



MILLER THOMSON

AVOCATS | LAWYERS

FORWARD TOGETHER

Mental Health and Disability

February 15, 2018

Nadya Tymochenko

416.595.8513

ntymochenko@millerthomson.com

Jesstina McFadden

416.595.2990

jmcfadden@millerthomson.com



Issues

- Legal definition of “disability”
 - Human rights & labour/employment Perspectives
- Provincial and federal Guides for accommodation of mental health issues
 - The law of accommodation
 - *Potential impact on schools*





What is Mental Health?

- Public Health Agency of Canada definition:

The capacity of each and all of us to feel, think, act in ways that enhance our ability to enjoy life and deal with the challenges we face. It is a positive sense of emotional and spiritual well-being that respects the importance of culture, equity, social justice, interconnections and personal dignity.

- World Health Organization (WHO) definition:

A state of well-being in which every individual realizes his or her own potential, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to her or his community.



Mental Health and Disability

- It is estimated that, in any given year, 1 in 5 Canadians experiences a mental health or addictions problem.
- The onset of symptoms is often between the ages of 15 and 24, although individuals of any age can be affected.
 - 34% of high school students indicate a moderate-to-serious level of psychological distress (i.e. symptoms of anxiety or depression), with 14% indicating a serious level of psychological distress.
- Mental illness is a leading cause of disability in Canada.

Centre for Addiction and Mental Health

- Correlation between mental health and disability is complex.
 - Not all mental health conditions constitute a disability.
 - Individuals who have a mental health condition may have periods of wellness followed by periods of disability – disability could be permanent, temporary or sporadic.
 - Some people may not experience any limitations, even when they have a medical diagnosis or experience impairment.



What is a Mental Disorder?

- Statutory Definitions: - e.g.
 - *Ontario Mental Health Act* - Any disease or disability of the mind (s. 1)
 - *Child, Youth and Family Services Act* - A substantial disorder of emotional processes, thought or cognition which grossly impairs a person's capacity to make reasoned judgments (s. 154)
 - *Criminal Code of Canada* - Disease of the mind (s. 2)
- A mental disorder causes major changes in a person's thinking, emotional state and behaviour, and disrupts the person's ability to work and carry out their usual personal relationship (Mental Health Commission of Canada)



Mental Health Care in Ontario

- Continuum of mental health services and supports, including:
 - Community-based (e.g. primary care, peer supports, community mental health agencies)
 - Emergency department
 - Long-term care
 - Hospital out-patient and in-patient
 - Crisis services and supports
- *Open Minds, Health Minds – Ontario’s Comprehensive Mental Health and Addictions Strategy*
- Services may be publicly funded (i.e. covered by OHIP) or private-pay (e.g. insurer, employer, out-of-pocket), depending on the nature, purpose and setting in which services provided
 - Services for **return to work purposes**
- Considerations regarding access to timely and appropriate services



Definition of Disability

- A “**disability**” is a physical or psychological condition that effects one’s capacity to do something.
- Disabilities may be the result of a physical limitation, an ailment, a social construct, a perceived limitation, a non-physical mental impairment or developmental condition, or a combination of all these factors.
- The focus of the analysis is on the effect of the distinction, exclusion or preference rather than the precise nature of the disability.

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)

(Decision No. 532/89 (1991), 17 W.C.A.T.R. 38 at 48 (Ont.) Kenny (Vice-Chair), Cook and Sequin)

Section 45(12) and Directive No. 12 under s. 122(1) ... [suggest] that, in essence, the term “disability” should not be narrowly defined



Definition – Human Rights

- Definition is complex and evolving.
- “Disability” covers a broad range and degree of conditions; present at birth, caused by an accident, or developed over time.
- Section 10 of the Ontario *Human Rights Code* defines “disability” as including (but not limited to):
 - *a condition of mental impairment or a developmental disability,*
 - *a mental disorder,*
 - *an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997.*
- Includes past or present conditions, as well as a subjective component (i.e. based on perception on disability).
- Anticipated disabilities are also covered by the *Code*, where a person is treated adversely because of a perception that they will eventually develop a disability, become a burden, pose a risk and/or require accommodation.

[Ontario Human Rights Commission](#)



The Standard – Federal Guide

- Mental Health Commission of Canada's (MHCC) *The National Standard of Canada for Psychological Health and Safety in the Workplace (the Standard)*
- Guide for employers to maintain mentally healthy workplaces
- Voluntary set of implementation guidelines, tools, resources and support
- Training Tools:
 - *Mental Health First Aid* – awareness relating to signs of common mental health issues and how to help colleagues
 - *Road to Mental Readiness* – material designed for first responders to reduce stigma of mental illness
 - *The Working Mind* – increasing mental health resilience in the workplace
 - Free monthly webinars on workplace mental health

[The National Standard of Canada for Psychological Health and Safety in the Workplace \(the Standard\)](#)





The Standard – Provincial Guide

- *Minds that Matter: Report on the consultation on human rights, mental health and addictions*
- Preventing and eliminating discrimination is a shared responsibility.
- The report was prepared after consultation with more than 1,500 individuals across Ontario
- Recommendations for action for government, housing providers, employers, service providers and other parties, as well as a series of OHRC commitments towards eliminating discrimination based on mental health and addictions in Ontario.

[*Minds that Matter: Report on the consultation on human rights, mental health and addictions*](#)





Disability in the Workplace – Duty to Accommodate

- The **duty to accommodate** requires an employer to modify work rules, practices, and requirements to meet the needs of individual employees who would otherwise be subjected to unlawful discrimination
- **BFORQ**: Bona Fide Occupational Requirement/Qualification
 - *Human Rights Code* allows an organization to show that a requirement, qualification or factor is nevertheless “reasonable and bona fide” in the circumstances
 - *Example: a preference for young or female restaurant servers, cannot constitute a BFORQ*

Stacey Ball, Canadian Employment Law





Disability in the Workplace – Duty to Accommodate

- The duty to accommodate is to be exercised short of **“undue hardship”**
- The duty to accommodate is limited by the employer’s ability to demonstrate that it could not have accommodated the employee without undue hardship
- Case by case analysis for what constitutes undue hardship for an employer
- Not a question of “business efficiency”
- “two-way street” – once employer initiates accommodation process, employee must cooperate in a reasonable manner (request and accept reasonable accommodation)

Stacey Ball, *Canadian Employment Law*





Duty to Accommodate Students

- *Human Rights Code* applies to the accommodation of students with mental health disabilities
- The *Education Act* s.169.1 emphasizes the importance of the well-being of students
 - Well-being is a broader standard than disability
- Accommodations may need to address not only existing disabilities but also the potential for future harm without supports
- What information do schools need?
- When is the duty to accommodate triggered?
- When is part of the education process assisting students to address mental health needs and facilitating mental health treatment?



FORWARD TOGETHER



MILLER THOMSON
AVOCATS | LAWYERS

MILLERTHOMSON.COM



© 2016 Miller Thomson LLP. All Rights Reserved. All Intellectual Property Rights including copyright in this presentation are owned by Miller Thomson LLP. This presentation may be reproduced and distributed in its entirety provided no alterations are made to the form or content. Any other form of reproduction or distribution requires the prior written consent of Miller Thomson LLP which may be requested from the presenter(s).

This presentation is provided as an information service and is a summary of current legal issues. This information is not meant as legal opinion and viewers are cautioned not to act on information provided in this publication without seeking specific legal advice with respect to their unique circumstances.

VANCOUVER CALGARY EDMONTON SASKATOON REGINA LONDON KITCHENER-WATERLOO GUELPH TORONTO VAUGHAN MARKHAM MONTRÉAL