability under the *Code*, and found that the housing provider violated the *Code* by failing to provide accommodation.^[50]

Over time, new disabilities may emerge that take time to be widely recognized and well-understood. For example, in recent years, there have been reports of an increase in food-related anaphylaxis.^[51] In Ontario, *Sabrina's Law* came into effect in January 2006.^[52] This legislation requires every school board in Ontario to establish and maintain an anaphylaxis policy. It also requires school principals to develop an individual plan for each student at risk of anaphylaxis.^[53] Human rights case law has recognized that anaphylaxis is a disability under the *Code*.^[54] Therefore, employers, housing providers and service providers (including education providers, daycares, etc.) have a legal responsibility to accommodate people with potentially life threatening allergies, as they would any other person with a disability, to the point of undue hardship.

Example: A school board develops a comprehensive food allergy policy that includes procedures for training staff in dealing safely with food allergies, including how to recognize symptoms of anaphylaxis and respond appropriately to possible emergencies. Local schools are required to hold information sessions for parents and students to raise awareness about life-threatening food allergies and the importance of including all students in school activities, including students with anaphylaxis.

In some cases, the law is still not clear as to whether certain conditions are disabilities within the meaning of the *Code*. For example, historically, human rights decision-makers have found that obesity is not a disability under the *Code* unless it is caused by bodily injury, birth defect or illness.^[55] More recently, however, the HRTO found that extreme obesity can be a disability under the *Code*.^[56] In 2014, the European Court of Justice ruled that morbid obesity can be considered a disability under the Equal Treatment in Employment Directive if the employee is prevented from fully taking part in professional life because of his or her weight.^[57]

It is important to note that even where human rights law has not recognized a specific condition as a disability, the *Code*'s protections will be engaged if a person is perceived to have a disability,^[58] or perceived to have functional limitations as a result.^[59]

Organizations with responsibilities under the *Code* should be aware that new and emerging disabilities may not yet be well-understood. In general, the meaning of disability should be interpreted broadly. It may be more challenging for a person with a less-recognized disability to have their disability verified by their family doctor, for example. It may be necessary for an employer, housing provider or service provider, etc. to consult with a specialist with expertise in the disability in question. The focus should always be on the needs and limitations of the person requesting the accommodation, rather than on a specific diagnosis.

Example: An employee experiences many symptoms, including extreme fatigue, nausea and headaches that interfere with her ability to do her job. She attempts to seek clarification of her disability from a medical professional but is having difficulty finding someone with expertise to do this. While she waits to be seen by a medical specialist who can diagnose her, her employer accommodates her by relying on what the employee and her physiotherapist say she needs to do the essential duties of her job. Once the employee is being treated by a specialist, the employer asks for further information from that person about the employee's limitations and need for accommodation, without asking for her diagnosis.

^[17] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 SCR 665, 2000 SCC 27 (CanLII) [Mercier]; *Chen v. Ingenierie Electro-Optique Exfo*, 2009 HRTO 1641 (CanLII) [Chen]; *McLean v. DY 4 Systems*, 2010 HRTO 1107 (CanLII).

^[18] Subsection 10(3) of the *Code*, *supra* note 7.

^[19] This is consistent with *Hinze v. Great Blue Heron Casino*, 2011 HRTO 93 (CanLII) [Hinze], in which the HRTO stated that the definition of disability extends to the actual or perceived possibility that a person may develop a disability in the future. See also *Hill v. Spectrum Telecom Group Ltd.*, 2012 HRTO 133 (CanLII) [Hill]; *Davis v. Toronto (City)*, 2011 HRTO 806 (CanLII), request for reconsideration denied, 2011 HRTO 1095 (CanLII); *Chen*, *supra* note 17; *Boodhram v. 2009158 Ontario Ltd.*, 2005 HRTO 54 (CanLII) [Boodhram]. It is also consistent with the multi-dimensional approach recommended by the Supreme Court of Canada in *Mercier*, *supra* note 17. In that case, the Court recognized that "[b]y placing the emphasis on human dignity, respect, and the right to equality rather than a simple biomedical condition, this approach recognizes that the attitudes of society and its members often contribute to the idea or perception of a 'handicap'. In fact, a person may have no limitations in everyday activities other than those created by prejudice and stereotypes." (at para. 77).

^[20] The Law Commission of Ontario has observed that older people are often affected by the perception that "they will inevitably *become* disabled, and therefore will become a burden or will be requesting expensive or administratively onerous accommodations or services [emphasis in original]." See Law Commission of Ontario, *A Framework for the Law as it Affects Older Adults: Final Report* (April 2012) at 51, available online at: www.lco-cdo.org/older-adults-final-report.pdf (date retrieved: July 20, 2015). On this point, the LCO Report cites Charmaine Spencer, *Ageism and the Law: Emerging Concepts*

and Practices in Housing and Health (Law Commission of Ontario: 2009), 3. Online: www.ontla.on.ca/library/repository/mon/24009/304762.pdf. Along the same lines, in a written submission to the OHRC (April 2015), the Advocacy Centre for the Elderly wrote, "Often, older persons are not affected by the actual experience of a disability itself but by the perception that they will eventually become disabled, despite the fact that the vast majority of older adults do not have such limitations."

[21] The OHRC is concerned about possible discrimination based on a person's genetic characteristics. While the issue has not been litigated extensively before human rights tribunals, it is the OHRC's view that the *Code's* prohibition on discrimination based on perceived disability could include subjecting a person to unequal treatment because of a belief that the person, due to genetic characteristics, is likely to or will develop a disability in the future.

[22] From the Preamble (e) to the *CRPD*, *supra* note 6 at p. 3.

[23] In *Hinze*, *supra* note 19, the HRTTO stated (at para. 19): "The social model conceptualizes 'disability' as the outcome of socially constructed barriers and discriminatory customs and norms and seeks to eliminate those barriers and prejudicial attitudes. The social model asserts what is truly the disadvantage is not the physical or mental condition, but rather society's response, which characterizes the condition as an impairment, and society's failure to accommodate difference. Under the social model, disabled people are not intrinsically disadvantaged because of their conditions, but rather they experience discrimination in the way we organize society."

[24] *Mercier*, *supra* note 17.

[25] *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703, 2000 SCC 28 (CanLII) [*Granovsky*]. In that case, the Supreme Court of Canada recognized that the primary focus of the disability analysis in the context of the *Canadian Charter of Rights and Freedoms* is on the inappropriate legislative or administrative response (or lack thereof) of the State (at para. 39). The Court said (at para. 33):

Section 15(1) ensures that governments may not, intentionally or *through a failure of appropriate accommodation*, stigmatize the underlying physical or mental impairment, or attribute functional limitations to the individual that the underlying physical or mental impairment does not entail, or fail to recognize the added burdens which persons with disabilities may encounter in achieving self-fulfillment in a world relentlessly oriented to the able-bodied. [Emphasis added.]

Although in *Granovsky* the focus was on State action, similar principles apply to organizations responsible for accommodation under human rights law: Office for Disability Issues, Human Resources Development Canada, Government of Canada, *Defining Disability: A complex issue*, Her Majesty the Queen in Right of Canada, 2003 at p. 39.

[26] *Devoe*, *supra* note 12.

[27] See for example *Newfoundland (Human Rights Commission) v. Companion*, 2002 NFCA 38 (CanLII); *Lane*, *supra* note 6, upheld in *ADGA*, *supra* note 6. The Federal Court of Appeal, applying *Mercier*, *supra* note 17 and *Granovsky*, *supra* note 25, stated that "disability in a legal sense consists of a physical or mental impairment, which results in a functional limitation or is associated with a perception of impairment. This was in relation to a dispute about whether a woman's chronic headaches were, in fact, a disability under the *Canadian Human Rights Act*. The Court found that they were: *Ottawa (City) v. Canada (Human Rights Comm.) (No. 2)* (2005), 54 C.H.R.R. D/462, 2005 FCA 311 at para. 15 (CanLII), leave to appeal refused [2005] S.C.C.A. No. 534.

[28] See, for example, *Boodhram*, *supra* note 19; *Hinze*, *supra* note 19; *Hill*, *supra* note 19.

[29] Whether a temporary condition amounts to a disability will depend on the facts of each case. In *Mercier*, *supra* note 17 at para. 82, the Supreme Court of Canada held that everyday illnesses or normal ailments, such as a cold, are not generally disabilities under human rights legislation. The HRTTO has applied this holding in several decisions, and some adjudicators have expressed the concern that to consider commonplace, temporary illnesses as disabilities would trivialize the *Code's* protections: see, for example, *Valmassoi v. Canadian Electrocoating Inc.*, 2014 HRTTO 701 (CanLII); *Davidson v. Brampton (City)*, 2014 HRTTO 689 (CanLII). That being said, the fact that a physical condition is of a temporary nature does not exclude it from coverage under the *Code*: see *Hinze*, *supra* note 19 at para. 14; *Mou v. MHPM Project Leaders*, 2016 HRTTO 327 (CanLII) [*Mou*]. Temporary injuries for which benefits were claimed or received under the *Workplace Safety and Insurance Act*, S.O. 1997 c. 16 Sch. A [*WSIA*] are clearly protected by the *Code*: see *Deroche v. Recycling Renaissance International Inc.*, 2005 HRTTO 26 (CanLII). And human rights tribunals in other jurisdictions have also found temporary conditions to constitute disabilities. For example, the tribunal in *Wali v. Jace Holdings Ltd.*, 2012 BCHRT 389 (CanLII) stated at para. 82: "It is not necessary that a disability be permanent in order to constitute a disability for the purposes of the *Code*. The *Code's* protection also extends to persons who suffer from temporarily disabling medical conditions: *Goode v. Interior Health Authority*, 2010 BCHRT 95 (CanLII). Whether a temporary condition constitutes a disability is a question of fact in each case."

[30] *Mou*, *ibid.* at para. 23.

[31] In *J.L. v. York Region District School Board*, 2013 HRTTO 948 (CanLII), the HRTTO found that while *pes planus* (flat feet) can be a disability in some cases, the applicant's experience of this condition did not amount to a disability as it did not present any obstacles to full participation in society. Similarly, in *Anderson v. Envirotech Office Systems*, 2009 HRTTO 1199 (CanLII), the Tribunal found that there was no evidence that the applicant's bronchitis was chronic or became a chronic condition. The kind

of bronchitis experienced by the applicant was commonly experienced by many and had no impact on his ability to participate fully in society. Thus, the Tribunal found that it was not a disability under the *Code*.

[32] In *Granovsky*, *supra* note 25, a case that involved a challenge to the Canada Pension Plan disability pension which arose under s. 15 of the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada rejected a notion of disability that would focus only on impairment or functional limitation. The Court said (at para. 29):

The concept of disability must therefore accommodate a multiplicity of impairments, both physical and mental, overlaid on a range of functional limitations, real or perceived, interwoven with recognition that in many important aspects of life the so-called 'disabled' individual may not be impaired or limited in any way at all.

[33] See, for example, *Dawson v. Canada Post Corp.* 2008 CHRT 41 (CanLII) [*Dawson*] at paras. 90-98.

[34] It generally would not include a medical diagnosis. For more information about the kinds of information that organizations can ask for, see the section of this policy entitled, "Medical information to be provided."

[35] Law Commission of Ontario, *A Framework for the Law as it Affects Persons with Disabilities*, (September 2012) [LCO, "Framework"] at 100, available online at: www.lco-cdo.org/en/disabilities-final-report-framework-introduction (retrieved July 9, 2015).

[36] Marcia H. Rioux and Fraser Valentine, "Does Theory Matter? Exploring the Nexus Between Disability, Human Rights, and Public Policy," in *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law*, (Vancouver: UBC Press), 2006, 47 at 51. The authors write that the "human rights approach to disability...identifies wide variations in cognitive, sensory, and motor ability as inherent to the human condition and, consequently, recognizes the variations as expected events and not as rationales for limiting the potential of persons with disabilities to contribute to society." This approach recognizes "the condition of disability as inherent to society, not some kind of anomaly to normalcy." (at page 52)

[37] Rosemarie Garland-Thomson, "Disability, Identity, and Representation: An Introduction," in *Rethinking Normalcy*, Tanya Titchkosky and Rod Michalko, eds. (Toronto: Canadian Scholars' Press Inc.) 2009, 63 at 70.

[38] In *Dixon v. 930187 Ontario*, 2010 HRTO 256 (CanLII) [*Dixon*], a housing case that involved a female tenant and her husband who used a wheelchair, the HRTO upheld a claim of discrimination based on disability and stated at para. 50: "[the housing provider] appeared to take the position that he was entitled to substitute his judgement for that of the [claimants] as to what they needed and where and how they should live. It appears that he presumed that he knew better than they what they needed, including what needs would arise in future from [the claimant's] medical conditions." The housing provider "did not appear to acknowledge the fact that the [claimants] are responsible adults who have the right and the capacity to make their own decisions. This type of patronising attitude toward people with personal characteristics identified as grounds of discrimination under the *Code* has been characterised as 'infantilising'." See also *Brock v. Tarrant Film Factory Ltd.*, 2000 CanLII 20858 (Ont. Bd. of Inq.), and *Turnbull v. Famous Players Inc.*, 2001 CanLII 26228 (Ont. Bd. of Inq.) [*Turnbull*].

[39] In this context, prejudices may be defined as deeply held negative perceptions and feelings about people with disabilities.

[40] Stereotyping is when generalizations are made about individuals based on assumptions about qualities and characteristics of the group they belong to. The Supreme Court of Canada has said "Stereotyping, like prejudice, is a disadvantaging attitude, but one that attributes characteristics to members of a group regardless of their actual capacities": *Quebec (Attorney General) v. A*, [2013] 1 SCR 61, 2013 SCC 5 (CanLII) at para. 326.

[41] A person is stigmatized when they possess an attribute that "marks" them as different and leads people to be devalued in the eyes of others: see Brenda Major and Laurie T. O'Brien, "The social psychology of stigma", *Annu. Rev. Psychol.* 2005 56:393-421 at 394-395. Inherent in this is the idea that people are seen as "deviant" from what society has deemed as the "norm": see Schur, Edwin M. 1971. *Labelling Deviant Behaviour: Its sociological implications*. New York: Harper & Row, Publishers, as cited by the Centre for Addiction and Mental Health, *The Stigma of Substance Abuse: A Review of the Literature* (18 August 1999). Available online at: www.camh.ca/en/education/Documents/www.camh.net/education/Resources_communities_organizations/stigma_subabuse_litreview99.pdf.

[42] LCO, "Framework," *supra* note 35 at 43.

[43] *Yale v. Metropoulos* (1992), 20 C.H.R.R. D/45 (Ont. Bd. Inq.)

[44] *Duliunas v. York-Med Systems*, 2010 HRTO 1404 (CanLII) [*Duliunas*]. See also *Ilevbare v. Domain Registry Group*, 2010 HRTO 2173 (CanLII) [*Ilevbare*], in which the HRTO states at para. 52: "The termination of a disabled employee's employment, in the midst of a medical leave of absence, is *prima facie* discriminatory and likewise demands an explanation." This suggests that *prima facie* discrimination will be found where an employee is terminated while on medical leave and the onus will be on the employer to provide a non-discriminatory reason for the termination. Also see *Russell v. Indeka Imports Ltd.*, 2012 HRTO 926 (CanLII) [*Russell*].

[45] Information taken from a written submission to the OHRC made by the Canadian Hearing Society (April 2015). The CHS states that the lack of widespread supports such as sign language interpretation and closed captioning contributes to this problem.

[46] *Entrop v. Imperial Oil Limited*, 2000 CanLII 16800 (ON CA); *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 (CanLII) [Tranchemontagne].

[47] The OHRC's *Minds That Matter: Report on the consultation on human rights, mental health and addictions*, 2012, is available on the OHRC's website at: www.ohrc.on.ca/sites/default/files/Minds%20that%20matter_Report%20on%20the%20consultation%20on%20human%20rights%20mental%20health%20and%20addictions.pdf

[48] See the OHRC's *Mental Health Policy*, *supra* note 9.

[49] Environmental sensitivities (also known as multiple chemical sensitivities, cerebral allergies, chemical-induced immune dysfunction, etc.) are triggered by the exposure to common environmental chemicals in lower levels than those that tend to affect the general public.

[50] *Noe v. Rane Management*, 2014 HRTO 746 (CanLII) [Noe]. In another case, asthma due to environmental allergies was found to be a disability: *Redmond v. Hunter Hill Housing Co-op (No. 2)*, 2013 BCHRT 276 (CanLII) [Redmond]. See also Canadian Human Rights Commission, *Policy on Environmental Sensitivities*, available online at: www.chrc-ccdp.gc.ca/sites/default/files/policy_sensitivity_0.pdf (date retrieved: February 8, 2016).

[51] A 2010 Canadian study reported that "[t]he incidence rate of anaphylaxis is increasing, and recent US reports suggest that it may be as high as 49.8 per 100,000 person-years. Foods are primary inciting allergens for anaphylaxis, and hospitalizations because of food-induced anaphylaxis are reported to have increased by 350% during the last decade." See Moshe Ben-Shoshan, *et al.*, "A population-based study on peanut, tree nut, fish, shellfish, and sesame allergy prevalence in Canada," *Journal of Allergy and Clinical Immunology*, 2010, available online at: www.med.mcgill.ca/epidemiology/joseph/publications/medical/benshoshan2010.pdf (date retrieved: March 8, 2016). Food Allergy Canada (formerly Anaphylaxis Canada) reports that food allergies, one of the most common causes of anaphylaxis, now affect more than 960,000 Ontarians (information compiled by Food Allergy Canada and included in a written submission to the OHRC in April 2015).

[52] *An Act to protect anaphylactic pupils*, 2005 – S.O. 2005, Chapter 7 ("Sabrina's Law").

[53] People may also be at risk for anaphylaxis due to allergies to medication, insect stings, latex, etc.

[54] *Rutledge v. Fitness One Peter Inc.*, [2010] O.H.R.T.D. No. 2041, 2010 HRTO 2039; *Subotic v. Jellybean Park Langley Campus Inc.*, [2009] B.C.H.R.T.D. No. 260, 2009 BCHRT 260. For American cases dealing with food allergies, see *Ridley School District v. M.R.*, 680 F.3d 260, 2012 U.S. App. LEXIS 9908 (QL) (U.S. Court of Appeals for the Third Circuit); *T.F. et al. v. Fox Chapel Area School District*, 2014 U.S. App. Lexis 18066 (U.S. Court of Appeals for the Third Circuit).

[55] See *Ontario (Human Rights Commission) v. Vogue Shoes* (1991), 14 C.H.R.R. D/425.

[56] *Ball v. Ontario (Community and Social Services)*, 2010 HRTO 360 (CanLII) [Ball].

[57] See <http://jurist.org/paperchase/2014/12/european-court-of-justice-rules-obesity-can-be-a-disability.php> and <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-07/cp140112en.pdf>

[58] See *Turner v. Canada Border Services Agency*, 2014 CHRT 10 (CanLII) in which the Canadian Human Rights Tribunal found that the respondent had discriminated against the complainant, in part, because of a perception that he had a disability due to obesity.

[59] This might apply, for example, where a man is denied employment opportunities that include a physical component because the employer perceives that his "larger-than-average" size prevents him from doing physical work, even where this is not the case.