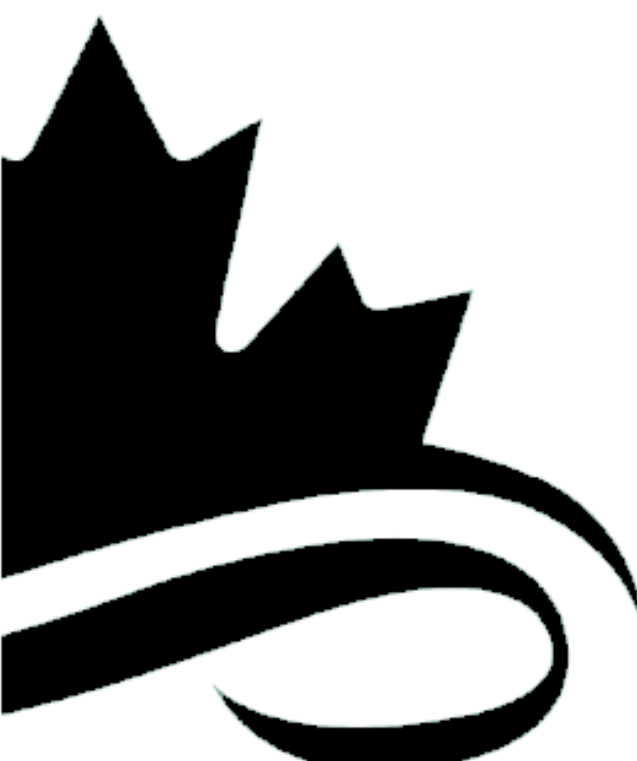




**Canadian Human  
Rights Commission**

**Commission canadienne  
des droits de la personne**



## **Accommodation for Environmental Sensitivities: Legal Perspective**

By: Cara Wilkie and David Baker  
May 2007

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# **Accommodation for Environmental Sensitivities:** **Legal Perspective**

By: Cara Wilkie and David Baker

## **Abstract**

Environmental sensitivities are a group of poorly understood medical conditions that cause people to react adversely to environmental triggers. The Canadian Human Rights Commission commissioned this report, in which the researchers seek to establish the status of the issues related to environmental sensitivities from a legal perspective and as these relate to the protection of human rights. The researchers examined case law, consulted experts and examined secondary sources on accommodation of people with environmental sensitivities in Canada, the United States, Australia, New Zealand and the United Kingdom, in order to answer several questions in the Canadian context: What is the status of the case law in these jurisdictions? Do building codes act as barriers to people with environmental sensitivities? What best practices emerge from the case law? How are conflicting interests reconciled? How can third parties be involved in the accommodation process? Where is the threshold of undue hardship? How are conflicts regarding accommodation preferences resolved?

# **Accommodation for Environmental Sensitivities:** **Legal Perspective**

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## **Executive Summary and Recommendations**

The Canadian Human Rights Commission commissioned this research project to examine past legal assessments of accommodation for environmental sensitivities, including how third parties may be involved and the relevance of buildings codes and standards. Environmental sensitivities are a complex and often poorly understood group of chronic conditions. Individuals with environmental sensitivities experience adverse reactions to environmental agents that are prevalent throughout the built environment and include electromagnetic fields and the chemicals found in building materials, furniture, cleaning and copying products, fragrances and pesticides.

Canadian and Australian approaches to disability are very broad, and environmental sensitivities are readily accepted. In contrast, the *Americans with Disabilities Act* applies a very restrictive test for an individual to qualify as a person with a disability, and individuals with environmental sensitivities are regularly denied protection. Because of the scientific confusion regarding sensitivities, individuals have difficulty finding and providing expert evidence in the United States, and may have this difficulty in Canada as well.

Accommodations that individuals with environmental sensitivities may require generally involve minimizing the use of triggering substances, filtering triggers from the environment or avoiding the trigger-filled environment. Each type of accommodation may meet the test of undue hardship in Canada, but will depend upon the circumstances of the accommodating entity. The entity may be able to require the individual's non-attendance, where attendance would be detrimental to his or her health, and the entity may be required to use enforcement mechanisms to ensure that third parties co-operate with accommodation measures. Each of these types of accommodation has been rejected in the United States. There is little relevant jurisprudence in Australia and none in the United Kingdom and New Zealand.

The researchers identified only one case in which the barrier identified was a building rule—namely, a condominium by-law requiring wall-to-wall carpeting. While no cases involving barriers in building codes were identified, the standards fall far short of accommodating individuals with environmental sensitivities. Governments in the United States and Australia are attempting to implement rules under which people with environmental sensitivities will be partially accommodated.

When accommodating any disability, the same considerations of dignity, individual assessments and independence apply. Many businesses have implemented fragrance-free and chemical avoidance policies, some will provide special equipment or renovate their

spaces, and others have transferred, reassigned or retrained employees with environmental sensitivities. Nonetheless, the areas of necessary accommodations are broad and many non-traditional sectors must consider their accommodation obligations.

**Recommendation 1:** Where an individual with a poorly understood disability is unable to provide expert medical evidence, the employer, service provider or other decision maker should seek an informed expert opinion on the effects of the condition and the resulting accommodation needs.

**Recommendation 2:** Employers, service providers and other decision makers should ensure that, if accommodation requests are rejected, it is not because the medical evidence provided is not as unequivocal as it may be with other disabilities: knowledge and understanding of the condition is still developing, and expectations regarding medical evidence should reflect this.

**Recommendation 3:** When reviewing their building codes, governments across Canada proactively address issues related to accommodation of people with disabilities, especially disabilities that are difficult to address retrospectively, such as environmental sensitivities.

**Recommendation 4:** Employers and service providers should develop and enforce fragrance-free and chemical avoidance policies, including promoting educational campaigns to increase voluntary compliance with such policies.

**Recommendation 5:** Employers and service providers, for their staff and service recipients, should develop or adopt educational material and programs for accommodation of people with environmental sensitivities, to increase voluntary compliance with such policies.

**Recommendation 6:** Employers and service providers should proactively take steps to minimize chemical use, purchase less-toxic products, and advocate with the construction and manufacturing industries to produce less-toxic materials.

**Recommendation 7:** The Commission should undertake or continue educational campaigns that encourage proactive accommodations, including in non-traditional areas of accommodation, such as national parks or other green spaces.

**Accommodation for Environmental Sensitivities:**  
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**Table of Contents**

I. Introduction to the Issue.....	5
Environmental Sensitivities.....	6
II. Environmental Sensitivities, Disability and Medical Evidence ..	8
a. Definitions of Disability.....	8
b. Evidentiary Difficulties .....	9
III. Accommodation for Environmental Sensitivities: State of Knowledge .....	11
a. Canada.....	12
b. United States.....	18
c. Australia.....	23
d. United Kingdom and New Zealand.....	23
e. Conclusion.....	24
IV. Government Policies and Standards Regarding Building Codes	26
V. Accommodation for Environmental Sensitivities: Best Practices	28
a. Accommodation Principles and Practices.....	28
b. Fragrance Policies and Chemical Avoidance.....	28
c. Special Equipment and Renovations.....	30
d. Transfers, Re-assignments and Retraining.....	30
e. Areas of Coverage.....	31
VI. Conclusion.....	32
Appendix A: Research Methodology.....	33
Appendix B: Annotated List of Available Resources.....	34
Appendix C: List of Acronyms.....	41
Appendix D: List of Organizations and Individuals Consulted.....	42

# **Accommodation for Environmental Sensitivities:** **Legal Perspective**

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## **I. Introduction to the Issue**

In an effort to clarify the issues surrounding environmental sensitivities and accommodation for them in employment, housing, facilities, employee organizations and services, the Canadian Human Rights Commission commissioned two research projects. One examines the medical and architectural considerations and awareness of environmental sensitivities. The other project, this report, examines past legal assessments of accommodation for environmental sensitivities, including how third parties may be involved and the relevance of buildings codes and standards. The report was commissioned to answer the following questions:

1. What is the current status of case law on environmental sensitivities in Canada, including complaints filed with federal, provincial and territorial human rights commissions and tribunals?
2. What is the current status of case law on environmental sensitivities in the U.S., U.K., Australia and New Zealand, including complaints filed with their human rights commissions and tribunals, if applicable?
3. Do government policies and standards on building codes, air quality and ventilation include features that can act as barriers or shortcomings that are detrimental to individuals with environmental sensitivities?
4. Does the case law include accommodation advice, including best practices, concerning environmental sensitivities? What are the pros and cons of these measures in terms of health, safety and cost?
5. What do the legislation and case law tell us about resolving situations where the rights and interests of some appear to conflict with those of others? How can opposing rights and interests be reconciled?
6. Where does the threshold of undue hardship lie under the *Canadian Human Rights Act* and the case law, considering the expense that may be involved in accommodations for environmental sensitivities (e.g. major renovations to buildings, moving to another building and major improvement of air quality)?
7. If there is a conflict between the preference of the employee and the ability of the employer to provide accommodation, and if so, how is this conflict resolved?

This report begins by examining environmental sensitivities generally to provide context for the research that follows. The authors consider environmental sensitivities in the light of international definitions of disability and evidentiary difficulties that may arise for

litigants because of the minimal understanding of the condition within the medical community.

In the sections that follow, the researchers turn to a consideration of the types of accommodations that may be requested by a person with environmental sensitivities and to jurisprudential consideration of the reasonableness of these accommodations in Canada, the United States, and Australia. The researchers also conducted research into New Zealand and United Kingdom jurisprudence, but were unable to identify anything of relevance. In each jurisdiction, the researchers consider which accommodations have been accepted and which have been rejected as unreasonable or as causing undue hardship. The researchers consider how third parties are engaged in the accommodation process and how the rights of the different parties are reconciled. The section concludes with the researchers drawing cross-jurisdictional conclusions on what accommodations will likely be required as a result of Canadian human rights analysis.

The researchers continue by examining the extent to which the case law, their consultations and secondary sources identify specific barriers or shortcomings in building codes and government standards on construction that are detrimental to individuals with environmental sensitivities.

This report concludes by providing, for the Commission and the employers, providers of goods, services, facilities or accommodations, and employee organizations subject to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the “Act”), descriptions of best practices in relation to accommodation of environmental sensitivities and principles of universal design.<sup>1</sup> This discussion includes a review of sample policies specific to accommodation for environmental sensitivities, such as fragrance or smoking policies.

## **Environmental Sensitivities**

Environmental sensitivities are not easily defined, as they are a complex and often poorly understood group of chronic conditions. The explanation of sensitivities that appears below is given here merely to provide context for the legal analysis that follows.

The Ad Hoc Committee on Environmental Hypersensitivity Disorders, chaired by former Judge George M. Thomson, defined environmental sensitivities as:

a chronic (i.e. continuing for more than three months) multisystem disorder, usually involving symptoms of the central nervous system and at least one other system. Affected persons are frequently intolerant to

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<sup>1</sup> While the Act’s prohibition of discrimination in sections 5-13 applies to all employers, providers of goods, services, facilities or accommodations, and employee organizations under the federal jurisdiction of the Canadian Human Rights Commission, the researchers use the term “employers and service providers” throughout this paper. This term is used for ease of reference and not because the duty to accommodate and the standard of undue hardship discussed in this paper do not apply equally to all entities covered by the Act.

some foods and they react adversely to some chemicals and to environmental agents, singly or in combination, at levels generally tolerated by the majority... Improvement is associated with avoidance of suspected agents and symptoms recur with re-exposure.<sup>2</sup>

Individuals with environmental sensitivities experience adverse reactions to environmental agents below the level deemed to be unsafe or to affect people. The causes, symptoms and triggers of environmental sensitivities vary from individual to individual. The triggering environmental agents are prevalent throughout the built environment and include electromagnetic fields and the chemicals found in building materials, furniture, cleaning and copying products, fragrances, and pesticides.

As a result of the scientific confusion, diagnostic difficulty and general lack of knowledge within the medical and broader community with regard to environmental sensitivities, the latter are often misdiagnosed as psychological or psychiatric conditions. This misdiagnosis and misunderstanding results in social stigma for people with sensitivities and may result in a denial of accommodation, with individuals being told that “it is in their head.” However, despite the lack of clarity on the causes of environmental sensitivities and the absence of a diagnostic test, there is no doubt that individuals experience physical symptoms as a result of environmental agents. Even if environmental sensitivities were triggered by a psychiatric condition, the Act’s guarantee of accommodation to the point of undue hardship and non-discrimination would be equally applicable, albeit potentially with different forms of accommodation.

While this paper uses the term “environmental sensitivities,” numerous other terms refer to the same or similar conditions, including “multiple chemical sensitivity (MCS),” “chemical injury,” “sick building syndrome,” “environmental illness,” “environmental hypersensitivity,” “electromagnetic field (EMF) sensitivity,” “Gulf War syndrome,” “environmental sensitivity disorder,” “20th century disease” and “environmental allergies.” Because of the variation in triggers and symptoms, it is preferable to refer to sensitivities in the plural, rather than the singular.

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<sup>2</sup> *Report of the Ad Hoc Committee on Environmental Hypersensitivity Disorders*, to Murray J. Elston, Minister of Health (August 1985), at 17-18.



## **II. Environmental Sensitivities, Disability and Medical Evidence**

### **a. Definitions of Disability**

International approaches to definitions of disability in human rights protection vary in their reliance on medical diagnoses and symptoms. At one end of this spectrum are the Canadian and Australian approaches, in which a very broad definition of disability is adopted.<sup>3</sup> As a result of this, complainants are required to provide minimal medical evidence to establish that they qualify as persons with a disability, and individuals with environmental sensitivities do not need to prove the veracity of their condition. In fact, the courts have specifically held that the inability of the medical community to diagnose a condition or identify its cause does not affect whether an individual has a disability, so long as its triggers can be identified.<sup>4</sup> Instead, the analysis is meant to focus on the individual's accommodation needs and the behaviour of the employer or service provider.<sup>5</sup>

In contrast, the *Americans with Disabilities Act* (ADA) applies a very restrictive medical test for an individual to qualify as a person with a disability and be eligible for protection under the ADA.<sup>6</sup> Individuals with environmental sensitivities often find it difficult to establish that they have a disability under this definition. In one case, for example, the United States District Court held that a woman did not qualify as a person with a disability because her sensitivities to chemicals only affected a major life function (breathing) while at the office and exposed to chemicals.<sup>7</sup> Numerous other decisions have

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<sup>3</sup> Disability is defined in section 25 of the Act as “any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.”

Section 4 of the Australian *Disability Discrimination Act* (DDA) 1992 (Cth.) defines disability in an equally broad manner, however with more detail, as:

- (a) total or partial loss of the person's bodily or mental functions; or
- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person's body; or
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; and includes a disability that:
  - (h) presently exists; or
  - (i) previously existed but no longer exists; or
  - (j) may exist in the future; or
  - (k) is imputed to a person.

<sup>4</sup> *Brewer v. Fraser Milner Casgrain LLP*, [2006] A.J. No. 625 (Q.B.). Note that this decision is currently under appeal.

<sup>5</sup> See e.g. *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 at para. 26.

<sup>6</sup> To qualify as a person with a disability under the ADA (42 U.S.C. § 12102(2)), a claimant must have, be perceived as having or have a history of a “physical or mental impairment that substantially limits one or more of [their] major life activities.”

<sup>7</sup> *Jones v. Ind. Civ. Rights Comm'n*, 2006 U.S. Dist. LEXIS 23954.

similarly concluded that environmental sensitivities do not qualify as a disability under the ADA because of their intermittence.<sup>8</sup>

## **b. Evidentiary Difficulties**

The reliance upon medical evidence in the United States places individuals with environmental sensitivities at a particular disadvantage as a result of the scientific confusion or broad acceptance of environmental sensitivities, the diagnostic difficulties, and the variation in triggers, symptoms and severity. American courts have frequently refused to allow expert testimony on sensitivities because they have concluded that it does not meet the test of scientific reliability for the acceptance of expert evidence.<sup>9</sup> As a result, individuals with sensitivities are often required to identify their disability more restrictively so as to obtain the status of scientific reliability. They may, for example, state that their disability is asthma or an allergy to a particular chemical.<sup>10</sup> However, this may have a detrimental impact upon other aspects of the discrimination analysis, including whether a major life function is affected and what accommodations the person may require.

While the Canadian and Australian approaches do not rely as heavily on medical evidence, particularly in establishing that a person qualifies as a person with a disability, such evidence remains necessary and relevant in determining what accommodations the person requires. The authors have not identified any Canadian jurisprudence regarding the acceptability of a medical opinion on an environmental sensitivity as it relates to needed accommodations, but such an obstacle to complainants can be anticipated and frequently arises for individuals in workplace injury compensation regimes.<sup>11</sup>

The general lack of knowledge on sensitivities within the medical community and the unavailability of tests to identify particular triggers may act as an obstacle to the treatment of sensitivities and to a complainant's ability to identify appropriate experts to testify before a tribunal or provide evidence to an employer about accommodation needs.<sup>12</sup>

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<sup>8</sup> See e.g. *Owen v. Computer Sciences Corp.*, 1999 U.S. Dist. LEXIS 12635; *Minor v. Stanford University/Stanford Hosp.*, 1999 U.S. Dist. LEXIS 9135; and *Farrish v. Carolina Commercial Heat Treating* (2002), 225 F. Supp. 2d 632.

<sup>9</sup> See e.g. *Treadwell v. Dow-United Techs* (1997), 970 F. Supp. 974; *Gabbard v. Linn-Benton Hous. Auth.* (2002), 219 F. Supp. 2d 1130; *Frank v. New York* (1997), 972 F. Supp. 130; *Coffey v. County of Hennepin* (1998), 23 F.Supp.2d 1081; *Yacher v. Shalala* (2000), EEOC DOC 03A00077.

<sup>10</sup> See e.g. *Treadwell v. Dow-United Techs* (1997), 970 F. Supp. 974.

<sup>11</sup> See e.g. *Nova Scotia Teachers Union v. King's County District School Board (Manzer Grievance)*, [1997] N.S.L.A.A. No. 10; *Nova Scotia Teachers Union v. King's County District School Board (Van Zoost Grievance)*, [1996] N.S.L.A.A. No. 6; *Decision No. 899/97*, [1998] O.W.S.I.A.T.D. No. 1695.

<sup>12</sup> See e.g. *Wachal v. Manitoba Pool Elevators*, [2000] C.H.R.D. No. 4 (C.H.R.T.), where complaint dismissed for lack of evidence linking disability with absences; *United Parcel Service Canada and Smith*, [2000] C.L.C.R.S.O.D. No. 15, where unsuccessfully invoked right to refuse unsafe work because no evidence linking health reactions and the workplace; *Brewer v. Fraser Milner Casgrain LLP*, [2006] A.J. No. 625 (Q.B).

**Recommendation 1:** Where an individual with a poorly understood disability is unable to provide expert medical evidence, the employer, service provider or other decision maker should seek an informed expert opinion on the effects of the condition and the resulting accommodation needs.

**Recommendation 2:** Employers, service providers and other decision makers should ensure that, if accommodation requests are rejected, it is not because the medical evidence provided is not as unequivocal as it may be with other disabilities: knowledge and understanding of the condition is still developing, and the expectations regarding medical evidence should reflect this.

### **III. Accommodating Environmental Sensitivities: State of Knowledge**

Because of the common use of chemicals throughout society, the spheres where individuals with environmental sensitivities may request accommodation are countless. While what are appropriate accommodations will depend on the individual's circumstances, the following is a list of some of the types of accommodations identified in the jurisprudence and secondary literature and through the researchers' consultations:

- Establishing and enforcing fragrance-free policies;
- Instituting a non-smoking policy that requires smokers to remain at a distance from entrances and ventilation intakes and that provides designated closets for the jackets and belongings of smokers;
- Carpet-free environments;
- Ensuring that the environment is not recently renovated and that all furniture and products are sufficiently used that they are no longer off-gassing;
- Informing the individual of planned cleaning, renovations or furniture purchases so that they may be involved in selecting products or may refrain from attending during that period;
- Eliminating or reducing chemical spraying, especially near ventilation intakes, and, if the spraying is unavoidable, informing individuals beforehand;
- Flexible work options, including telecommuting;
- Windows that open;
- Activated carbon or activated-charcoal-filtered air cleaners;
- Office locations away from copying and cleaning products and indoor traffic;
- Providing books that are sufficiently used that they will not off-gas, and that do not contain moulds or dust;
- Providing low-electromagnetic-field equipment;
- Not including perfume advertisements in magazines or limiting access to them;<sup>13</sup> and
- Establishing no-idling policies.

This list provides examples of accommodations that an individual may seek, but consideration is not given to whether such accommodations would be required of a covered entity or whether they are too onerous and would impose an undue hardship. As for other forms of accommodation, section 15(2) of the Act dictates consideration of health, safety and cost in the determination of what constitutes an undue hardship.

In the sections that follow, the authors will review jurisprudence on how this test is applied in the context of environmental sensitivities. In addition to accommodation steps taken by employers and by service and facility providers, full accommodation of environmental sensitivities may require that proactive steps be taken by co-workers,

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<sup>13</sup> While the authors have identified no Canadian equivalent, American postal legislation and regulations require that fragrance advertising samples in the mail be sealed or wrapped to prevent accidental exposure (39 U.S.C. § 3001(g) and *Domestic Mail Manual*, 601.11.15).

neighbours and other service users. Issues therefore arise with regard to how the interests of different parties are reconciled and how the various parties are involved in the accommodation process. The authors also explore the extent to which courts have considered sufficiency of government policies and standards on building codes as they relate to accommodation for environmental sensitivities.

In conducting their research, the authors examined cases that have arisen in comparable contexts as well, including those of asthma and allergies, as they provide useful insight into what are considered reasonable accommodations.

## **a. Canada**

### *i. Undue hardship*

Section 15(2) of the Act specifically outlines the factors that may be considered in assessing what constitutes an undue hardship: health, safety and cost. Other Canadian approaches to disability protection, such as those of Ontario, specify similar considerations for what constitutes an undue hardship and is therefore not a required accommodation.<sup>14</sup>

Searches of Canadian jurisprudence revealed a surprising number of administrative decisions relating to environmental sensitivities. However, many of these do not address the specific issues that form the subject of this research as they relate to causation of injuries under workplace safety and insurance regimes,<sup>15</sup> turn on evidentiary issues, such as whether an employer was aware of a disability,<sup>16</sup> or conclude that the employer did appropriately attempt to accommodate an employee without considering the undue hardship test.<sup>17</sup> The decisions that relate to undue hardship have several general themes: the extent to which a covered entity must allow for non-attendance at its place of business, reasonable adjustments to the building or other accommodations, continuing to work when the workplace is injurious, and balancing conflicting interests.

#### 1. Non-attendance

The first theme, that of non-attendance at the place of business, is one that is frequently referenced in the jurisprudence, though few decisions include a full undue hardship analysis. Such alternative attendance arrangements may include telecommuting or alternative work placements. The appropriateness of these means of accommodation

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<sup>14</sup> See e.g. *Human Rights Code*, R.S.O. 1990, c. H.19, s. 17(2).

<sup>15</sup> See e.g. *Dalhousie University v. Nova Scotia Government Employees Union (MacDonald Grievance)*, [2001] N.S.L.A.A. No. 12.

<sup>16</sup> See e.g. *Peace Wapiti School Board #33 v. General Teamsters, Local Union No. 362 (Kwasniewski Grievance)*, [2003] A.G.A.A. No. 92.

<sup>17</sup> See e.g. *Coles and Treasury Board (National Defence)*, [1998] C.P.S.S.R.B. No. 37.

largely depend on the particular circumstances of the employment and the entity providing the accommodation.

In *Harris*, a student complained of non-accommodation when she was required to attend a particular class, rather than being allowed to record the lectures or rely on notes taken by other students.<sup>18</sup> The tribunal considered the nature of the course and held that, since a major and reasonable purpose of the course was to develop skills through student interactions, non-attendance was not an appropriate accommodation. Instead, ensuring access to seating by an open window was an appropriate accommodation. However, in other courses that the student had taken where development of interactive skills was not the purpose of the course, the College was correct to accommodate the student by allowing her to record lectures or rely on student notes.

The *Anderson Grievance* decision also addresses this issue, albeit in obiter.<sup>19</sup> The grievor complained of the employer's non-accommodation after it failed to assign tasks that would allow the individual to remain away from the office during renovations. The employer argued that assigning such tasks would constitute an undue hardship, as the only non-office responsibilities within its business required that the individual drive. It argued that driving would be an inappropriate accommodation because, if the individual was unable to work in a dusty office during renovations, the individual also could not work out of the office doing tasks requiring driving, because of dust on the road. The arbitrator dismissed the grievance for lack of jurisdiction, but commented that the employer would likely have been unable to meet the undue hardship test, because of a lack of medical evidence concerning dust while driving. The arbitrator implicitly accepted the reasonableness of assigning the employee, at least temporarily, tasks out of the office.

In *Hutchinson*, the Public Services Staff Relations Board chastised a grievor for not accepting the reasonably proposed accommodation of telecommuting after alternative accommodation attempts, including requests to refrain from wearing fragrances and the purchase of an air cleaner and respirator, were unsuccessful.

Similarly, a grievor who wished to be accommodated by being allowed to work half-days was unsuccessful in her claim of non-accommodation.<sup>20</sup> The Board held that the claimant had unreasonably refused to be accommodated by working full time at an alternative location, whereas the employer had a reasonable operational justification for refusing to allow her to work part time.

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<sup>18</sup> *Harris v. Camosun College*, [2000] B.C.H.R.T.D. No. 51.

<sup>19</sup> *Re. Alberta and Alberta Union of Provincial Employees (Anderson Grievance)* (1996), Alta. G.A.A. File No. 96-075 (not published).

<sup>20</sup> *Guibord and Treasury Board (Transport Canada)*, [1995] C.P.S.S.R.B. No. 114, upheld on appeal [1996] F.C.J. No. 1534.

## 2. Other accommodations

Alterations within the building environment, use of different cleaning products, and policies on fragrances and smoking are a more commonly discussed form of accommodation. However, there is almost no Canadian jurisprudence on the subject. These accommodations can range from those that are quite easily implemented, such as altering cleaning products used, to drastic building changes. The reasonableness of the accommodation can therefore vary drastically, depending on the nature of the request and the entity of which it is requested.

In *Abetkoff*, the Saskatchewan Human Rights Commission initially rejected a complaint of non-accommodation by an individual with a smoke allergy working in a smoke-filled casino, as it had determined that there were no accommodations available that were not unduly burdensome.<sup>21</sup> Upon review, the Tribunal held that the employer had not fully considered the reasonableness of creating a smoke-free part of the casino. The Tribunal directed that, to establish that this would cause an undue hardship, the employer would have to conduct a full cost-benefit analysis. The Tribunal's decision was not a final disposition of the matter, as it was referred back to the Commission, but it clearly demonstrates the fulsome analysis that a covered entity will have to conduct, especially in relation to smoking policies that benefit individuals beyond just those with a smoke-related disability.

Similarly, in the *Hyland Grievance*, the Grievance Board held that an employer failed to meet its duty to accommodate when it refused to provide a prison guard with a smoke-free placement.<sup>22</sup> This was a reasonable accommodation, as the employee remained capable of working in a non-smoke-free environment as required during emergencies.

In a somewhat related decision, the Federal Court (Trial Division) considered a claim by an individual with environmental sensitivities that he had been subject to cruel and unusual punishment when incarcerated.<sup>23</sup> The Court considered the steps that the prison had taken to accommodate his disability, including attempting different assignments within the institution, providing special equipment and developing alternative living arrangements, and the Court concluded that the prison had taken all reasonable steps to accommodate him. The Court specifically rejected the proposal that the prison construct a special cell, not because of the expense associated with this, but because this was not feasible in light of the institution's construction schedule.

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<sup>21</sup> *Abetkoff v. Saskatchewan Indian Gaming Authority*, December 31, 2002 (SK H.R.T.).

<sup>22</sup> *Ontario (Ministry of Correctional Services) and O.P.S.E.U. (Hyland) (Re)*, 115 L.A.C. (4th) 289 (Ont. Cr. G. S. B).

<sup>23</sup> *Kelly v. Canada*, [1996] F.C.J. No. 880.

### 3. Continuing to work when environment harmful

A final theme that the researchers have discovered in the Canadian jurisprudence relates to refusals to work or insistence on working in an environment that is harmful to an individual with sensitivities.

Administrative decision makers have considered whether an employer can terminate an individual with sensitivities because the individual cannot be accommodated when he or she wishes to continue working in the harmful environment. In the *Gooch Grievance*, the employer terminated the grievor because it was unable to accommodate him by keeping him free from exposure to fumes, smoke and dust after several unsuccessful accommodation attempts.<sup>24</sup> The grievor argued that he was wrongfully terminated, as he was willing to continue to work in the harmful environment. The Board held that the employer was correct to terminate the employee against his objections, in light of the uncontradicted harm his continued employment would have caused him.

Similarly, in *Paradowski*, an animal hospital terminated an employee because of her allergies to animals.<sup>25</sup> It argued that it could not allow her to continue to work there and regularly ingest medications to minimize her allergic reactions. The Tribunal refused an application to dismiss the complaint, but has not made a final determination in the matter.

In addition to an employer's ability to terminate an employment relationship when it cannot be accommodated without ongoing adverse health effects on the employee, the employee may refuse to work in unsafe environments. The *Canada Labour Code*, for example, allows an employee to refuse unsafe work.<sup>26</sup> Under the current interpretation of the federal legislation, this right to refuse unsafe work includes the right to refuse work that is unsafe because of a combination of the worker's medical condition and the conditions of the workplace.<sup>27</sup>

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<sup>24</sup> *IKO Industries Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 773 (Gooch Grievance)*, [1999] A.G.A.A. No. 63.

<sup>25</sup> *Paradowski v. Sunshine Valley Animal Hospital Ltd.*, [2004] B.C.H.R.T.D. No. 442.

<sup>26</sup> R.S.C. 1985, c. L-2, s. 128. See also *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s. 43(3).

<sup>27</sup> Federal interpretation policies and jurisprudence conclude that unsafe conditions must be caused by the workplace itself, not a medical condition of the employee (see e.g. Human Resources and Skills Development Canada, *Interpretations, Policies and Guidelines on Occupational Health and Safety, Part II of the Canada Labour Code, Refusals to Work and Medical Certificates*, No. 905-1-IPG-031). However, where the dangerous situation is a result of a medical condition AND the conditions of the workplace, the right to refuse work arises, albeit with great evidentiary difficulties in establishing causation (see e.g. *Bugden and Treasury Board*, [1988] C.P.S.S.R.B. No. 236; *United Parcel Service Canada and Smith*, [2000] C.L.C.R.S.O.D. No. 15; *Webber and Treasury Board*, [1993] C.P.S.S.R.B. No. 85; *Timpauer v. Air Canada*, [1985] F.C.J. No. 184). In contrast, the equivalent Ontario interpretation manual specifically states that a worker has the right to refuse work that is unsafe because of his or her "susceptibility" to the conditions at the workplace (Ontario Ministry of Labour, Operations Division, *Policy and Procedures Manual*, "Work Refusals Guidance Notes," 1 (22 August 2005) at 56).



#### 4. Balancing conflicting interests

Often, when accommodations are sought, the interests of third parties are affected. This issue arises particularly clearly in an unionized environment where an accommodation may require that provisions of the collective agreement be disregarded to allow an individual to have increased sick leave, adopt flexible work arrangements or transfer positions. In Canada, courts and tribunals have interpreted the specific description of undue hardship considerations as rendering irrelevant the preferences of third parties or the terms of collective agreements, unless they create an undue expense.<sup>28</sup>

While the test and the relevance of these factors is the same when accommodating for environmental sensitivities or other disabilities, the types of accommodation that may be required for sensitivities make the issue particularly relevant. To accommodate an individual with a sensitivity to fragrances or smoke, other employees and customers may be required to refrain from using fragranced grooming or laundry products.

The researchers did not identify any Canadian jurisprudence where such a policy was assessed against the undue hardship standard, but it was often an accommodation that had been attempted by respondents to a grievance or complaint. Through their consultations and literature review, the researchers learned of numerous entities across Canada that have implemented fragrance-free policies or asked people in their offices to voluntarily refrain from using fragranced products.<sup>29</sup> The primary issue that arises is not one of the appropriateness of such policies, but rather of their enforcement. This issue is discussed in greater detail below.

As there is no right to wear fragranced products, the only conflict related to fragrance policies is one of interests, not rights.<sup>30</sup> However, rights-based conflicts have arisen and been discussed in the jurisprudence regarding service animals and allergies to animals. In *Dewdney*, a woman complained that a taxi driver refused her service because she used a service animal.<sup>31</sup> The Tribunal held that the driver's animal allergy constituted a disability and the two conflicting accommodations had to be balanced against one another. Because the passenger could easily obtain services from another driver without an allergy, the Tribunal found for the taxi company and its appropriate balancing of these conflicting rights.

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<sup>28</sup> See e.g. *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (Meiorin Grievance)*, [1999] 3 S.C.R. 3 at para. 80; *R. v. Cranston*, [1997] C.H.R.D. No. 1; *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at 988.

<sup>29</sup> The following Web site lists organizations with scent-free policies: *Fragranced Policies Information Network*, online: [http://www.fpinva.org/Access%20Issues/policies\\_wordage.htm](http://www.fpinva.org/Access%20Issues/policies_wordage.htm).

<sup>30</sup> See e.g. *McNeill v. Ontario (Ministry of Solicitor General & Correctional Services)*, [1998] O.J. No. 1188; *R. v. Ample Annie's Itty Bitty Roadhouse*, [2001] O.J. No. 5968; *Cominco Ltd. v. United Steelworkers of America, Local 9705*, [2000] B.C.C.A.A.A. No. 62.

<sup>31</sup> *Dewdney v. Bluebird Cabs Ltd.*, [2003] B.C.H.R.T.D. No. 5.

This issue was also considered in *Fitton*, where several passengers with service animals were not able to board a plane, as the pilot had severe allergies to dogs.<sup>32</sup> The Agency concluded that the airline had fulfilled its obligations by considering less intrusive alternatives, although none were operationally feasible. Nonetheless, the Agency recommended that the airline investigate development of a system that would cross-reference this information in its booking system.

At present, it is unclear whether smoking or addiction to nicotine will qualify as a disability requiring accommodations.<sup>33</sup> Should it qualify, issues similar to those related to animal allergies will arise, as the accommodation of smokers and those allergic to smoke may be in conflict with one another.

## *ii. Involving the various parties*

Numerous parties may need to be involved in the accommodation process for it to be effective: employers, colleagues, commercial landlords, residential landlords, neighbours and service recipients. During their consultations, the researchers learned that, often, these parties are involved in the accommodation process through education and voluntary compliance. Just as harassment is prevented through both education and enforcement, so too is co-operation with the accommodation of environmental sensitivities.

For example, Nancy Bradshaw of the Environmental Health Clinic and Women's College Hospital in Toronto speaks to employers and employees on development of fragrance-free policies in the workplace.<sup>34</sup> She finds that, because a large portion of the population reports some sensitivity to fragrances and has a general understanding of asthma, a condition with similar environmental triggers, many individuals will voluntarily comply with fragrance policies. If unable to eliminate exposure to triggers, partial compliance will at least reduce the toxins from fragrances in the environment.

However, the main question is what to do when voluntary measures are unsuccessful. Is an employer required to discipline or terminate employees for non-compliance? Must a service provider refuse service to clients? Must a condominium or apartment building evict residents for not complying with smoking rules?<sup>35</sup> The answer to this question, as with all other accommodation, depends on the particular circumstances giving rise to the request for accommodation.

In *Hyland*, a prison guard filed a grievance for non-accommodation for his smoke sensitivity.<sup>36</sup> The Board held that the employer failed to accommodate by not enforcing

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<sup>32</sup> *Fitton et al. v. Air Georgian Ltd.*, Decision No. 528-AT-A-2004 (C.T.A.).

<sup>33</sup> See e.g. *Cominco Ltd. v. United Steelworkers of America, Local 9705*, [2000] B.C.C.A.A.A. No. 62; *Re. Hamilton-Wentworth (Regional Municipality) and C.U.P.E., Local 167* (1994), 44 L.A.C. (4th) 257.

<sup>34</sup> Interview of Nancy Bradshaw by Cara Wilkie and Margaret E. Sears (September 12, 2006).

<sup>35</sup> This issue was argued, though not decided, in *Brown v. Strata Plan LMS 952*, [2005] B.C.H.R.T.D. No. 137.

<sup>36</sup> *Ontario (Ministry of Correctional Services) and O.P.S.E.U. (Hyland) (Re)*, 115 L.A.C. (4th) 289 (Ont. Cr. G. S. B.).

its non-smoking policy and that it was unreasonable for it to require the grievor to identify those individuals breaching the policy, as this would result in his isolation from colleagues.

In *Maljkovich*, the Crown was ordered to pay compensation for breach of its common-law duty to provide a prisoner with a smoke allergy with a healthful environment.<sup>37</sup> The prisoner had been regularly exposed to smoke during his incarceration, and the Court held that the defendant should have taken the reasonable step of monitoring compliance with the non-smoking policy. As in *Hyland*, the Court held that the prison's reliance on guard observation of policy breaches or complaints being raised was unreasonable. Instead, enforcement of the policy should have included better monitoring of smoke-free spaces or smoke detectors to alert prison officials to policy breaches.

The Ontario Rental Housing Tribunal has considered the health effects of smoking on residential neighbours.<sup>38</sup> In *Feaver*, a landlord with health reactions to smoking sought to evict a tenant living below her because smoke passed between units through the ventilation system. While unable to conclude that her health effects were caused by the smoke, the Tribunal concluded that the smoke was preventing her reasonable enjoyment of the property and ordered the tenant to stop smoking in the unit. Should the tenant fail to comply with this order, the Tribunal ordered that the tenant could be evicted.

The researchers have not identified decisions specific to fragrance policies or other decisions that relate to the issues of enforcement against service recipients or in housing. The visibility of smoking and the general prevalence of smoke-detecting equipment make infringements of smoke-free policies simpler to identify and enforce than fragrance-free policies. Practically speaking, the ability to enforce fragrance policies is much greater with respect to employees than service recipients. In some environments, such as hospitals, enforcement of such policies against service recipients would be nearly impossible, as there is a right to receive services.

## **b. United States**

Because of the dissimilarities between the ADA and the Act, comparisons with American jurisprudence must be made cautiously. Many conditions not easily recognized as disabilities in the United States, such as environmental sensitivities, do or would qualify in Canada (see discussion of definitions of disability above). Accommodations that have been rejected as unreasonable or as posing an undue hardship in the United States, such as the provision of sign-language interpretation services, may be required in Canada. The researchers therefore caution readers with regard to drawing conclusions from the cases outlined below.

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<sup>37</sup> *Maljkovich v. Canada*, [2005] F.C.J. No. 1679.

<sup>38</sup> *Feaver v. Davidson*, [2003] O.R.H.T.D. No. 103.

*i. Undue hardship*

The ADA requires that proposed accommodations be both reasonable and not pose an undue hardship. Accommodations constitute undue hardship when they require actions that are significantly difficult or expensive. In making this determination, relevant factors to consider include the nature and cost of such accommodation, the financial resources of the enterprise, the number of individuals employed by it, the type of facilities it has and the type of operations carried out by the covered entity.<sup>39</sup> However, accommodations characterized as “personal devices and services” are not required as a form of accommodation where they are devices that the individual also requires outside the workplace.

Searches of American jurisprudence revealed a surprising number of decisions relating to environmental sensitivities that had either survived argument on the definition of disability or where this issue had not been addressed. The decisions that relate to undue hardship have several general themes: allowing for non-attendance at the workplace, providing a chemical-free environment, making alterations to the building and job restructuring.

1. Non-attendance

While the courts have been careful to state that they do not reject non-attendance options in all circumstances, in each case that the researchers have identified that relates to this issue, non-attendance was rejected because it was held to be an unreasonable form of accommodation.<sup>40</sup>

In *Jones*, the Court rejected an employee’s proposal to be accommodated by being allowed to work from home, as the employee would not have had sufficient access to documents and people and would have created an unreasonable administrative burden.<sup>41</sup> Quoting the *Vande Zande* decision, the Court addressed the appropriateness of such accommodations:

Most jobs in organizations public or private involve team work under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance. This will no doubt change as communications technology advances, but is the situation today. Generally, therefore, an employer is not required to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home...<sup>42</sup>

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<sup>39</sup> ADA § 12111(10).

<sup>40</sup> See e.g. *Lalla v. Consol. Edison Co. of N.Y., Inc.*, 2001 U.S. Dist. LEXIS 5312.

<sup>41</sup> *Jones v. Ind. Civ. Rights Comm'n*, 2006 U.S. Dist. LEXIS 23954.

<sup>42</sup> *Ibid.* quoting *Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 544-45 (7th Cir. 1995).

Similarly, in *Whillock*, the Court held that the employer was not required to allow an airline telephone agent to work from home, as the required computer equipment is normally in constant use and does not sit idle when a particular individual is not on duty.<sup>43</sup> Additionally, it was necessary to ensure the security of information and for the employee to have in-person interactions for supervision, mentoring and training. The Equal Employment Opportunity Commission (EEOC) similarly rejected such a work arrangement as unreasonable in *Roth*.<sup>44</sup>

In *Keck*, the complainant proposed working during off-peak hours, such as evenings and weekends, and proposed that smoke and perfumes be banned during those times.<sup>45</sup> Despite the fact that she had been allowed to work in this way previously for three years, the Court held that it did not constitute a reasonable accommodation, as supervision would not be possible. In *Heaser*, the Court similarly rejected a work-from-home arrangement, even though an individual had previously worked from home for three months, with no performance issues.<sup>46</sup>

## 2. Provision of a chemical-free environment

American courts have been similarly dismissive of proposals to accommodate for environmental sensitivities by providing a chemical-free environment. Generally, such accommodations are rejected on the basis that the accommodation requests are for personal devices and so the accommodations are not required by the ADA.<sup>47</sup>

In *Jones*, the Court considered a request to accommodate for sensitivities by avoiding exposure to the triggering substances:

In this situation, there is only so much avoidance that can be done before an employer would essentially be providing a bubble for an employee to work in... An employer is not required by the ADA to create a wholly isolated work space for an employee that is free from other co-workers... The ADA does not mandate the creation of a co-worker free bubble for Jones.<sup>48</sup>

By contrast, providing a smoke-free area of the office to an individual with a sensitivity to smoke has been accepted as a reasonable accommodation.<sup>49</sup>

In *Comber*, the complainant argued that her employer had unreasonably refused an accommodation request not to drive a particular vehicle on a particular day, as a strong

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<sup>43</sup> *Whillock v. Delta Air Lines* (1995), 926 F. Supp. 1555.

<sup>44</sup> *Roth v. Johnson* (2006), EEOC DOC 01A55898.

<sup>45</sup> *Keck v. New York State Office of Alcoholism & Substance Abuse Servs.* (1998), 10 F. Supp. 2d 194.

<sup>46</sup> *Heaser v. Toro Co.* (2000), 247 F.3d 826.

<sup>47</sup> *McCauley v. Winegarden* (1995), 60 F.3d 766.

<sup>48</sup> *Jones v. Ind. Civ. Rights Comm'n*, 2006 U.S. Dist. LEXIS 23954 quoting *Buckles v. First Data Resources, Inc.*, 176 F.3d 1098,1101 (8th Cir. 1999).

<sup>49</sup> *County of Fresno v. Fair Employment & Housing Com.* (1991), 226 Cal. App. 3d 1541.

deodorizer had recently been used in it. After rejecting evidence on environmental sensitivities as not being scientifically based, the Court held that the accommodation was not a reasonable one, as it would require the employer to respond to her “sense” of fragrances instantaneously.<sup>50</sup>

### 3. Building adjustments

Various renovations or changes to the building environment have been proposed and accepted in the case law. The cost of such adjustments and who will be funding them are primary considerations when determining their appropriateness.

In *Lincoln Realty*, the Pennsylvania Human Relations Commission ordered the largest number of accommodations that the researchers found for any individual with sensitivities. The Commission ordered the following:<sup>51</sup>

- 1) The landlord must allow the tenant to install a kitchen ceiling fan at the tenant’s expense;
- 2) The landlord must remove the dishwasher and seal the pipes at its own expense;
- 3) The landlord must permit the tenant to install a washer and dryer in her unit at her own expense;
- 4) The landlord must install an exhaust fan in the laundry room and install a control switch on the first floor level, at its own expense;
- 5) The landlord must either paint or wallpaper the hallways of the building, using a less toxic paint and in consultation with the tenant, at its own expense;
- 6) The landlord must attempt to address any pest problem with the least toxic pesticide application possible, in consultation with the tenant and at its own expense;
- 7) The landlord must allow the tenant to either recover or uncover her floors at her own expense;
- 8) Within 100 feet of the building, the landlord must attempt to implement an organic lawn care program at its own expense; and
- 9) The landlord must provide to the tenant notice of pest and lawn treatments with toxic materials and all painting.

On appeal, the Court either upheld all of the accommodations or remanded them to the Commission for determination on particular issues, none of which related to their reasonableness or the hardship they might pose.

In *Nanette*, the Court held that, in their entirety, the accommodations requested by the claimant were unreasonable and she was therefore unable to perform the job safely.<sup>52</sup>

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<sup>50</sup> *Comber v. Prologue, Inc.* (2000), 2000 U.S. Dist. LEXIS 16331.

<sup>51</sup> *Lincoln Realty Management v. Pennsylvania Human Relations Commission* (1991), 143 Pa.Cmwlth. 54, 598 A.2d 594.

<sup>52</sup> *Nanette v. Snow* (2004), 343 F. Supp. 2d 465 & *Nanette v. Snow*, 2005 U.S. App. LEXIS 20320.

She had requested that the employer ensure that, in her work environment, no cleaning chemicals be used in her presence, there be good fresh air circulation, she not be located near a copier, there be no recent paint, carpet, glue or furniture, there be no perfumes, it be possible to open the windows and there be no construction.

As these two very different cases demonstrate, the outcome in each case depends on the identity of the covered entity and on who is funding the requested accommodations. However, the *Nanette* decision is more reflective of the jurisprudential treatment of accommodation requests by individuals with sensitivities.

#### 4. Job changes

An alternative accommodation that may be explored is job restructuring. Where the individual's position requires attendance at the office or exposure to chemicals (as in the case of a factory worker), job changes or restructuring may provide a feasible alternative. However, the American courts have regularly held that employers are under no obligation to accommodate in such a way.

In *Mulloy*, the Court, while recognizing the possibility of job restructuring as a reasonable accommodation, held that "an employer need not exempt an employee from performing essential functions, nor need it reallocate essential functions to other employees...To request elimination of an essential function as an accommodation is... 'not, as a matter of law, a reasonable or even plausible accommodation.'"<sup>53</sup>

In *McAlpin*, an employer's refusal to create a vacancy by transferring an employee with a position that did not involve chemical exposure was upheld by the Court.<sup>54</sup> The Court held that "[a]n employer has no duty whatsoever to create a new job out of whole cloth, or to create a vacancy by transferring another employee out of his job."

In *Bazert*, the Court, while not ordering that the employer create a new position, did order it to return an individual to a previous position that was free from exposure to smoke, fragrances or cleaning products.<sup>55</sup> The Court's conclusion on the reasonableness of this accommodation was different from those above because the discriminatory action was transferring him out of the position where he was accommodated, rather than the complainant occupying a position and requesting to be transferred.

#### *ii. Conflicting interests and involving the various parties*

The research revealed only one decision on how conflicting interests can be balanced or third parties involved. The *Temple* decision considers the involvement of third parties in

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<sup>53</sup> *Mulloy v. Acushnet Co.*, 2005 U.S. Dist. LEXIS 12778.

<sup>54</sup> *McAlpin v. National Semiconductor Corp.* (1996), 921 F. Supp. 1518. See also *Gits v. Minnesota Mining and Manufacturing* (2001), not reported in F.Supp.2d, 2001 WL.

<sup>55</sup> *Bazert v. Louisiana Department of Public Safety and Corrections* (2000), 1st C. C.A.

accommodation for a sensitivity and in enforcement.<sup>56</sup> The complainant was a tenant with environmental sensitivities who had been accommodated through duct cleaning, changing the cleaning products used, not painting, and removing carpet. When a tenant living below the complainant began using cleaning products that triggered health reactions, she was asked to change the product that she used and to put tin foil over her vents. The complainant continued to be exposed to the cleaning products and asked that the tenant below her reduce her use of cleaning products. When she failed to do so, the complainant asked that the tenant be evicted.

The Court held that this was an unreasonable accommodation as it would have resulted in evicting the longer-term tenant in favour of a new tenant. Just as it would be unreasonable to eject a senior employee from his or her position, evicting the longer-term tenant was unreasonable, as the Court ought to respect third-party interests.

Despite the somewhat limited legal requirement to involve third parties, the voluntary adoption of fragrance-free policies is as much an option as it is in Canada.

### **c. Australia**

There is a single decision of relevance in Australia. In *Lewin*, the Australian Capital Territory Discrimination Tribunal considered an accommodation request made by a woman attending group therapy—specifically, a request that the organizers implement a no-fragrance policy.<sup>57</sup> Rather than instituting such a policy, the facilitators asked those in attendance at the first session to refrain from wearing fragrances in the future (though the accommodation request had been submitted prior to this session). The Tribunal held that such an accommodation did not pose undue hardship and that the facilitators' failure to request compliance prior to the first session and to take positive action subsequently to prevent exposure was discriminatory.

### **d. United Kingdom and New Zealand**

As noted above, the authors reviewed the jurisprudence of the United Kingdom and New Zealand. However, they were unable to identify any cases relevant to this research.

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<sup>56</sup> *Temple v. Gunsalus*, 1996 U.S. App. LEXIS 24994.

<sup>57</sup> *Lewin v. ACT Health & Community Care Service*, [2002] ACTDT 2.



## **e. Conclusion**

Through this review of domestic and international jurisprudential considerations of how to accommodate for environmental sensitivities, a number of conclusions can be drawn specific to the Canadian context. Canadian courts do not generally follow the American example in disability accommodation because of the very different definitions of disabilities and approach to accommodation (as discussed above). Nonetheless, the number of relevant Canadian decisions is large enough to draw thematic conclusions.

### *i. Undue hardship*

Few proposed accommodations for environmental sensitivities have been found to constitute an undue hardship. While one can expect that a wholesale building renovation would be an undue hardship because of the cost involved, whereas minor alterations would not, none of the Canadian decisions on environmental sensitivities consider the appropriateness of such proposals.

However, arrangements to avoid the workplace when it cannot be made appropriate have been considered. This accommodation depends on the specific nature of the employee's position or of other positions in which it may be possible to place him or her. Nonetheless, Canadian courts are more willing to accept the appropriateness of alternative work arrangements, whether temporary or permanent, than are their American counterparts.

Unlike the situation with the conclusions drawn by the American courts, it can be expected that Canadian decision makers will continue to find that a non-smoking policy does not pose an undue hardship. We expect that the same rationale will likely apply to fragrance policies. Similarly, a covered entity would likely be expected to use less-toxic cleaning materials, pesticides and paints.

### *ii. Conflicting interests*

In Canada, there generally will not be conflicting interests that warrant consideration in the human rights analysis. As with other disabilities, the preferences of third parties do not constitute an undue hardship and are irrelevant to the analysis.

Nonetheless, some interests are affected through enforcement, as discussed below, and some disabilities may require a balancing of conflicting rights to accommodations. Where two disabilities require conflicting accommodations, decision makers will first consider whether alternative means of accommodation exist that do not pose a conflict. If no such accommodation exists, the conflicting interests must be balanced against one another to determine which accommodation will impose less hardship on the covered entity or on the individuals. In *Fitton*, only one of the accommodations was operationally feasible; therefore, the employee was immediately accommodated and the service

recipients were inconvenienced while they awaited a time when they could be accommodated without significant difficulty.

*iii. Involving the various parties*

Canadian courts and administrative decision makers have not only concluded that employers and service providers are required to enforce smoking policies by disciplining employees or evicting tenants, but also have concluded that an entity cannot rely solely on complaints of non-compliance for enforcing the policy. Instead, the entity may be required to purchase smoke detectors at a reasonable expense. These decisions are certainly applicable to the enforcement of fragrance policies, though detection of infringements may be more difficult and would require the purchase and use of fragrance-detecting devices, the availability of which is unknown and beyond the scope of this project.<sup>58</sup>

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<sup>58</sup> One device, known as a chromatograph, has been suggested as a potential device for fragrance detection. The specifics of this device, its uses or accuracy have not been examined by the authors.

#### **IV. Government Policies and Standards on Building Codes**

For this report, the researchers, through their consultations, secondary source review and case law searches, sought material on the extent to which government policies and standards on building codes, air quality and ventilation include features that act as barriers that are detrimental to individuals with environmental sensitivities.

The only case law that the researchers were able to identify that addresses barriers in building codes or rules is *Konieczna*.<sup>59</sup> The complainant identified as a barrier a by-law of a condominium complex requiring residents to have wall-to-wall carpeting, because she had severe allergies to the latex contained in carpeting, as well as to dust mites, mould and formaldehyde. The primary issue before the Tribunal was not the hardship that an accommodation might cause, but whether the Tribunal had the jurisdiction to examine the by-law and whether it constituted prima facie discrimination. The Tribunal found for the complainant on both issues and stated:

Although the by-law is neutral on its face, and applies equally to all residents, the Complainant is adversely affected by the by-law because of her physical disability. The by-law affects her health and quality of life in a way it does not for other residents who do not suffer from the Complainant's disability.<sup>60</sup>

While the researchers were unable to identify any other case law addressing requirements in such standards that act as a barrier to persons with sensitivities, the standards fall far short of accommodating individuals with environmental sensitivities. Generally, building standards are intended for the safety of a building, rather than its impact on health, and as such are particularly unaccommodating in relation to environmental sensitivities.

In fact, the Ontario Human Rights Commission has specifically acknowledged the shortcomings of the *Ontario Building Code* in accommodation for disabilities generally. Building codes are designed to provide a minimum level of safety, but “those responsible for providing access often rely only on the requirements of the *Building Code* without due consideration for their obligations under the *Human Rights Code*.”<sup>61</sup> In its submissions, the Commission recommended that the *Building Code* include standards to minimize chemical exposure.

Despite the shortcomings of building codes generally, the Act, the ADA and the DDA provide for developing standards on accessibility that move toward universal design. In Australia, the Human Rights Commission was recently involved in the redevelopment of the building codes to provide standards for accessibility. However, because the building

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<sup>59</sup> *Konieczna v. Strata Plan NW2489*, [2003] B.C.H.R.T.D. No. 37.

<sup>60</sup> *Ibid* at para. 51.

<sup>61</sup> Ontario Human Rights Commission, Submission to the Ministry of Municipal Affairs and Housing on the Accessibility Provisions of the Ontario Building Code, March 1, 2002.

codes do not currently address issues related to accommodation for environmental sensitivities, this project has yet to address such disabilities.<sup>62</sup>

In the United States, the National Institute of Building Sciences and the Access Board are working together to develop voluntary standards on indoor air quality as it relates to design and construction, operations and maintenance, building materials and designated clean air rooms.<sup>63</sup> While these guidelines are voluntary at this stage, the hope is that, by including industry representatives in their development, there will be greater voluntary compliance with them.<sup>64</sup>

The *California Building Code* currently defines the term “designated clean air room” and provides for certain ventilation and building standards to define a room as such.<sup>65</sup> Again, while buildings are not required to have such spaces, the development of voluntary standards is intended to lead to greater provision of such spaces and to allow individuals with environmental sensitivities to have confidence that they will be healthy in such spaces.

New York State has passed legislation and published guidelines obliging schools throughout the state to purchase less-toxic cleaning and maintenance products.<sup>66</sup> The purpose of the guidelines is to protect general student and employee health, not just the health of those sensitive to chemicals, but it will certainly act to minimize exposures for people with sensitivities as well.

At present, Canadian building codes and government standards related to accommodation for environmental sensitivities are lagging behind those of the United States and Australia. Several states have developed voluntary or mandatory standards on less-toxic alternatives.

**Recommendation 3:** When reviewing their building codes, governments across Canada proactively address issues related to accommodation of people with disabilities, especially disabilities that are difficult to address retrospectively, such as environmental sensitivities.

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<sup>62</sup> Interview with Michael Small and Commissioner Graeme Innis by Cara Wilkie and Margaret E. Sears (August 29, 2006).

<sup>63</sup> National Institute of Building Sciences, “Report of the Indoor Environmental Quality Project to the Architectural and Transportation Barriers Compliance Board,” July 14, 2005.

<sup>64</sup> Interview with James Raggio by Cara Wilkie and Margaret E. Sears (Sept. 6, 2006).

<sup>65</sup> *California Code of Regulations*, Title 24, Parts 2 and 12, 1117B.5.11-1117B.5.11.3.

<sup>66</sup> New York State Office of General Services, “Guidelines and Specifications for the Procurement and Use of Environmentally Sensitive Cleaning and Maintenance Products for All Public and Nonpublic Elementary and Secondary Schools in New York State” August 28, 2006, online: <[http://www.ogs.state.ny.us/bldgadmin/environmental/GreenGuidelines\\_August2006.pdf](http://www.ogs.state.ny.us/bldgadmin/environmental/GreenGuidelines_August2006.pdf)>

## **V. Accommodating Environmental Sensitivities: Best Practices**

In many cases in which environmental sensitivities were considered, a number of accommodations were attempted before the matter went to court or administrative grievance mechanisms were used. The experiences of the employers and service providers involved provide examples of best practices when accommodating for sensitivities. In addition, there are numerous secondary documents identifying means of accommodation for persons with environmental sensitivities. In this section, the authors review thematic best practice accommodations as considered in the jurisprudence and briefly assess them in relation to health, safety and cost.

### **a. Accommodation Principles and Practices**

As for any other disability, the accommodation process for persons with environmental sensitivities must be conducted in an individualized, respectful and inclusive manner. Employers and service providers are well-advised to accommodate in a respectful manner that protects the individual's self-respect, privacy, comfort and autonomy.<sup>67</sup> Accommodations should be individual in nature and not "one size fits all."<sup>68</sup> Finally, the goal of accommodations is independence and full participation of the individual.<sup>69</sup> When evaluating potential accommodations, this is the standard that they ought to be measured against.

### **b. Fragrance Policies and Chemical Avoidance**

Chemical elimination and avoidance is the most significant form of accommodation for environmental sensitivities. Employers and service providers ought to consider the extent to which they can eliminate use of pesticides and use less-toxic or non-toxic cleaning products. Such efforts not only serve to accommodate for environmental sensitivities, but also may minimize injuries and provide a healthier environment. The New Zealand Association of Hairdressers, for example, recognized how pervasive chemicals and resulting injuries were in its industry. As a result, it worked with the Occupational Safety and Health Service of the Department of Labour to develop guidelines on the use, minimization and storage of chemicals used in its industry.<sup>70</sup>

Fragrance policies are one form of chemical avoidance. The jurisprudence makes numerous references to employers and service providers who asked their employees or

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<sup>67</sup> See e.g. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 53 & *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 at para. 74.

<sup>68</sup> See e.g. *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 S.C.R. 3.

<sup>69</sup> See e.g. *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 69.

<sup>70</sup> New Zealand Association of Hairdressers, "Guide to Occupational Safety and Health for the Hairdressing Industry" (February 1997).

service recipients to voluntarily refrain from using fragranced products.<sup>71</sup> Many human rights commissions, unions, churches, hospitals and offices have posted signs and implemented policies seeking voluntary compliance.<sup>72</sup>

Such means of accommodation have no associated costs or risks to health and safety and may in fact have a positive impact upon the health of non-environmentally sensitive individuals. As demonstrated in the extensive workplace injury jurisprudence on this subject, chemical avoidance may in fact prevent injuries and claims of workplace illness, and therefore reduce cost to the employer and health and safety risks in the entire workplace.<sup>73</sup>

Their success is entirely dependent on the collegiality of others and on any education efforts made to inform them as to the reason for the policy.<sup>74</sup> While the policy may not fully accommodate for an individual's sensitivity, in environments where enforcement is nearly impossible, such as where a hospital's service recipients are concerned, it will serve to reduce the frequency and intensity of chemical exposure.<sup>75</sup>

Wherever possible, a fragrance policy should be developed that incorporates enforcement mechanisms such as those that apply for the breach of any other workplace policy (a dress code, for example). The Canadian Department of Justice's policy, for example, specifically states that managers may be required to take "disciplinary action for those who do not accommodate their co-workers."<sup>76</sup>

**Recommendation 4:** Employers and service providers should develop and enforce fragrance-free and chemical avoidance policies, including promoting educational campaigns to increase voluntary compliance with such policies.

**Recommendation 5:** Employers and service providers, for their staff and service recipients, should develop or adopt educational material and programs for accommodation of people with environmental sensitivities, to increase voluntary compliance with such policies.

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<sup>71</sup> See e.g. *Brewer v. Fraser Milner Casgrain LLP*, [2006] A.J. No. 625 (Q.B.); *Lewin v. ACT Health & Community Care Service*, [2002] ACTDT 2; *Hutchinson and Treasury Board (Environment Canada)*, [1999] C.P.S.S.R.B. No. 39.

<sup>72</sup> See e.g. Department of Justice, "Environmental Sensitivities Guidelines," Newsletter, March 31, 2006; Region of Peel, "Scent Sensitivity Program", Wellness at Peel, March 4, 2003; Ottawa Hospital, "Scent-free Workplace," *Administrative Policy and Procedure Manual* (June 13, 2001); Ontario Human Rights Commission, "About the Ontario Human Rights Commission," online: <<http://www.ohrc.on.ca/english/about/index.shtml>>.

<sup>73</sup> See e.g. Decision No. 2188/05, [2005] O.W.S.I.A.T.D. No. 2810; Decision No. 1165 02, [2004] O.W.S.I.A.T.D. No. 2081; Decision No. 1179/98, [1999] O.W.S.I.A.T.D. No. 2561; Decision No. 1271 00, [2001] O.W.S.I.A.T.D. No. 2342.

<sup>74</sup> See e.g. *Lewin v. ACT Health & Community Care Service*, [2002] ACTDT 2.

<sup>75</sup> Interview with Nancy Bradshaw by Cara Wilkie and Margaret E. Sears (September 12, 2006).

<sup>76</sup> Department of Justice, "Environmental Sensitivities Guidelines," Newsletter, March 31, 2006.

### **c. Special Equipment and Renovations**

Commonly attempted and referenced means of accommodation are the provision of specialized equipment to filter the air or to avoid exposure to triggers. In *Treadwell*, an employer provided an employee with extended gloves, a hood, and a dust mask for her sensitivities.<sup>77</sup> In several cases, employers provided their employees with desk filtration systems or HEPA air filters.<sup>78</sup> In *County of Fresno*, the employer provided one of its employees with desk filtration systems to eliminate some of the smoke in the work environment.

The provision of small and individual equipment, while perhaps not providing full accommodation for an individual's disability, is inexpensive and poses no health or safety risks. Larger building or ventilation changes, such as those attempted in *West* and *Temple*, will result in a much larger expense to the employer, but are also more likely to provide a holistic accommodation for the individual with sensitivities.<sup>79</sup> Compared to avoiding or eliminating triggering substances, the provision of specialized equipment is not ideal, as it is much more efficient to avoid the release of toxic substances than to remove them once released.<sup>80</sup> Employers and service providers are therefore well-advised to focus primarily on avoidance and to accommodate by filtering the air only when avoidance is impossible or insufficient.

### **d. Transfers, Re-assignments and Retraining**

In workplaces or positions that by definition involve great exposure to environmental agents, a transfer to an alternative position or alternative location may be the only feasible option. In *IKO Industries*, for example, the employee worked in a factory with regular exposure to wood, smoke and dust that made him ill.<sup>81</sup> No reasonable adjustment to the workplace would eliminate these exposures, as they existed because of the nature of the business. Nonetheless, the employer attempted to transfer the individual internally, in the hopes that other factories, doing similar work, would be appropriate.

In *Coles*, the employer similarly attempted a transfer and provided several months of retraining to an unskilled employee who had developed allergies to cleaners used in the kitchen in which she had worked.<sup>82</sup>

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<sup>77</sup> *Treadwell v. Dow-United Techs.* (1997), 970 F. Supp. 974.

<sup>78</sup> See e.g. *County of Fresno v. Fair Employment & Housing Com.* (1991), 226 Cal. App. 3d 1541; *Jones v. Ind. Civ. Rights Comm'n*, 2006 U.S. Dist. LEXIS 23954; *Vickers v. Veterans Admin.* (1982), 549 F. Supp. 85.

<sup>79</sup> *Justice v. West* (2000), EEOC DOC 01971002; *Temple v. Gunsalus*, 1996 U.S. App. LEXIS 24994. See also *Hutchinson and Treasury Board (Environment Canada)*, [1999] C.P.S.S.R.B. No. 39.

<sup>80</sup> See the companion report to this by Margaret E. Sears for greater details.

<sup>81</sup> *IKO Industries Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 773 (Gooch Grievance)*, [1999] A.G.A.A. No. 63.

<sup>82</sup> *Coles and Treasury Board (National Defence)*, [1998] C.P.S.S.R.B. No. 37.

In some cases, transfers between offices or from one position to another may be sufficient. If, for example, an individual is sensitive to the chemicals used in copying, relocating him or her away from printers, fax machines and photocopiers may be significant as a form of accommodation.<sup>83</sup>

Transfers and reassignments can certainly be provided as an inexpensive accommodation where retraining is not required. However, where no position with the employer can meet the individual's need for non-exposure, transfers and reassignments do not serve as an appropriate accommodation and may have significant health and safety implications.<sup>84</sup> The expense of retraining can be minimal if the individual has most of the skills required, but it can be high where he or she does not have them, as in *Coles*.

#### e. Areas of Coverage

Complete accommodation of individuals with environmental sensitivities requires efforts to minimize the use of toxic substances. As the jurisprudence demonstrates, individuals with environmental sensitivities may require proactive action in traditional areas of accommodation such as employment, commercial service provision and housing. However, their accommodation needs may also encompass the actions of commercial neighbours, parks when pesticides are sprayed, construction, and manufacturing of consumer and commercial products. Because chemicals are pervasive, so too must accommodation be if it is to adequately address the needs of individuals with environmental sensitivities.

**Recommendation 6:** Employers and service providers should proactively take steps to minimize chemical use, purchase less-toxic products, and advocate with the construction and manufacturing industries to produce less-toxic materials.

**Recommendation 7:** The Commission should undertake or continue educational campaigns that encourage proactive accommodations, including in non-traditional areas of accommodation, such as national parks or other green spaces.

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<sup>83</sup> See e.g. DeFreitas Saab, T., "Accommodation and Compliance Series: Employees with Multiple Chemical Sensitivity and Environmental Illness," online: Job Accommodation Network <<http://www.jan.wvu.edu/media/MCS.html>>.

<sup>84</sup> See e.g. *IKO Industries Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 773 (Gooch Grievance)*, [1999] A.G.A.A. No. 63; *Paradowski v. Sunshine Valley Animal Hospital Ltd.*, [2004] B.C.H.R.T.D. No. 442.



## **VI. Conclusion**

There are many more obstacles to accommodation for environmental sensitivities than there are to many other disabilities. A person with sensitivities may find it difficult to understand his or her condition and its triggers, and may then find it difficult to explain and document these to employers and service providers. Successful accommodations require innovative strategies to minimize or eliminate exposure to triggers through their elimination or removal from the environment or through avoidance of the environment. Individuals normally excluded from the accommodation process, such as colleagues, other service recipients and neighbours, must actively participate in many accommodations of people with environmental sensitivities if the accommodation is to be successful. Employers and service providers must be willing to develop and utilize enforcement mechanisms to compel compliance where it is not provided voluntarily. These hurdles are largely unique to environmental sensitivities.

## **Appendix A: Research Methodology**

### **Literature Review and Consultations**

The researchers began by conducting a review of secondary literature resources on environmental sensitivities, accommodation for them and relevant case law. Such documents, identified through electronic database searches, the consultation process, and hard-copy indices, broadened the review of jurisprudence and provided contextual information on environmental sensitivities.

Simultaneously, the researchers contacted representatives of domestic and international human rights agencies and organizations with expertise in environmental sensitivities. The researchers were able to identify relevant literature, jurisprudence, best practices and standards through their consultation. Additionally, the researchers were able to confirm their conclusions on the state of the case law in each jurisdiction through this process.

The researchers have incorporated in this report the information gathered through the literature review and consultation.

### **Legal Database Search**

The researchers examined the jurisprudence in each Canadian jurisdiction from human rights tribunals and the courts, and in union arbitration decisions. Similarly, the researchers reviewed relevant jurisprudence and administrative decisions in New Zealand, Australia, the United States and the United Kingdom. Cases of significance were subsequently noted to follow the development of the jurisprudence and considerations applied in the past.

The researchers used a number of terms in their searches, but the primary terms used were “environmental sensitivity,” “chemical sensitivity,” “environmental illness,” “asthma” and “allergy.”

After identifying relevant case law, the researchers reviewed the decisions to identify emerging themes, patterns and rules.

## **Appendix B: Annotated List of Available Resources**

### **Articles**

Ad Hoc Committee on Environmental Hypersensitivity Disorders, report to Murray J. Elston, Minister of Health (August 1985). This report details the knowledge about environmental hypersensitivity, especially its prevalence, diagnosis, and treatment.

Advisory Panel on Environmental Hypersensitivity, report to R. Reid, Assistant Deputy Minister of Health (September 8 1986). Review of the report of the Ad Hoc Committee on Environmental Hypersensitivity Disorders.

Afram, R., "New Diagnoses and the ADA: A Case Study of Fibromyalgia and Multiple Chemical Sensitivity" (2004), 4 *Yale J. Health Pol'y L. & Ethics* 85. Extensive review of cases in relation to whether fibromyalgia and MCS are a disability under the ADA.

Allergy and Environmental Health Association, "The Environment of Learning: How School Boards Can Help," PowerPoint presentation (n.d.). This presentation provides information about environmental sensitivities in order to promote better indoor school environments and air quality.

Ashford, N. & Miller, C., "Chemical Sensitivity: A Report to the New Jersey Department of Health" (December 1989). This report provides a review of MCS and cautions against pursuing psychological causes of illness before environmental causes have been ruled out.

Bigenwald, C.A., Director, District Health Council Program, memorandum to D.W. Corder, Acting Assistant Deputy Minister, Ontario Ministry of Health (July 23, 1986). Review of Advisory Panel on Environmental Hypersensitivity's recommendations.

Buck, K., Director, Policy and International Program, Canadian Human Rights Commission, letter to Brett Moore, Head Eco-Systems Protection, Parks Canada (June 26, 2003). Letter on environmental sensitivities, the duty to accommodate and chemical spraying.

Canada Mortgage and Housing Corporation, "Research house for the environmentally hypersensitive: description and technical details" (1994). Brochure describing prototype house to improve air quality for individuals with environmental sensitivities.

Citizens for a Safe Learning Environment, "Examples of North American Organizations That Recognize Multiple Chemical Sensitivities/Environmental Illness," online: <http://www.chebucto.ns.ca/education/CASLE/casle.html>. Brief overview of some North American jurisdictions and organizations that have taken steps to recognize environmental sensitivities.

DeFreitas Saab, T., “Employees with Fragrance Sensitivity,” *Accommodation and Compliance Series*, online: Job Accommodation Network, <http://www.jan.wvu.edu/media/fragrance.html>. Overview of respiratory impairments in the context of the ADA and the duty to accommodate.

DeFreitas Saab, T., “Employees with Multiple Chemical Sensitivity and Environmental Illness,” *Accommodation and Compliance Series*, online: Job Accommodation Network, <http://www.jan.wvu.edu/media/MCS.html>. Overview of MCS in the context of the ADA and the duty to accommodate.

DeFreitas Saab, T. “Employees with Respiratory Impairments,” *Accommodation and Compliance Series*, online: Job Accommodation Network, <http://www.jan.wvu.edu/media/respiratory.html>. Overview of respiratory impairments in the context of the ADA and the duty to accommodate.

Department of Justice, “Environmental sensitivities: finding solutions,” *Inter Pares* (Summer/Fall 2003). Article from an internal publication describes the accommodation received by two Department of Justice employees with environmental sensitivities.

Fallace, M. & Lang, R., “Why Multiple Chemical Sensitivity and Related Conditions Should Be Excluded from the Americans with Disabilities Act” (1997), 48 *Lab. L.J.* 66 (Appendix A, tab 21). Article on MCS as a disability and accommodation for it.

Guiffrida, D., Psychiatric Patient Advocate Office, letter to Howard Danson, Acting Director, Psychiatric Hospitals Branch, Ministry of Health (July 12 1989). Letter on effect of environmental toxins in hospital setting

Health and Welfare Canada, “Chronic Diseases in Canada, Supplement: Environmental Sensitivities Workshop” (May 24 1990). Contains 20 recommendations regarding environmental sensitivities.

Human Resources and Social Development Canada “*Refusals to Work and Medical Certificates*,” No. 905-1-IPG-031, *Interpretations, Policies and Guidelines (IPGs) on Occupational Health and Safety, Part II of the Canada Labour Code*. Excerpt from policy and guidelines regarding work refusals by individuals with disabilities or specific medical conditions.

Kassirer, J. & Sandiford, K., “Socio-Economic Impacts of Environmental Illness in Canada,” report to the Environmental Illness Society of Canada, November 15, 2000. Report detailing the social and economic costs of environmental illnesses in Canada to both individuals with sensitivities and to the public as a whole.

Lieberman, M.S. et al., “Multiple Chemical Sensitivity: An Emerging Area of Law” (1995), *Trial* 31:22 (LegalTrac). Article discusses accommodating people with MCS in housing and employment.

Mahoney, W.J., OMA Liason, Special Education Advisory Council, Ministry of Education, letter to Peter Ferren, Special Education Advisory Council, Ministry of Education, Special Schools Branch (October 24, 1995). Letter discusses MCS in the educational environment.

McCampbell, A., "Multiple Chemical Sensitivities Under Siege," online: Townsend Letter for Doctors and Patients' Archives (January 2001), <http://www.tldp.com>. Article focussing on New Mexico, mostly about the chemical industry and corporate lobbying regarding MCS.

McDonald, J., "This Place Makes Me Sick!", (2002) 28 *Employee Rel. L.J.* 101. Article on MCS as a disability.

McWilliams, K., "Peanut-Free Buffer Zones: Has the Department of Transportation Gone Nuts?" (1999), 65 *J. Air L. & Com.* 189. Article on discrimination in air travel.

ME/CFS Society, "MCS Basics Paper," online: [http://sacfs.asn.au/about/chemical/mcs\\_basic.pdf](http://sacfs.asn.au/about/chemical/mcs_basic.pdf). Paper reviews international positions on and recognition of MCS and criticizes the Australian response.

Ministry of Labour, "Work Refusals Guidance Notes," *Policy and Procedures Manual*. Excerpt from policy manual regarding work refusals by workers who are particularly susceptible to health conditions.

National Institute of Building Sciences, "Report of the Indoor Environmental Quality Project to the Architectural and Transportation Barriers Compliance Board," July 14, 2005. Report on improving access to buildings for people with MCS and EMS.

New Zealand Association of Hairdressers Inc., "Guide to Occupational Safety and Health for the Hairdressing Industry," February 1997. Guide developed as a result of injuries and health problems related to the work practices in the hairdressing industry that gives information about best practices on protection.

Norton, K., Chief Commissioner, Ontario Human Rights Commission, Letter to Tony Clement, Minister of Health and Long-Term Care (April 16 2003): Letter on use of pesticides for West Nile virus prevention, implications for people with environmental sensitivity and the duty to accommodate.

Norton, K., Chief Commissioner, Ontario Human Rights Commission, letter to Pat Vanini, Executive Director, Association of Municipalities of Ontario (April 16, 2003). Letter on use of pesticides for West Nile virus prevention and implications for people with environmental sensitivity and the duty to accommodate.

Ontario Human Rights Commission, "Submission to the Ministry of Municipal Affairs and Housing on the Accessibility Provisions of the Ontario Building Code," March 1, 2002. Document notes the inadequacy of existing government standards on accessibility.

Ontario Medical Association Committee on Public Health, “Environmental Hypersensitivity Disorders,” report to Council 1987. Position paper calling for the separation of medical and social issues around environmental hypersensitivity disorders.

Public Service Alliance of Canada, “Multiple Chemical Sensitivity at Work: Guide for PSAC Members” (April 1997). Guide outlines issues around MCS in the workplace, including information on symptoms and how a union can help.

Read, D., “Multiple Chemical Sensitivities” (report to the Environmental Risk Management Authority of New Zealand, June 2002), online: ERMENZ Reports, Reviews and Research, <http://www.ermanz.govt.nz/resources/publications/pdfs/ER-GI-02-1.pdf>. Report is an overview of scientific knowledge on MCS.

Reed Gibson, P., “Understanding & Accommodating People with Multiple Chemical Sensitivity in Independent Living” (2002), online: Independent Living Research Utilization, <http://www.ilru.org/html/publications/bookshelf/MCS.html>. Booklet reviews the employment, housing and social challenges faced by people with MCS, and makes suggestions for how independent living advocates can assist them.

Sears, M. et al., “Pesticide assessment: Protecting public health on the home turf” *Paediatr. Child Health* 2006; 11(4):229-234., online: Prevent Cancer Now, <http://www.preventcancer.ca/news/pdf/06-04-Sears24-D.pdf>. Article reviews the Canadian assessment standard for a common herbicide, and advocates for stronger legislation and increased use of alternate landscaping practices.

Sine, D. et al., “Accommodating Employees with Environmental Sensitivities: A Guide for the Workplace,” online: Healthy Indoors Reports and Publications, <http://healthyindoors.com/english/resources/workplace1.pdf>. Educational booklet aimed primarily at employers.

Staton, K.A. & Caswell, T.A., “The Americans with Disabilities Act As It Relates to Employment in the Aviation Industry: Navigating Through Uncontrolled Airspace,” (1999) 64 *J. Air L. & Com.* 459. Discussion of MCS and appropriate accommodations.

Stutt, E. & Rotor, L., “Accommodating the Needs of Students with Environmental Sensitivities: A Report for School Boards, Parents and Educators,” Allergy and Environmental Health Association of Canada (January 1996). Guide explaining environmental sensitivities in the educational context with information on accommodating students.

Wilson, C.W., “MCS Disorder and Environmental Illness as Handicaps,” online: Global Recognition Campaign for Multiple Chemical Sensitivity and Chemical Injury, <http://www.mcs-global.org/Documents/PDFs/MCS%20Disorder.pdf#search=%22MCS%20Disorder%20a>

nd%20Environmental%20Illness%20as%20Handicaps%22>. Memo analysing whether MCS is a disability under the *Fair Housing Act*.

Winterbauer, S. "Multiple Chemical Sensitivity and the ADA: Taking a Clear Picture of a Blurry Object (Americans with Disabilities Act of 1990)," (1997) 23 *Employee Rel. L.J.* 64 (LegalTrac). Practical discussion on accommodating an employee with MCS.

Working Group of the WHO European Centre for Environment and Health, Bilthoven Division, "The Right to Healthy Indoor Air: Report on a WHO Meeting, Bilthoven, Netherlands, 15-17 May 2000," UN Doc. EUR/00/5020494, online: World Health Organization Regional Office for Europe, <<http://www.euro.who.int/document/e69828.pdf>>. Document reviewing the increasing incidence of health problems from unsafe indoor air.

### **Sample Policies**

Allergy and Environmental Health Association, "No Scents, Please!", OC Transpo scent-free awareness sign. Sign to be posted inside OC Transpo buses were part of an information campaign.

Department of Justice Human Resources Planning and Policy Unit, "Policy on Accommodating Differences in the Workplace" (June 2001). This policy sets out the requirements and procedures for the accommodation of all employees and prospective employees who require accommodation on any ground protected by the *Canadian Human Rights Act* and the *Employment Equity Act*.

Department of Justice, "Environmental Sensitivities Guidelines," Newsletter, March 31, 2006. Guideline outlining the Department's policies on indoor air quality as it relates to environmental sensitivities.

Fragrance Products Information Network, "Workplace Policies," online: <[http://www.fpinva.org/Access%20Issues/workplace\\_policies.htm](http://www.fpinva.org/Access%20Issues/workplace_policies.htm)>. This document reviews the rationales for fragrance-free policies in the workplace and suggests how they may be implemented.

New York State Office of General Services, "Guidelines and Specifications for the Procurement and Use of Environmentally Sensitive Cleaning and Maintenance Products for All Public and Nonpublic Elementary and Secondary Schools in New York State," August 28, 2006, online: [http://www.ogs.state.ny.us/bldgadmin/environmental/GreenGuidelines\\_August2006.pdf](http://www.ogs.state.ny.us/bldgadmin/environmental/GreenGuidelines_August2006.pdf). Guidelines developed to protect the health of children and employees by using products that minimize adverse health impacts.

New Zealand Association of Hairdressers, "Guide to Occupational Safety and Health for the Hairdressing Industry" (February 1997). This guide was developed to address injuries

and health problems directly attributable to workplace practices in the industry. It gives information for employers and employees on safer work environments.

Office of Compliance, Student Policy and Judicial Affairs of Rutgers State University, , “Whether Multiple Chemical Sensitivity (MCS) is a disability protected under Section 504 and the ADA” (January 2002), online: Office of Compliance, Student Policy and Judicial Affairs, <http://www.rci.rutgers.edu/~polcomp/docs/mcs.pdf>. A policy advisory discussing the responsibility of the university to provide accommodations to individuals with MCS.

Office of General Counsel at The Catholic University of America in Washington, D.C., Summary of Federal Laws, “Non-Discrimination with Respect to Students” (August 2005), online: The Office of General Counsel, <http://counsel.cua.edu/fedlaw/rehabs.cfm>. A summary of accessibility guidelines for the university campus noting that federal regulation does not make provision for MCS or EMS.

Ottawa Hospital, , “Scent-free Workplace,” *Administrative Policy and Procedure Manual*, (June 13, 2001). Document describes the hospital’s scent-free work environment.

Ontario Human Rights Commission, “About the Ontario Human Rights Commission,” online: <http://www.ohrc.on.ca/english/about/index.shtml>. This Commission document includes its request for voluntary compliance with a fragrance-free policy.

Penetanguishine General Hospital, “Fragrance Friendly Environment”: Poster reminding people about patients with sensitivities to scents.

QEII Health Sciences Centre Administrative Policy and Procedure, “Smoking, Scents and Air Quality” (January 1997): Policy document explaining the requirement for a smoke and fragrance-free environment, including the consequences of violation.

Region of Peel, “Scent Sensitivity Program”, Wellness at Peel, March 4, 2003:  
Fragrance-free policy of the Region of Peel

Regional Municipality of Halifax, “No Scents Makes Good Sense”, Metro Transit scent-free policy poster: Poster requesting passengers to refrain from using scented products.

Health and Welfare Canada, Health Protection Branch, “Les Sensibilités d’Origine Environnementale,” *Actualités* (December 23, 1991). This document provides a brief explanation of the symptoms, treatment and prevention of environmental sensitivities.

### **Websites of Relevant Organizations**

Allergy and Environmental Health Association, [www.aeha.ca](http://www.aeha.ca)

American Academy of Environmental Medicine, [www.aem.com](http://www.aem.com)



American Industrial Hygiene Association, [www.aiha.org](http://www.aiha.org)

American Environmental Health Foundation, [www.aehf.com](http://www.aehf.com)

Asthma and Allergy Foundation of America, [www.aafa.org](http://www.aafa.org)

Environmental Health Network, [www.ehnca.org](http://www.ehnca.org)

Canada Employment Immigration Union, [www.ceiu-seic.ca/page\\_1766.cfm](http://www.ceiu-seic.ca/page_1766.cfm)

Chemical Injury Information Network, [www.ciin.org](http://www.ciin.org)

Citizens for a Safe Learning Environment, <http://www.chebucto.ns.ca/education/CASLE>

Environmental Health Clearinghouse, [www.infoventures.com/e-hlth](http://www.infoventures.com/e-hlth)

Environmental Health Clinic, [www.mcms.dal.ca/ricu/environ.htm](http://www.mcms.dal.ca/ricu/environ.htm)

Environmental Illness Society of Canada, [www.eisc.ca](http://www.eisc.ca)

Environmental Law Centre, [www.elc.org.uk](http://www.elc.org.uk)

Environmental Sensitivities Research Institute, [www.esri.org](http://www.esri.org)

Fragranced Products Information Network, [www.fpinva.org](http://www.fpinva.org)

Healthy Indoor Partnerships, <http://healthyindoors.com/>

Human Ecology Action League, [www.members.aol.com/HEALNATN/index.html](http://www.members.aol.com/HEALNATN/index.html)

Institute for Environmental Health Sciences, [www.niehs.nih.gov](http://www.niehs.nih.gov)

Invisible Disabilities Association of Canada, [www.nsnet./org/idacan](http://www.nsnet./org/idacan)

Job Accommodation Network, [www.jan.wvu.edu](http://www.jan.wvu.edu)

MCS Referral and Resources, [www.mcsrr.org](http://www.mcsrr.org)

National Centre for Environmental Health, [www.cdc.gov/nceh](http://www.cdc.gov/nceh)

National Foundation for the Chemically Hypersensitive, [www.mcsrelief.com](http://www.mcsrelief.com)

### **Appendix C: List of Acronyms**

ADA: *Americans with Disabilities Act*

DDA: *Disability Discrimination Act*, Australia

CHRC: Canadian Human Rights Commission

EEOC: Equal Employment Opportunity Commission

EMF: electromagnetic field

EMS: electromagnetic sensitivities

MCS: multiple chemical sensitivities or multiple chemical sensitivity

## **Appendix D: List of Organizations and Individuals Consulted**

The following are individuals and organizations consulted by the authors. Contacts that were made with other individuals and organizations did not lead to a consultation.

### **Human Rights Commissions and Government Organizations:**

<b>Individual(s) Consulted</b>	<b>Organization Represented</b>
1. Sylvia Bell and Denny Anker	New Zealand Human Rights Commission
2. Rod Robb	Disability Rights Commission, Great Britain
3. Michael Small and Graeme Innes	Human Rights and Equal Opportunity Commission, Australia
4. Audrey Dean and Cassie Palamar	Alberta Human Rights and Citizenship Commission
5. Cherie Robertson	Ontario Human Rights Commission
7. John Dwyer	Formerly of Canadian Human Rights Commission
8. Karen Izzard	Canadian Human Rights Commission
9. George Thomson	Formerly of Ad Hoc Committee on Environmental Hypersensitivity Disorder
10. Alec Farquahar	Ontario Ministry of Labour, Occupational Health and Safety
11. James Raggio	Access Board, United States
12. Christopher Kuczynski and Danielle Hayot	Americans with Disabilities Act, Policy Division, Equal Employment Opportunity Commission, United States
13. Janie Hickok Siess and Paul Ramsey	Department of Fair Employment and Housing, California

### **Non-Governmental Organizations:**

<b>Individual(s) Consulted</b>	<b>Organization Represented</b>
1. Kirk Spencer and Seema Lamba	Public Service Alliance of Canada
2. Fred Sadori	Canadian Employment and Immigration Union
3. Matthew Wilson	Director of Labour Relations and

Compensation, Durham Region, Ontario

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|---------------------------|---|
| 4. Virginia Salares       | Canada Mortgage and Housing Corporation   |
| 5. Jennifer Agnolin       | Canadian Environmental Law Association  |
| 6. Shirly Delay           | Invisible Disabilities Association of Canada  |
| 7. Claudette Guibord      | Advocacy Group for the Environmentally Sensitive, Canada  |
| 8. Linda Nolan-Leeming    | Allergy and Environmental Health Association, Canada  |
| 9. Virginia Loescher      | Scarborough Legal Clinic  |
| 10. Jay Kassirer          | Healthy Indoors Partnership, Canada   |
| 11. Nancy Bradshaw        | Environmental Health Clinic, Women's College Hospital, Canada                                   |
| 14. Alfred Donnay         | Multiple Chemical Sensitivities Referral & Resources and John Hopkins University, United States |
| 15. Tracie DeFreitas Saab | Job Accommodation Network, United States  |
| 16. Dr. Colin Little      | Allergy and Environmental Sensitivity Support and Research Association, Australia               |
| 17. Dorothy Bowes         | Allergy, Sensitivity and Environmental Health Association of Queensland, Australia              |
| 18. Dr. Kartar Badsha     | Environmental Law Centre, United Kingdom  |
| 19. Bonita Poulin         | Global Recognition Campaign for Multiple Chemical Sensitivity and Chemical Injury               |