

A Practical Guide to a Condominium's Duty to Accommodate

Under the *Condominium Act* (the “**Act**”), owners and residents must comply with the declaration, the by-laws and the rules of a condo.

- A corporation has a duty to take all reasonable steps to ensure that the owners and occupiers of units comply with the Act, declaration, by-laws and rules (s. 17)
- Owners & occupiers shall comply with the Act, declaration, by-laws and rules (s.119)

But what happens when someone cannot comply with these documents as a result of a disability?

As a general rule, once it is established that an individual suffers from a disability, the corporation has a duty to accommodate it, short of undue hardship. This duty exists regardless of the age of the building and of whether the building complies with the building codes, etc.

What is a Disability?

Under the *Ontario Human Rights Code* (the “**Code**”), every person with a disability has a right to equal treatment.

A disability can be triggered by age, an accident, an injury, or an illness. The concept of disability is defined broadly by the Code and includes:

- **Physical disability:** Any degree of physical disability, infirmity, malformation,

disfigurement, paralysis, amputation, blindness, deafness, muteness, physical reliance on a service animal, wheelchair or other device.

- **Mental disability:** A mental impairment, developmental disability, learning disability or mental disorder.

The person making the request does not have an onerous standard to meet when initially communicating the existence of a disability to trigger the duty to accommodate. (*Collins v. ECC No. 35, 2018*)

There needs to be a “working diagnosis” of a “recognized mental disability” or an “articulation of clinically-significant symptoms” with “specificity and substance”. (*SCC 89 v Dominelli, 2015*)

The Duty to Accommodate: Two Duties in One

Essentially, the corporation has two duties as part of its duty to accommodate:

A **procedural duty**, which includes the duty to listen to and acknowledge the individual needs, to investigate options, to communicate with the individual in a timely and respectful manner, to keep the process moving, to keep the individual informed, to explain why an accommodation is granted or denied, and to consider all options.

A **substantive duty** to actually put in place a reasonable accommodation, unless “undue hardship” would result. It is impossible to provide an exhaustive list of all which falls within the **substantive** duty. The required accommodation will vary with each case. It can go from installing a ramp, or seeking compliance from the other owners, to switching parking spots to provide a more suitable one. Not every problem can be resolved and, sometimes, it is sufficient to have complied with the **procedural** duties.

What is “Undue Hardship”?

Hardship is naturally expected to follow from accommodation requests. It is only **undue** hardship which relieves the corporation from its duty to accommodate. The factors which are taken into account to determine whether the accommodation would cause “undue hardship” can include the following:

1. health and safety concerns;
2. costs; and
3. effect on the rights of other owners.

Undue hardship is a high threshold to meet. Tribunals give some weight to health and safety considerations, but much less to costs or morale considerations. The cost of the accommodation will be balanced against the financial means of the organization

What Medical Evidence Can be Obtained by the Condominium?

Inquiring about the individual's limitation may be a good starting point, but the corporation is not necessarily entitled to be provided with a diagnosis.

In 2017, the Ontario Human Rights Commission released a policy¹ position on the medical documentation/information that can be requested from those seeking a disability-related accommodation. Condo corporations can request information on the following:

- Confirmation of the existence of a disability;
- The limitations or needs associated with the disability;
- Whether the person can perform the essential duties or requirements of being an employee, occupant or condominium service user, with or without accommodation;
- The type of accommodation required; and
- Regular updates on any changes in the disability or required accommodation.

¹ 2017 Ontario Human Rights Commission's policy position on medical documentation

Balancing Your Duty to Accommodate With Your Duty to Enforce

On the one hand, the corporation has a duty to take all reasonable steps to ensure that all owners and occupiers comply with the Act, the declaration, the by-laws and the rules. On the other hand, it also has a duty to accommodate individuals with a disability, short of undue hardship. It's quite the balancing act!

Where the corporation is able to show that a proposed accommodation would create undue hardship and there are no other alternatives, then the corporation has met its duty to the point of undue hardship and cannot be expected to do anything more.

Not Complying With the Human Rights Code

If the Human Rights Tribunal finds there has been a breach of the Code, it may order:

1. monetary compensation, paid by the party who infringed the rights of an individual;
2. restitution to the party whose rights have been infringed; and
3. anything that the party ought to do to ensure compliance with the Act.

Ontario courts have recognized that there is no ceiling on awards of general damages under the Code. This can be costly for the condo!

Practical Suggestions

The corporation should take steps to ensure that staff and board members know to promptly report and properly handle any complaints so that they can be resolved in a timely manner. Keep a written record of your actions.

In some circumstances, the corporation may want to seek medical information from an individual requesting an accommodation. As such requests are very delicate, you should always consult legal counsel before making any requests.

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