

# **Chapter I**

## **Introduction and Legal Framework**

### **A. INTRODUCTION**

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Canada is an inclusive society, and the Government of Canada is committed to a workplace where people of diverse cultures and abilities contribute fully. Canadian law guarantees equal opportunity for all members of society, and under federal staffing law, all candidates being assessed during a selection process, including those with disabilities, must be provided with equal opportunity to demonstrate their qualifications.

#### **1. Purpose of the Guidelines**

The purpose of this document is to provide guidelines for making decisions about the kinds of modifications to assessment tools and procedures which are appropriate to accommodate candidates with a variety of disabilities. As “guidelines” they provide a framework of principles and recommended procedures which human resource consultants, managers and others responsible for determining accommodations can use in handling concrete cases. In addition, they provide information about and possible accommodations for specific disabilities. While the aim of these Guidelines is to increase awareness and provide practical guidance, they do not replace the judgement of those making decisions in specific cases.

#### **2. Using these Guidelines**

The chapters and appendices which make up these Guidelines may be divided into three categories:

# Basic concepts are addressed in Chapters I-IV.

- S **Chapter I** defines key terms used in the Guidelines and summarizes the legal framework within which they must be applied.
- S **Chapter II** outlines the general principles which serve as a basis for determining accommodations, taking into account the nature of the disability, the qualifications being assessed, and the type of assessment methods being used.
- S **Chapter III** describes the roles of the various parties involved in determining accommodations, discusses issues involved in obtaining information from candidates, and outlines the standards for documentation when it is required for the provision of appropriate accommodations.

- S **Chapter IV** outlines recommended procedures for determining and applying accommodations to ensure a fair assessment process.
- # **Chapter V** discusses issues applicable to candidates in eight different categories of disability and proposes a range of specific accommodations for various assessment methods (written tests, interactive exercises, selection interviews, etc.)
- # **Appendices A and B** contain questions for obtaining information about disabilities and a glossary of adaptive technology and services.

Most users of these Guidelines will have a specific case in mind when they consult the document. However, it is recommended that users take the necessary time to read the chapters covering the basic concepts before referring to accommodations for a specific disability. Chapter V cannot be used effectively without a sound understanding of the first four chapters: the process of determining appropriate accommodations does not follow a single “recipe” but is based on principles and requires both judgement and sensitivity on the part of the user.

### 3. Definitions

Definitions of some terms which will be important when reading and interpreting these Guidelines are found below.

#### 1) Persons with disabilities

“Persons with disabilities” are defined in the *Employment Equity Act* (1995) as: persons who have a **long-term or recurring physical, mental, sensory, psychiatric or learning impairment** and who (a) consider themselves to be disadvantaged in employment by reasons of that impairment, or (b) believe that an employer or potential employer is likely to consider them to be disadvantaged in employment by reason of that impairment (*EEA*, Section 3; emphasis added).

For the purpose of these Guidelines, persons with disabilities do not have to fall strictly within this definition. These Guidelines include such temporary disabilities as injuries, recuperation from surgery, or special requirements due to pregnancy or childbirth.

#### 2) Assessment

In this document, the term “assessment” is used in two distinct ways.

Throughout most of the text, “assessment” refers to the process of evaluating the competencies of candidates in the process of selection for the purposes of recruitment, promotion, or selection to training programs. This is also referred to as “employment testing” and includes written examinations, keyboard tests, and interactive methods of assessment (simulations, interviews, role-plays, reference checks, 360E assessments, etc.).

A second use of the term “assessment” refers to an evaluation carried out by a qualified professional for the purposes of diagnosing and describing the functional limitations of an individual. A professional assessment normally includes a variety of diagnostic tests whose purpose is to determine the existence and nature of an individual’s disabilities and associated functional limitations, and it may also include recommendations for appropriate accommodation in workplace or testing contexts. This type of assessment may take the form of a psycho-educational assessment, a medical examination or an assessment for rehabilitation or career counseling purposes, among others.

### 3) **Accommodations**

In this document, the term “accommodations” is used in two different contexts:

In the context of testing, “accommodations” refers to modifications to testing procedures or instruments which are designed to accommodate the needs of an individual candidate, in order to eliminate or minimize the impact of any disabling condition and permit a fair assessment of his or her abilities in a selection process. In these Guidelines, the term will be used to refer to any departure from established testing protocol made for this purpose. Accommodations may include the following types of alterations to testing protocol but do not imply any change to the qualifications being assessed:

- S** modifications to test administration procedures (e.g., individual testing sessions, time extensions, additional breaks, use of adaptive technology or other aids);
- S** provision of test materials in a format different from that used in the standard administration (e.g., large print, braille, electronic or audio format);
- S** modification of test questions, sub-tests or exercises incompatible with a specific disability (e.g., for a blind individual, substitution of different questions for those containing illustrations);
- S** use of alternative assessment methods or complementary sources of information.

A second use of the term “accommodations” refers to adaptations to the work environment that permit a person with a disability to do his or her job effectively. In this document these will be referred to as “job accommodations” or “workplace accommodations”.

## **B. LEGAL FRAMEWORK**

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The duty to provide accommodations to persons with disabilities is well established in Canadian law and jurisprudence. While some limits are placed on the accommodations which employers are required to offer, stress is placed on the **obligation to accommodate** in employment practices to provide for equal opportunity to persons with disabilities. This chapter briefly outlines the employer's obligations under the law, considering the key notions of *reasonable accommodation*, *duty to accommodate*, *merit*, *undue hardship*, and *bona fide occupational requirements* as they relate to the assessment of persons with disabilities in the staffing process. The reader is also referred to the policy document describing these obligations, the joint Treasury Board and Public Service Commission *Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service* (June, 2002).

### **1. Employment Equity Act (1995)**

The purpose of the *Employment Equity Act (EEA)* is:

to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that **employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences.** (*EEA*, Section 2; emphasis added)

The *EEA* requires employers to identify and remove barriers to employment of persons in the four designated groups, and to institute positive policies and practices and *make reasonable accommodations* to ensure that persons in the four designated groups achieve representation in the employer's workforce proportionate to their labour market availability (Section 5).

The *EEA* also establishes certain limits on the obligation to implement employment equity. Employers are not obliged to undertake measures which would cause "*undue hardship*" or result in hiring or promotion not being based on **selection according to merit** (Section 6).

Thus, the manager engaged in a selection process must be prepared to provide accommodations for persons with disabilities on the job and in the assessment process. In the selection process, the accommodations must provide for selection based on merit.

## 2. **Canadian Human Rights Act** (Amended 1998)

Disability has been one of the prohibited grounds of discrimination in employment practices since the Canadian Human Rights Act (*CHRA*) was first enacted in 1976. In 1998, the *CHRA* was amended to stress the obligation on employers to provide accommodations, commonly referred to as the “**duty to accommodate.**” The amendment establishes the limit on the employer’s duty to accommodate as *undue hardship* (section 15) in two steps. First, the *Act* specifies that an exception to a finding that a practice is discriminatory is if it is based on a “**bona fide occupational requirement**” (BFOR) (Section 15(1)(a)). However, for a practice to be considered to be based on a BFOR, it must be established that accommodation of the needs of an individual or class of individuals affected would impose *undue hardship*, considering health, safety and cost” (Section 15(2)).

Supreme Court rulings have further defined the employer’s obligations for providing accommodations. The Meiorin decision<sup>1</sup> established a test to determine if an employment standard is a BFOR (i.e., considered an exception to a finding of discrimination and thus permissible). The employer must be able to show that: 1) the purpose of the standard or requirement is rationally connected to the performance of the job; 2) it was adopted in good faith (“bona fide”) in the belief that it was necessary to accomplish the purpose; and 3) the standard is reasonably necessary to accomplish the purpose for which it was adopted. The employer must show that the standard is not excessive and that accommodation would result in undue hardship taking into consideration health, safety and cost. If the discriminatory standard meets these three criteria, it is considered a BFOR and can be maintained. It is important to note that the term “standards” used in the context of the Meiorin decision includes qualifications set out in statements of qualifications.

## 3. **Public Service Employment Act** (Amended, 1993)

**Merit** is the guiding principle in selection and hiring in federal organizations subject to the *Public Service Employment Act (PSEA)*. The principle of merit expressed in the original *PSEA* of 1967 was as it now appears in section 10(1), which prescribes that “appointments to or from within the Public Service shall be based on selection according to merit.” This is known as “**relative merit**”, indicating that the person appointed must be the person who is the best qualified from among those in a competition. In 1993 the definition of selection according to merit was broadened to include appointment based on the competence of individuals “as measured by such standard of competence...rather than as measured against the competence of other persons” (section 10(2)). This is referred to as “**individual merit**” and is applied only in circumstances prescribed by the Public Service Commission in Regulations. Whether relative or individual merit is being applied, candidates must undergo an assessment process to demonstrate their qualifications. In both cases, merit is served by

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<sup>1</sup> *British Columbia vs. British Columbia Service Employees’ Union* (Sept 1999), known as “Meiorin”.

providing accommodations when disabilities prevent candidates from fully demonstrating their qualifications.

#### **4. Standards for Selection and Assessment (2001)**

Under section 12 of the *PSEA*, the Public Service Commission is responsible for establishing the standards which govern how candidates are selected and assessed. Section 12(3) of the *PSEA*, prohibits discrimination in the prescription of the standards, with disability being one of the prohibited grounds of discrimination. In the *Standards for Selection and Assessment*, the Commission describes four generic standards which apply to selection and assessment. Standard 3 is of particular relevance to persons with disabilities, as it provides for alternative assessment methods in certain circumstances to allow all candidates to be assessed in a way which preserves merit:

Assessment methods must treat all candidates in an equitable and nondiscriminatory manner. Nonetheless, equitable assessment does not necessarily require the use of the same assessment methods or sources of information for all candidates. For example, in some circumstances, such as sometimes occurs in the assessment of candidates with disabilities, equitable assessment will require the modification of usual procedures... Accommodation ensures that each person is assessed according to his or her own personal characteristics rather than presumed group characteristics.... In all cases, the use of different assessment methods or sources of information for different candidates must be justified on the basis that such differential usage provides for a more accurate assessment and that the information gathered from these different methods or sources is comparable. (*Standards for Selection and Assessment*, Standard 3)

In sum, Canadian law and jurisprudence place clear obligations on departmental personnel in the staffing process:

- S** on the manager to ensure that qualifications described for a job are indeed required to accomplish the work; and
- S** on the selection board to accommodate persons with disabilities in the assessment process as necessary – up to the point of undue hardship, if required – in order to provide for selection according to merit.