

Inaccessible Inclusion: Privacy, Disclosure and Accommodation of Mental Illness in the Workplace

Nicholas Caivano[†]

Many employees living with mental health disabilities recognize the risk of being stigmatized by co-workers and supervisors and are reluctant to disclose their diagnoses. Employees who disclose their mental health conditions may face restricted opportunities, micro-management, subtle forms of social exclusion (including being the subject of gossip) and the possibility of having mistakes over-attributed to their illnesses. Hiding a mental health issue, however, denies the employee the opportunity to access much-needed accommodation and support. In this article, I examine whether the accommodation process as prescribed by the law in Canada protects workers, who would otherwise be excluded due to mental illness, from being stigmatized on that very basis. I also explain how the law may fail to provide a solution for the unequal treatment of persons with mental illness in the workplace by failing to separate institutional inclusion (equal access to job functions) and social inclusion (equal treatment by others) in the accommodation process.

[†] Policy Analyst, Canadian HIV/AIDS Legal Network; Academic Associate, Rule of Law and Economic Development Research Group, McGill University. The author would like to thank Colleen Sheppard for her guidance in developing this article and Derek J Jones for his insights on the article's topic.

Nombre de travailleurs aux prises avec la maladie mentale reconnaissent le risque d'être stigmatisés par leurs collègues et leurs supérieurs hiérarchiques et éprouvent de la réticence à divulguer leur trouble mental. Ceux et celles qui le font risquent ainsi de voir leurs perspectives restreintes, de faire l'objet de microgestion, de subir des formes subtiles d'exclusion sociale (y compris faire l'objet de ragots) et de voir leurs erreurs attribuées démesurément à leur état de santé mentale. Par ailleurs, en ne divulguant pas son trouble mental, la personne qui souffre d'un tel trouble renonce à la possibilité de recevoir les adaptations et le soutien dont elle a pourtant grand besoin. Dans cet article, j'examine si le processus d'adaptation prescrit par la loi au Canada protège de la stigmatisation liée à la maladie mentale les travailleurs susceptibles d'être exclus en raison même de celle-ci. J'explique qu'en ne faisant pas la distinction entre l'inclusion institutionnelle (accès égal aux fonctions professionnelles) et l'inclusion sociale (traitement égal par les autres) dans le processus d'adaptation, la législation pourrait ne pas parvenir à fournir une solution au traitement inégal des personnes aux prises avec la maladie mentale en milieu de travail.

I. Introduction

Many employees living with mental health disabilities recognize the risk of being stigmatized by co-workers and supervisors and are reluctant to disclose their diagnoses. Employees who disclose their mental health conditions may face restricted opportunities, micro-management, subtle forms of social exclusion (including being the subject of gossip) and the possibility of having mistakes over-attributed to their illnesses.¹ Hiding a mental health issue, however, denies the employee the opportunity to access much-needed accommodation and support.² Workers must decide whether to disclose their disability and face the possibility of structural stigma or remain silent and be subject to unequal access to work opportunities. This choice has been referred to as the “difference dilemma”.³

This article considers how employers have accommodated workers who are categorized as “different” due to their mental illnesses while also protecting them from being stigmatized on that same basis. While accommodation can result in the inclusion of persons with mental illness in the workplace by removing barriers that prevent them from performing their duties, in practice accommodation cannot achieve social inclusion where the lack of privacy protections results in unequal treatment. I assert that legal and policy structures in Canada may fail to provide a solution for the unequal treatment of persons with mental illness in the workplace where accommodation conflates institutional inclusion (i.e. equal access to job functions) and social inclusion (i.e. equal treatment by others).

Often, differential treatment manifests as stigma, which has been described as one of the greatest barriers confronting people living with mental illness, producing negative consequences impacting all aspects of their lives.⁴ Arlene Kanter noted that “stigma reflects the values of the dominant group that determines which human differences are desired and which are feared, devalued, or undesired.”⁵ Stigma can also manifest

¹ Patrick Corrigan & Robert Lundin, *Don't Call Me Nuts: Coping with the Stigma of Mental Illness* (Tinley Park, IL: Recovery Press, 2001).

² Susan G Goldberg, Mary B Killeen & Bonnie O'Day, “The Disclosure Conundrum: How People with Psychiatric Disabilities Navigate Employment” (2005) 11:3 *Psychology Public Policy & L* 463.

³ Martha Minow, “Learning to Live with the Dilemma of Difference: Bilingual and Special Education” (1985) 48:2 *Law & Contemp Probs* 157 at 157. Colleen Sheppard and Derek J Jones framed the discrimination faced by persons with mental health issues in the workplace as a “difference dilemma”, examining pre-employment disclosure, the duty to accommodate, and return to work policies: Colleen Sheppard & Derek J Jones, “Transformative Justice: Shattering Stigma in the Workplace” (Presentation delivered at the 5th International Stigma Conference: *Together Against Stigma: Changing How We See Mental Illness*, Mental Health Commission of Canada, Ottawa, 4–6 June 2012) [unpublished].

⁴ Peter Byrne, “Stigma of Mental Illness and Ways of Diminishing It” (2000) 6:1 *Advances in Psychiatric Treatment* 65 at 65.

⁵ Arlene S Kanter, “The Law: What's Disability Studies Got to Do With It or an Introduction to Disability Legal Studies” (2011) 42:2 *Colum HRLR* 403 at 417; Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Garden City, NY: Anchor Books, 1961); Erving Goffman, *Stigma*:

as a sense of shame. Given that the adaptive response to shame is secrecy, employers of people living with mental illness face particular challenges to accommodating employees' specific needs while respecting their need for privacy.⁶

People with mental illness identify employment discrimination as among their most frequent experiences of stigma.⁷ One in five employees living with a serious mental illness report experiencing job-related discrimination such as being refused a transfer, having difficulty accessing training and professional development and not advancing on the job through promotion.⁸ While people with mental health issues may have vastly different medical conditions, they seem to have one fundamental thing in common; they are members of a "socially assigned group status that tends to result in systematic disadvantage and deprivation of opportunity."⁹

The economic arguments for providing appropriate accommodations to people with mental health issues are compelling. In 2012, the costs associated with mental illness in Canada were estimated to amount to a staggering \$21 billion per year,¹⁰ making up over 25 percent of all disability claims.¹¹ At least a third of employees experience emotional or psychiatric symptoms that reduce their performance on the job.¹² Furthermore, the cost of retaining people who suffer from mental illness, many of whom have job skills that are in high demand, is much less than the cost of recruiting and training new employees.¹³ These costs to the economy are growing at a rate of 1.9 percent annually.¹⁴

It is clear that Canadian society has a vested interest in ensuring that people with mental health issues have access to accommodations that allow them to work safely, effectively and in an environment free from stigma and

Notes on the Management of Spoiled Identity (Garden City, NY: Prentice-Hall, 1963). Goffman explains that a stigmatized person is "reduced in our minds from a whole and usual person to a tainted, discounted one" (*ibid* at 3).

⁶ Byrne, *supra* note 4.

⁷ Felicity Callard et al, *Mental Illness, Discrimination and the Law: Fighting for Social Justice* (Oxford: Wiley-Blackwell, 2012) ch 5.1.

⁸ Marjorie L Baldwin & Steven C Marcus, "Perceived and Measured Stigma Among Workers with Serious Mental Illness" (2006) 75:3 Psychiatric Services 388. In this study, "serious mental illness" consisted of persons with a mood, anxiety, or psychotic disorder.

⁹ Samuel R Bagostos, "Subordination, Stigma, and 'Disability'" (2000) 86:3 Va L Rev 397 at 401.

¹⁰ "Mental Illness Imposes High Costs on the Canadian Economy" (19 July 2012), online: The Conference Board of Canada <www.conferenceboard.ca/press/newsrelease/12-07-19/mental_illness_imposes_high_costs_on_the_canadian_economy.aspx> [Conference Board].

¹¹ Brian Lindenber, "Putting a Face on Mental Illness" (28 June 2012) online: Benefits Canada <www.benefitscanada.com/benefits/health-wellness/putting-a-face-on-mental-illness-30087>.

¹² JianLi Wang, Carol E Adair & Scott B Patten, "Mental Health and Related Disability Among Workers: A Population-Based Study" (2006) 49:7 Am J Ind Med 514.

¹³ Paul Taylor, "Mental Illness Costs the Canadian Economy a Lot", *The Globe & Mail* (19 July 2012), online: <www.theglobeandmail.com/life/health-and-fitness/health/mental-illness-costs-the-canada-economy-a-lot/article4428441/>.

¹⁴ Conference Board, *supra* note 10.

discrimination. Provincial and federal human rights legislation imposes a duty to accommodate on employers.¹⁵ The duty is designed to promote equal opportunity and encourage the full participation of people with disabilities in the workplace by requiring employers to eliminate discriminatory barriers.¹⁶ Employers may be required to make adjustments such as allowing more flexible scheduling,¹⁷ modifying the employee's duties¹⁸ or lowering the minimum standard.¹⁹

In order to receive accommodation, persons with mental illness are required to provide medical information to their employers. The question for an employee seeking accommodation is how much information is he or she required to disclose? Conversely, what medical details must an employer be aware of in order to trigger the employer's duty to accommodate? Is an employer under an obligation to obtain a doctor's opinion on how an employee can best be accommodated, or must an employer rely solely on an employee's doctor's note? The law surrounding the degree of disclosure needed to trigger the duty to accommodate is unsettled and lower courts and tribunals have little guidance on this matter. Specifically, there have been few court and tribunal rulings concerning the issue of mental illness accommodation that have been judicially reviewed. This article uses examples from cases where the issue has been addressed to examine how legal and policy structures in Canada have begun to grapple with the privacy intrusion and stigmatizing impact that a request for accommodation can create.

¹⁵ Federal and provincial anti-discrimination measures "place a positive duty on employers ... to accommodate people's needs for reasons associated with recognized discriminatory grounds." Laura Barnett, Julia Nicol & Julian Walker, "Background Paper: An Examination of the Duty to Accommodate in the Canadian Human Rights Context," Library of Parliament (2012) at 2, online: <www.parl.gc.ca/Content/LOP/ResearchPublications/2012-01-e.pdf>. Michael Lynk notes that "[t]he essence of the duty to accommodate is ... [that] employers ... in Canada are required to make every reasonable effort, short of undue hardship, to accommodate an employee who comes under a protected ground of discrimination within human rights legislation." Michael Lynk, "Disability and the Duty to Accommodate in the Canadian Workplace", Addiction Consulting (2004) at 1, online: <www.addictionconsulting.com/media/ACCOMMODATION.pdf>. Additionally,

the duty requires more from the employer than simply investigating whether any existing job might be suitable for a disabled employee. Rather, the law requires an employee to determine whether existing positions can be adjusted, adapted or modified for the employee, or whether there are other positions in the workplace that might be suitable for the employee. The responsibility requires the employer to look at *all* other reasonable alternatives (*ibid* at 2 [emphasis in original]).

¹⁶ See *British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees' Union*, [1999] 3 SCR 3, 176 DLR (4th) 1 [Meiorin cited to SCR]; *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868, 181 DLR (4th) 385.

¹⁷ See e.g. *Ontario (Ministry of Community and Social Services) v Ontario Public Service Employees Union* (2000), 50 OR (3d) 560, 191 DLR (4th) 489 (CA); *Skopitz v Intercorp Excelle Foods Inc*, [1999] OJ 1543, 43 CCEL (2d) 253 (Ct J (Gen Div)); *Qureshi v G4S Security Services (Canada) Ltd*, 2009 HRTO 409, 73 CCEL (3d) 307.

¹⁸ See e.g. *Jones v CHE Pharmacy Inc*, 2001 BCHRT 1, 2001 CLLC 230-028; *Muldoon v Canada (AG)*, 2004 FC 380, 249 FTR 42; *Ottawa-Carleton District School Board v Ontario Secondary School Teachers' Federation* (2005), 141 LAC (4th) 41, 82 CLAS 105 (Ont Arbitration Board).

¹⁹ See e.g. *Green v Canada (Public Service Commission)*, [2000] 4 FC 629, 183 FTR 161; *Irvine v Canada (Canadian Armed Forces)*, 2002 CLLC 230-015, 41 CHRR D/466 (CHRT).

This article provides a framework for understanding why workplace accommodation may fail to achieve full inclusion for persons with disabilities and uses this framework to suggest a model for addressing the privacy needs of persons with mental health disabilities. Full inclusion, where persons with mental illness are free from structural stigma and enjoy access to employment on an equal basis with others, includes both social and institutional inclusion.²⁰ However, current legal and policy structures that set the parameters of the accommodation process in Canada produce only restricted inclusion because they do not protect the privacy of persons with mental illness who may suffer differential treatment due to structural stigma. This is because insufficient legal safeguards protecting an employee's privacy can lead to the disclosure of sensitive information to individuals with control over the employee's workplace outcomes. I suggest that the more workplace accommodation law conflates social and institutional inclusion, the less likely it will be that accommodation will create a truly inclusive work environment. It is hoped that this analysis will sharpen our understanding of the need for sensitivity in the accommodation processes for persons with mental illness in modern workplaces.

The first part of this article discusses the employer's duty to accommodate persons with mental illness. I review the individualized approach to accommodation prescribed by courts and tribunals as a key factor in achieving substantive equality for persons with disabilities in the workplace. I also highlight the challenges to effective accommodation that are unique to persons with mental illness. In the second part, I explain why accommodation has not resulted in the inclusion of persons with mental illness in the workplace. I examine the process most often followed by courts and tribunals to determine whether an employer's duty to accommodate has been triggered and what practical effect this has on persons with disabilities. I argue that the prevailing approach, which requires significant disclosure from employees, produces only restricted inclusion for persons with mental illness. In the third part, I describe an approach to accommodation that decouples the two components of full inclusion, namely social and institutional inclusion. I argue that this method of determining whether an employer's duty to accommodate has been triggered protects the privacy of persons with mental illness and is less likely to perpetuate structural stigma.

²⁰ For a discussion of inclusion that may fail to achieve social justice in societal institutions, see Yuvraj Joshi, "The Trouble with Inclusion" (2014) 21:2 Va J Soc Pol'y & L 207. Joshi argues that while "attempts are being made to include members of excluded groups in societal institutions ... inclusion does not always achieve justice and might sometimes perpetuate injustice" (*ibid* at 207).

II. The Concept of Reasonable Accommodation

Before examining how courts in Canada have considered an employer's duty to accommodate mental illness, I will discuss the potential issues which mental illness presents to the accommodation process due to the nature of this disability. Once these issues have been identified, this section will review how Canadian courts and tribunals have interpreted the duty to accommodate mental illness before turning to a discussion of the relevant international human rights norms such as the *Convention on the Rights of Persons with Disabilities*.²¹ As this section will show, the duty to accommodate has certain strengths for persons with mental illness seeking accommodation in the workplace, such as the focus on individual circumstances as well as its immediate applicability. However, the current understanding of the duty to accommodate also contains inherent limitations posed by the legal concepts of reasonableness and undue burden, which are to be assessed on an individualized basis.

A. Accommodation and Mental Illness

Accommodation allows persons with disabilities to perform their duties safely and effectively and can help someone with a mental health issue return to work after a leave of absence. Canadian employers cannot discriminate against employees with disabilities or illnesses, whether overt or perceived, but instead must accommodate them. However, C. Tess Sheldon cautions that "if accommodation practices are not genuinely inclusive,"²² a person with mental illness "may be perceived as a recipient of special treatment or favouritism"²³ resulting in structural stigma. This person may experience resentment from, or harassment by, other employees who see no outwardly visible signs that the person is living with a disability.

For employers providing accommodation to employees with disabilities, mental illness is conceptually distinct from other disabilities because it tends not to be outwardly visible.²⁴ The experience of a person with mental illness is highly subjective, with many people suffering episodic or cyclical symptoms that can make the disability's impact on an employee's needs unpredictable. Thus, the very nature of mental illness makes it particularly challenging to

²¹ *Convention on the Rights of Persons with Disabilities*, 30 March 2007, 2515 UNTS 3 art 28.2(a) (entered into force 3 May 2008) [CRPD].

²² C Tess Sheldon, "It's Not Working: Barriers to the Inclusion of Workers with Mental Health Issues" (2011) 29:1 Windsor YB Access Just 163 at 166.

²³ *Ibid.*

²⁴ Michael J Prince, "Policies and Practices on the Accommodation of Persons with Invisible Disabilities in Workplaces: A Review of Canadian and International Literature" (22 April 2015) at 8, online: Centre for Research on Work Disability Policy <https://www.crwdp.ca/sites/default/files/documentuploader/full_report_-_lit_review_on_persons_with_invisible_disabilities_in_workplaces_prince_2015.pdf>.

develop standardized accommodation procedures.²⁵

In many of the human rights and labour arbitration cases concerning this issue, courts and tribunals were faced with deciding whether an employer's duty to accommodate had been triggered. Jurisprudence establishes that the employer and employee have corresponding obligations with respect to the accommodation process. Employees have a duty to identify the barriers they are facing on the job due to their disability and to relay this information to the employer; this duty was first articulated by the Supreme Court of Canada in *Central Okanagan School District No 23 v Renaud*.²⁶ The employer must, in turn, offer appropriate accommodation up to the point of undue hardship.²⁷ This raises the question of what requirements courts place on persons with mental illness in order to trigger the accommodation process, particularly when the nature of an employee's disability may prevent him or her from meeting these requirements and when doing so may subject the employee to structural stigma.

It is useful to first examine the definitions of mental illness to which courts and tribunals most often refer.²⁸ According to the Canadian Human Rights Commission,

[m]ental illness is characterized by alterations in thinking, mood or behaviour—or some combination thereof—associated with significant distress and impaired functioning. The symptoms of mental illness range from mild to severe, depending on the type of mental illness, the individual, the family and the socio-economic environment. Mental illness may take many forms, including mood disorders such as depression and bipolar disorder; schizophrenia; anxiety disorders such as obsessive compulsive disorder and post-traumatic stress disorder; eating disorders; and addictions.²⁹

Alternatively, the Ontario Human Rights Commission has adopted the

²⁵ See generally Gareth Williams, "Theorizing Disability" in Gary Albrecht, Katherine D Seelman & Michael Bury, eds, *Handbook of Disability Studies* (Thousand Oaks: Sage Publications, 2001) 123.

²⁶ *Central Okanagan School Dist No 23 v Renaud*, [1992] 2 SCR 970, 95 DLR (4th) 577 [Renaud cited to SCR].

²⁷ Barnett, Nicol & Walker, *supra* note 15 at 4.

²⁸ For a United States perspective, see Bagenstos, *supra* note 9 at 399:

Particularly in the employment discrimination context, the ambiguity of [the] definition [of "disability"] has led to great controversy. Employers argue that plaintiffs and courts have expanded the "disability" category to allow workers with minor physical or personality conditions to obtain ... unjustified exemptions from generally applicable work rules. Disability rights activists argue, by contrast, that courts have inappropriately applied a restrictive definition of "disability" to squelch [*Americans with Disabilities Act*] cases at the summary judgment stage.

See also Robert L Burgdorf Jr, "'Substantially Limited' Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability" (1997) 42:2 Vill L Rev 409 at 536.

²⁹ Canadian Human Rights Commission, *Policy and Procedures on the Accommodation of Mental Illness* (2008) at 5, online: <www.chrc-ccdp.ca/sites/default/files/policy_mental_illness_en_1.pdf> [CHRC], citing *The Human Face of Mental Health and Mental Illness in Canada*, Public Health Agency of Canada (2006) at 30, online: <www.phac-aspc.gc.ca/publicat/human-humain06/pdf/human_face_e.pdf>.

Canadian Psychiatric Association's definition, which describes mental illness as

significant clinical patterns of behaviour or emotions associated with some level of distress, suffering (pain, death), or impairment in one or more areas of functioning (school, work, social and family interactions). At the root of this impairment are symptoms of biological, psychological or behaviour dysfunction, or a combination of these.³⁰

Given that mental illness can, in many cases, result in behavioural or mood dysfunction, it is understandable why the individualized approach mandates that different obligations be imposed on a person with a mental illness than, for example, on a person seeking accommodation for a physical disability. People with mental illness, due to the very nature of their disability, may lack the insight into their condition to be able to find an appropriate accommodation. For example, a person with a mental illness may be unable to identify that a more flexible absenteeism policy would reduce the barriers to his or her ability to work effectively. A person who uses a wheelchair, by contrast, is more likely to be able to identify that a ramp would allow access to his or her workplace.

The Canadian Human Rights Commission has also noted that mental illness may prevent a person from fully initiating the accommodation process. Specifically, the Commission has stated that "denial of the existence of a mental illness may be a symptom of the condition."³¹ While most individuals with a mental illness are willing and capable of engaging in the accommodation process, the Commission recognizes that an illness can prevent someone from assessing his or her own mental health, its impact on his or her work performance or the need to reach out and articulate a concern to an employer.³² For these reasons, an individualized approach, in which the processes that trigger the duty to accommodate vary on a case-by-case basis, is the method most prescribed by courts and tribunals.

B. Accommodation in Canadian Law

The *Canadian Charter of Rights and Freedoms*³³ "applies to the acts and conduct of government, and does not apply to the acts of, and conduct between, individuals"³⁴ and/or those of private corporations. Provincial human rights

³⁰ Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (December 2009) at 37, online: <www.ohrc.on.ca/sites/default/files/attachments/Policy_and_guidelines_on_disability_and_the_duty_to_accommodate.pdf> [OHRC], citing Canadian Psychiatric Association, "Mental Illness and Work", online: <<https://ww1.cpa-apc.org/MIAW/pamphlets/Work.asp>>.

³¹ CHRC, *supra* note 29 at 6.

³² *Ibid.*

³³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [Charter].

³⁴ Ontario Human Rights Commission, "II. Introducing the Ontario Human Rights Code", online <www.ohrc.on.ca/sites/default/files/Policy_and_Guidelines_on_Disability_and_the_Duty_to_Accommodate.pdf>.

codes, however, generally are applicable to the conduct of both private and public sector actors within the province's jurisdiction.³⁵ The interpretation of the *Charter* may assist in interpreting provincial human rights codes despite the differences in the scope of their applicability. For example, the Ontario Human Rights Commission notes that "some of the general principles used to interpret the *Charter* can also be used in interpreting"³⁶ the *Ontario Human Rights Code*.³⁷

Persons with disabilities are protected from discrimination as an enumerated group under section 15 of the *Charter*. When this provision came into force in 1985, "[t]he inclusion of persons with disabilities as a designated group for rights protection in the *Charter* ... was considered a major triumph for advocates of better disability law and policy in Canada".³⁸ Section 15(1) of the *Charter* ensures that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."³⁹ With the enactment of the *Charter*, Canada became the first country to give constitutional status to the equality rights of people with disabilities, both mental and physical.⁴⁰

The underlying principle behind how persons with disabilities are accommodated in Canada is individualization.⁴¹ In the 1985 decision *Ontario Human Rights Commission v Simpson-Sears Ltd*,⁴² the Supreme Court of Canada initially incorporated the duty to accommodate into Canadian human rights law as a process of accommodating employees with *ad hoc* exceptions to general rules that were not otherwise being questioned.⁴³ Furthermore, the Supreme Court, in *Nova Scotia (Workers' Compensation Board) v Martin*, affirmed the need for an individualized approach to accommodating persons with disabilities, given that there are a "virtually infinite variety" of disability-related needs.⁴⁴ The Court stated that "[d]ue sensitivity to these differences

[ohrc.on.ca/en/book/export/html/4264>](http://ohrc.on.ca/en/book/export/html/4264).

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Human Rights Code*, RSO 1990, c H 19 [Code].

³⁸ Mary Anna McColl et al, "People With Disabilities and the Charter: Disability Rights at the Supreme Court of Canada under the Charter of Rights and Freedoms" (2016) 5:1 Can J Disability Stud 183 at 184.

³⁹ *Charter*, *supra* note 33, s 15(1).

⁴⁰ M David Lepofsky, "The Charter's Guarantee Of Equality To People With Disabilities – How Well Is It Working?" (1998) 16:1 Windsor YB Access Just 155 at 161.

⁴¹ OHRC, *supra* note 30 at 13.

⁴² *Ontario Human Rights Commission v Simpsons-Sears*, [1985] 2 SCR 536, 23 DLR (4th) 321.

⁴³ Dianne Pothier, "How Did We Get Here? Setting the Standard for the Duty to Accommodate" (2009) 59:1 UNBLG 95 at 95.

⁴⁴ *Nova Scotia (Workers' Compensation Board) v Martin*; *Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 at para 81, [2003] 2 SCR 504. The Court set out that the question "will not be whether the state has excluded all disabled persons or failed to respond to their needs in some general sense, but rather whether it has been sufficiently responsive to the needs and circumstances of each person with a

is the key to achieving substantive equality for persons with disabilities.”⁴⁵ Individualization has also become the dominant method of implementing accommodations given that persons with mental illness may have periods where they require more supports than at other times, thus necessitating a case-by-case approach.⁴⁶ Policies for accommodating people with physical disabilities thus “cannot be bluntly applied to the accommodation of employees with mental health issues.”⁴⁷

The Supreme Court criticized the individualized approach to the duty to accommodate in *Meiorin*, fearing that “it risked legitimizing systemic discrimination by not questioning dominant norms.”⁴⁸ According to Pothier, this suggests that systemic accommodation is needed to challenge such norms, but she cautions that “[t]o date, the systemic aspects of accommodation have been given only scant attention.”⁴⁹ Instead of leading to systemic corrective action, *Charter* cases have often resulted in awards of individual compensation.⁵⁰ For these reasons, while the *Charter* has achieved a number of important legal milestones for persons with disabilities, some commentators look back at these moments with disappointment, lamenting that the *Charter* has not achieved the sweeping social changes it was envisioned to provide.⁵¹

C. Accommodation in International Law

Rather than directly incorporating human rights treaties into its domestic law, Canada’s treaty obligations can be implemented by ensuring that its legislation conforms with international human rights law. The Supreme Court recently affirmed the importance of international law sources in interpreting domestic law, stating that “to interpret a Canadian law in a way that conflicts with Canada’s international obligations risks incursion by the courts in the executive’s conduct of foreign affairs and censure under international law.”⁵² The Supreme Court has also recognized that the “*Charter* is the primary vehicle through which international human rights achieve a domestic effect”.⁵³ The

disability” (*ibid*).

⁴⁵ *Ibid.*

⁴⁶ *Meiorin*, *supra* note 16 at para 64. McLachlin J (as she was then) stated that “[t]he skills, capabilities and potential contributions of the individual claimant and others like him or her must be respected as much as possible. Employers, courts and tribunals should be innovative yet practical when considering how this may best be done in the particular circumstances” (*ibid*).

⁴⁷ Sheldon, *supra* note 22 at 168.

⁴⁸ Pothier, *supra* note 43 at 104; *Meiorin*, *supra* note 16 at paras 39–42.

⁴⁹ Pothier, *supra* note 43 at 95.

⁵⁰ Lepofsky, *supra* note 40.

⁵¹ Henry Arthurs & Brent Arnold, “Does the Charter Matter?” (2005) 11:1 Rev Const Stud 37; Bruce Porter, “Twenty Years of Equality Rights: Reclaiming Expectations” (2005) 23:1 Windsor YB Access Just 145.

⁵² *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at para 47, [2015] 3 SCR 704.

⁵³ *R v Ewanchuck*, [1999] 1 SCR 330 at para 73, 169 DLR (4th) 193.

Canadian government has repeatedly represented to treaty bodies that the Charter can be used to enforce international human rights.⁵⁴

The concept of reasonable accommodation is firmly embedded in the CRPD and is given explicit mention in Articles 13, 14, 24 and 27. The CRPD defines “reasonable accommodation” as

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.⁵⁵

Article 2, in particular, recognizes the denial of reasonable accommodation as a form of discrimination:

Discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. *It includes all forms of discrimination, including denial of reasonable accommodation.*⁵⁶

In addition, Article 5(3) of the CRPD requires states to “take all appropriate steps to ensure that reasonable accommodation is provided.”⁵⁷

One aspect of the duty to accommodate under the CRPD is particularly noteworthy when considering the differences between discrimination due to mental illness and other forms of discrimination. The duty focuses on the needs of a particular person (“where needed in a particular case”) rather than an entire group of persons with disabilities. It also overtly imposes positive obligations on states, providing for a substantive, rather than formal, notion of equality.⁵⁸ Given the duty imposed on states under Article 5(3) of the CRPD to ensure that reasonable accommodation is provided, states have a positive obligation “to identify barriers in the way of a disabled person’s enjoyment of their human rights and to take appropriate steps to remove them.”⁵⁹

The duty to accommodate under the CRPD is subject to similar qualifications as its Canadian articulation. Only “reasonable” adjustments are required and

⁵⁴ *Victoria (City) v Adams*, 2008 BCSC 1363 at paras 98–99, 161–62, 299 DLR (4th) 193; UN Committee on Economic, Social and Cultural Rights, *Responses to the Supplementary Questions Submitted by the United Nations Committee on Economic, Social and Cultural Rights*, UNESCOR, UN Doc E/C.12/Q/CAN/1 (1998) at paras 1, 53; UN Human Rights Committee, *Initial Reports of States Parties due in 1977: Addendum – Canada*, UNHRC, UN Doc CCPR/C/1/Add.62 (1983) at 1–2; UN Committee on Economic, Social and Cultural Rights, *Summary Record of the 5th Meeting*, UNESCOR, 8th Sess, UN Doc E/C.12/1993/SR.5 (1993) at para 21.

⁵⁵ CRPD, *supra* note 21, art 2.

⁵⁶ *Ibid* [emphasis added].

⁵⁷ *Ibid*, art 5(3).

⁵⁸ Anna Lawson, *Disability and Equality Law in Britain: The Role of Reasonable Adjustment* (Portland, OR: Hart Publishing, 2008) at 187–88.

⁵⁹ *Ibid* at 31.

any adjustments or modifications must not impose a “disproportionate or undue burden” on the state.⁶⁰ The Committee on the Rights of Persons with Disabilities (responsible for overseeing the implementation of the CRPD) found violation of both the duty of reasonable accommodation and the prohibition of discrimination under Articles 5(1) and 5(3) in *HM v Sweden*.⁶¹ The matter concerned the denial of a building permit for the construction of a hydrotherapy pool for the rehabilitation of a person with a physical disability. The state justified the denial on grounds of incompatibility of the extension with the city development plan.⁶² The Committee found a violation of the duty of reasonable accommodation because access to a hydrotherapy pool was essential, and the only effective means, to meet the disabled person’s health needs.⁶³ The state did not advance any reason as to why a departure from the development plan would constitute an undue hardship or disproportionate burden on the state, thus leading the Committee to find a violation of the prohibition of discrimination.⁶⁴

III. Why Accommodation Law Produces Restricted Inclusion

This part explains why accommodation has not resulted in inclusion for persons with mental illness. I review the current model used by courts and tribunals to determine whether an employer’s duty to accommodate has been triggered and argue that this model leaves persons with mental illness open to structural stigma because it requires excessive disclosure. I posit that this model is problematic because it conflates institutional inclusion and social inclusion. The result is that accommodation has not provided an adequate remedy for the exclusion that persons with mental illness face in the workplace.

As this section shows, courts have adopted the view that an employer cannot offer safe and appropriate accommodation to an employee without medical documentation that provides details about the employee’s workplace limitations. I refer to this approach as the full disclosure model of triggering the duty to accommodate. The full disclosure model may not require employees to provide their precise diagnosis to their employer, but it does mandate that they reveal extensive ancillary information about their condition. From this information, the nature of their mental health issue can easily be inferred. The model requires employees to waive some of their privacy rights so their employer may assess their medical condition to determine what

⁶⁰ CRPD, *supra* note 21, art 2.

⁶¹ *HM v Sweden*, Communication No 3/2011, UNCRPD, 7th Sess, UN Doc CRPD/C/7/D/3/2011 (2012).

⁶² *Ibid* at para 2.6.

⁶³ *Ibid* at para 8.5.

⁶⁴ *Ibid*.

accommodations are needed.⁶⁵ The full disclosure approach sets no constraints on who within the organization may act as the employer's representative and have access to the employee's health information. While accommodation that follows this approach may succeed in ensuring institutional inclusion, it fails to account for social inclusion and therefore does not fulfil human rights law's promise of full inclusion. Both types of inclusion are needed for persons with mental illness to be free from structural stigma and enjoy access to employment on an equal basis with others.

A. The Disclosure Process

The Human Rights Tribunal of Ontario's decision in *Matthews v Chrysler Canada Inc.* illustrates the approach to determining whether an employer's duty to accommodate has been triggered under the full disclosure model.⁶⁶ The main tenet of the model is that employers are absolved of responsibility when courts find that they have not been given enough information to proceed with initiating an accommodation dialogue. Specifically, the *Matthews* decision suggests that in order to trigger the duty to accommodate, two coinciding factors are needed. First, the employee's direct supervisors must be made aware that he or she has a disability; and second, that the employee must supply extensive medical information detailing the impact of the mental illness on his or her job functions.

Matthews, the grievor, made allegations of discrimination and failure to accommodate against his employer, Chrysler. Matthews provided evidence that he had a variety of mental health issues and that Chrysler had all the necessary medical information on file to be able to deduce what his restrictions and needs were in order to accommodate him.⁶⁷ Matthews argued that when Chrysler finally offered accommodation, the position was not only inappropriate for his skill level, but also humiliating.⁶⁸

Matthews suffered from anxiety, depression, bipolar disorder and a

⁶⁵ Corrigan has described the term "full disclosure" as referring to people with mental illness making information regarding their diagnosis available to everyone in the workplace. This type of disclosure may develop gradually over the course of the person's employment or all at once. Patrick W Corrigan, "Dealing with Stigma through Personal Disclosure" in Patrick W Corrigan, ed, *On the Stigma of Mental Illness: Practical Strategies for Research and Social Change* (Washington: American Psychological Association, 2005) 257 at 257; Nancy J Herman, "Return to Sender: Reintegrative Stigma-Management Strategies of Ex-Psychiatric Patients" (1993) 22:3 *J Contemporary Ethnography* 295; Kim L MacDonald-Wilson et al, "Disclosure of Mental Health Disabilities" in Izabela Z Schultz & E Sally Rogers, eds, *Work Accommodation and Retention in Mental Health* (New York: Springer, 2011) 191. Employees may also opt for a "selective disclosure" approach by sharing only the more "acceptable" parts their disability, such as "I have a health condition" or "I take medication," instead of revealing information that is more likely to result in stigmatization, such as a "I have bi-polar disorder." Goldberg, Killeen & O'Day, *supra* note 2 at 480.

⁶⁶ *Matthews v Chrysler Canada Inc.*, 2011 HRTO 2053, [2011] OHRTD No 2045 [*Matthews* cited to HRTO].

⁶⁷ *Ibid* at para 31.

⁶⁸ *Ibid*.

substance abuse problem.⁶⁹ While on sick leave, he filed a Sickness and Accident Report which identified his illnesses and detailed the medications he was taking.⁷⁰ He also provided his employer with a report from an independent psychiatric evaluation that provided extensive detail concerning his mental health.⁷¹ Matthews then wrote a letter to the human resources department asking for accommodation for his “health issues” and citing the fact that he had missed a number of days of work.⁷² He stated that he was not always able to comply with the call-in procedure before every absence due to his psychiatric illness.⁷³ He also asked that he be relieved of his obligation to provide ongoing medical notes for each absence.⁷⁴

Matthews argued that his employer knew, based on his medical file, what his diagnoses were and therefore should have known what accommodation he required.⁷⁵ He testified that he was treated as if he had no disability-related needs when Chrysler either knew or should have surmised that his absences were related to his illnesses.⁷⁶ While his medical file did not explicitly address his ability to call in before an absence, he argued that the “company doctors had access to all the information they needed to recommend and implement appropriate accommodations.”⁷⁷ In addition, Matthews opposed providing the information that he had given to Chrysler’s human resources department to his direct supervisors, wanting to keep his medical details private from them.⁷⁸

Chrysler, in turn, argued that it had recognized and met its duty to accommodate based on the medical and accommodation needs that Matthews and his doctors identified.⁷⁹ The employer

argued that the [Ontario *Human Rights Code*] does not require employers to predict or presume anything about an employee’s health or disability status. While it acknowledged having a duty to act, the [employer] argued that the duty to accommodate is only triggered by information given, or requests made, by the [employee], and where the [employee] is co-operative in facilitating the development of an appropriate accommodation plan.⁸⁰

The adjudicator decided in favour of the employer and held that

⁶⁹ *Ibid* at para 9. A large portion of the case also concerned Matthews’ suffering from, and seeking accommodation for, diabetes.

⁷⁰ *Ibid* at para 10.

⁷¹ *Ibid*.

⁷² *Ibid* at para 12.

⁷³ *Ibid*.

⁷⁴ *Ibid*.

⁷⁵ *Ibid* at para 17.

⁷⁶ *Ibid* at para 4.

⁷⁷ *Ibid* at para 19.

⁷⁸ *Ibid*.

⁷⁹ *Ibid* at para 5.

⁸⁰ *Ibid*.

Chrysler had acted appropriately under the *Code* given the information it had.⁸¹ The adjudicator stated that employees are responsible for making the accommodation process work by providing their employer with information that allows an employer to gain an accurate understanding of the restrictions for which an employee requires accommodation.⁸² The issue here, however, was that Matthews had not reached out to his immediate supervisors.⁸³

The approach taken in *Matthews* with respect to the disclosure of information to supervisors shows how employees have been required to waive their privacy in order to trigger their employer's duty to accommodate. Given that Matthews had provided Chrysler details of his illnesses by means of his Sickness and Accident Report, as well as an independent psychiatric evaluation which he had undergone, it is surprising that the adjudicator placed the additional onus on the employee to provide further disclosure to his supervisors before considering the duty to accommodate to have been triggered. It is also surprising that the decision does not address Chrysler's duties to initiate an accommodation dialogue in light of the information that Matthews provided to human resources.

The adjudicator noted that Matthews' supervisors "[knew] nothing about his medical needs"⁸⁴ and that he "opposed providing them with any medical information on the basis of his privacy interests."⁸⁵ He concluded that Matthews' "refusal to disclose to his direct superiors his medical needs prevented him from carrying out necessary elements of the accommodation process."⁸⁶ The adjudicator did not address whether Chrysler's human resources personnel, who had access to detailed reports about Matthews' mental health issues, had a responsibility to communicate with his supervisors and convey that he required leeway with respect to the company's absenteeism policy. Instead, the adjudicator suggests that Matthews was required to share his history of mental illness with his direct supervisors and leave it to them to determine what accommodations were needed.⁸⁷

The case suggests that an employer must have extensive knowledge about an employee's illness in order to determine how that illness can best be accommodated and that the accommodation process cannot proceed with incomplete information. Chrysler argued successfully that Matthews' medical file did not explicitly address his inability to phone in. Matthews claimed that he was denied accommodation with respect to standard call-in and break-time

⁸¹ *Ibid* at para 6.

⁸² *Ibid* at para 50.

⁸³ *Ibid* at para 45.

⁸⁴ *Ibid* at para 19.

⁸⁵ *Ibid*.

⁸⁶ *Ibid* at para 47.

⁸⁷ *Ibid* at para 50.

procedures.⁸⁸ This suggests that, to trigger Chrysler's duty to accommodate, Matthews should have had a dialogue about problematic scenarios that could arise at work with his doctor and then for each scenario, ask the doctor to either agree or disagree that Matthews' health would indeed be a barrier with the doctor noting so in the medical file.

Matthews shows how courts and tribunals, in grappling with the tension between an employee's right to privacy and an employer's need for information, have neglected to consider the stigmatizing effect that providing access to sensitive information to immediate superiors can create. The Tribunal did not consider how the power imbalance between Matthews and his direct supervisors might render him particularly vulnerable to discrimination and reprisal.

The *Matthews* case also suggests that the law imposes no duty on an employer to minimize unequal treatment other than to ensure an employee is able to perform his or her duties as required by his or her position. When Matthews returned to work after a leave of absence with orders not to return to his former position, Chrysler did not have an accommodated position immediately available.⁸⁹ As a result, Matthews spent his first two days back at the plant in a waiting area.⁹⁰ He felt publicly shamed by being kept waiting in this manner, out of work and in full view.⁹¹ On the third day, Matthews was assigned to a position known as "skid watch", which required sitting, standing and potentially pushing a button in the event of an emergency.⁹² Matthews testified that he did not want to work skid watch because it was known to be a job assigned to workers with restrictions and that he felt unfairly stigmatized as a person with a disability.⁹³ The adjudicator's conclusion that there was "no direct evidence that any of [Chrysler's] actions were taken *deliberately* to retaliate against the applicant"⁹⁴ suggests that his assessment of whether Matthews' rights were violated did not take into account any repercussions that a person with mental illness might experience due to stigma in the workplace.

Thus, the prevailing approach to offering workplace accommodation only when an employee surrenders personal information, with little guarantee of privacy, seems to result in institutional inclusion by providing equal access to job functions. But, as *Matthews* shows, it does not result in social inclusion, because the lack of such privacy protections leaves persons with mental illness

⁸⁸ *Ibid* at para 41. The accommodation sought regarding break-time procedures was in relation to his diabetes.

⁸⁹ *Ibid* at para 23.

⁹⁰ *Ibid*.

⁹¹ *Ibid*.

⁹² *Ibid* at para 24.

⁹³ *Ibid*.

⁹⁴ *Ibid* at para 58 [emphasis added].

open to structural stigma if they choose to request accommodation.

B. The Right to Privacy

Privacy holds instrumental value for individuals and has been said to have a close relation to social utility because people must “sell” themselves to the world by controlling the flow of available information about themselves.⁹⁵ Indeed, the reluctance of persons with mental illness to disclose their condition is not unfounded; the reality of discriminatory practices provides a very real incentive for them to keep their medical diagnoses to themselves.⁹⁶

Employers regulated by the federal government are subject to the *Personal Information Protection and Electronic Documents Act*.⁹⁷ Under this statutory scheme, companies seeking personal information, including medical documentation, must obtain an employee’s consent for the collection, use and disclosure of that information.⁹⁸ An employer is not necessarily entitled to know the exact medical condition from which an employee is suffering.⁹⁹ The doctor’s certificate need only include a diagnosis where doing so is clearly and legitimately necessary. In OPC PIPEDA 257, for example, the Federal Privacy Commissioner, whose office oversees the enforcement of *PIPEDA*, held that an employer’s policy of requiring a medical diagnosis to be included on a doctor’s certificate violated the Act.¹⁰⁰ While the employer was within its rights in requiring a medical certificate, the Commissioner held that “the word of the employees’ physicians should have been sufficient” to satisfy

⁹⁵ Richard Posner argues that privacy in personal information should be protected only to the extent to which it increases social utility and assigned away from individuals when it does not. Richard A Posner, “The Right of Privacy” (1978) 12:3 Ga L Rev 393 at 394; Paul M Schwartz, “Privacy and the Economics of Personal Health Care Information” (1997) 76:1 Texas L Rev 1 at 8 at 399–400.

⁹⁶ See Patrick W Corrigan, “The Impact of Stigma on Severe Mental Illness” (1998) 5:2 Cognitive & Behavioral Practice 201 at 201:

Social psychologists have developed a model of stereotype that frames stigma as a cognitive structure. This model identifies three targets: (a) persons who hide their mental health experience from the public and suffer a private shame; (b) persons who have been publicly labeled as mentally and suffer societal scorn; and (c) society itself, which suffers fears and misinformation based on stigma and myth.

⁹⁷ *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [PIPEDA].

⁹⁸ *Ibid*, Schedule 1, 4.3.1. There are also exceptions to this general rule, found at ss 7(1)–(3).

⁹⁹ See e.g. *Individual alleged that employer asked for too much medical information* (6 March 2003), PIPEDA Case Summary #2003-135, online: Office of the Privacy Commissioner of Canada <www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2003/pipeda-2003-135>; *An individual challenged the requirement to provide the medical diagnosis on her doctor's certificate for sick leave* (3 October 2003), PIPEDA Case Summary #2003-233, online: Office of the Privacy Commissioner of Canada <www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2003/pipeda-2003-233>; *Employees objected to corporation's requirement for medical diagnosis on sick leave certificates* (Fall 2003), PIPEDA Case Summary #2003-257, online: Office of the Privacy Commissioner of Canada <www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2003/pipeda-2003-257> [OPC PIPEDA 257].

¹⁰⁰ OPC PIPEDA 257, *supra* note 99.

the company that the employee was indeed living with a disability.¹⁰¹ The Commissioner stated that "it was both unnecessary and inappropriate for the organization to have demanded medical diagnoses in the circumstances of these cases."¹⁰²

The provinces of Alberta¹⁰³ and British Columbia¹⁰⁴ have enacted privacy legislation that applies to provincially regulated private-sector employees in those jurisdictions. The legislation in both provinces states that an employer may only collect, use and disclose an employee's personal information with the employee's consent¹⁰⁵ to the extent that they are reasonably required to do so to manage their employment.¹⁰⁶ These statutes provide greater guidance to arbitrators and human rights tribunals attempting to balance the employee's right to privacy with the employer's need for information.

In practice, the extent to which an employee must give up their privacy depends on what details a doctor's medical report is required to contain in order to receive accommodation. Under the full disclosure approach, a doctor advising a patient's employer that he or she is suffering from a mental health condition is not enough to trigger an accommodation dialogue without specifying further information about the illness.

In *Baber v York Region District School Board*,¹⁰⁷ for example, the Human Rights Tribunal of Ontario found that an employee was required to provide details from her doctors beyond a verification that she was suffering from mental illness. In that case, a teacher with multiple mental health issues was fired because she refused to undergo an independent medical examination when her employer complained that the medical documentation she had supplied did not specify precisely what accommodations she required. When she asked for accommodation, her employer, the school board, sent her a letter setting out three options: she could either apply for long-term disability benefits, requiring her to submit supporting medical documentation; she could consent to have a company-affiliated nurse contact her doctor directly; or she could undergo an independent medical examination and provide the results to the company.¹⁰⁸ The teacher requested a teacher-librarian role as a possible accommodation while she recovered, and when pressed by management, she provided medical certificates from her physician and psychiatrist stating that a teacher-librarian role would be appropriate due

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Personal Information Protection Act*, SA 2003, c P-6.5 [Alberta Privacy Act].

¹⁰⁴ *Personal Information Protection Act*, SBC 2003, c 63 [BC Privacy Act].

¹⁰⁵ Alberta Privacy Act, *supra* note 103, s 7(1)(a)–(d); BC Privacy Act, *supra* note 104, s 6(1)(a)–(c).

¹⁰⁶ Alberta Privacy Act, *supra* note 103, s 1(j)(i); BC Privacy Act, *supra* note 104, s 1.

¹⁰⁷ *Baber v York Region District School Board*, 2011 HRTO 213, 71 CHRR D/293 [*Baber* cited to HRTO].

¹⁰⁸ *Ibid* at para 30.

to her “increasing health issues”.¹⁰⁹ The school board found these certificates inadequate, arguing that they did not identify her work-related limitations or any specific accommodations that would allow her to resume her teaching role.¹¹⁰

The teacher alleged that the school board had breached its duty to accommodate by firing her after she again refused to choose between the three options presented in the letter and that it discriminated against her on the basis of her mental illness.¹¹¹ The Tribunal dismissed her claim, finding that she had “failed to cooperate in the accommodation process when she refused to provide medical documentation to her employer.”¹¹² As Vice-Chair Price explained,

[t]he duty to accommodate does not give employees permission to refuse to provide their employers with information about their ability to work with or without restrictions where there is a legitimate question about that, as was the case here. Nor does the duty to accommodate require an employer to tolerate an employee’s ongoing unsubstantiated absence from work.¹¹³

In *Baber*, the Tribunal seemed to favour the employer’s definition of what constitutes adequate medical documentation rather than considering the employee’s preference for maintaining a degree of privacy. The information the teacher provided gave the opinion of two medical professionals who agreed that she suffered from mental illness and required accommodation and went so far as to recommend an alternate job that would be suitable until she became able to return to her original position. The employer was unwilling to offer the teacher a librarian position or to offer her a position with analogous job characteristics as the one suggested by the doctor. *Baber* illustrates the Human Rights Tribunal of Ontario’s adoption of a full disclosure approach in which the employer’s need for information in order to implement accommodations seems to override the employee’s desire for privacy.

Other cases have echoed the approach we observe in *Baber*. In *Kamloops/Thompson SD No 73 v British Columbia Teachers’ Federation*, for example, the arbitrator held that a medical certificate confirming that an employee was suffering from an undisclosed medical issue was insufficient to trigger the employer’s duty to accommodate.¹¹⁴ In that case, a teacher presented a doctor’s note stating that she was receiving treatment for “a medical problem that has been precipitated by what she perceives to be an intolerable work

¹⁰⁹ *Ibid* at paras 34, 44–45.

¹¹⁰ *Ibid* at para 46.

¹¹¹ *Ibid* at para 2.

¹¹² *Ibid* at para 106.

¹¹³ *Ibid* at para 171.

¹¹⁴ *Kamloops/Thompson SD No 73 v British Columbia Teachers’ Federation (Reimer Grievance)*, [2005] BCCAAA No 39, LAX/2005-190 [cited to BCCAAA].

environment.”¹¹⁵ The arbitrator held that the certificate was insufficient for the employer to have deduced that the employee might have been suffering from a mental illness that would have benefited from an accommodation dialogue.¹¹⁶ Courts and tribunals following this approach have thus required that doctors’ certificates leave virtually nothing about the employee’s mental health condition private in the interests of providing the employer with complete information.

C. Structural Stigma

To fully understand how the prevailing approach to accommodation may fail to provide a full solution to the exclusion of persons with mental illness in the workplace context, it is necessary to examine how stigma creates a gap between institutional and social inclusion.¹¹⁷ A negative perception of mental illness remains prevalent in our society, leading to stigma and discrimination and resulting in poorer work outcomes for those living with a mental health disability. Among health conditions, mental illness generates some of the most powerful negative attitudes¹¹⁸ and therefore produces significant stigma. Such stigma translates to unequal treatment in the workplace, as mental illnesses are the medical conditions most often at issue in employment discrimination allegations.¹¹⁹

Mental illness may elicit more prejudice among co-workers within an organization than another type of disability. Social cognitive theories, and particularly the theory of controllability attribution, provide one approach to understanding how stigma develops toward people with mental illness. Attribution is a model of human motivation which assumes that individuals seek a causal understanding of events.¹²⁰ Controllability refers to the amount of influence a person is perceived to exert over a situation—in this case, a disability.¹²¹ The theory posits that individuals react to those who are perceived as unable to influence a negative situation with sympathy. In contrast, they react to those perceived as having some degree of control over a negative

¹¹⁵ *Ibid* at para 7.

¹¹⁶ *Ibid* at paras 57–58.

¹¹⁷ As argued in this article, institutional inclusion in the employment context can be understood as equal access to job functions, while social inclusion involves the equal treatment by others.

¹¹⁸ George P Royal & Michael C Roberts, “Students’ Perceptions of and Attitudes Toward Disabilities: A Comparison of Twenty Conditions” (1987) 16:2 *J Clinical Child Psychology* 122; Mary T Westbrook, Varoe Legge & Mark Pennay, “Attitudes Towards Disabilities in a Multicultural Society” (1993) 36:5 *Social Science & Medicine* 615.

¹¹⁹ See Kathryn Moss et al, “Outcomes of Employment Discrimination Charges Filed under the Americans with Disabilities Act” (1999) 50:8 *Psychiatric Services* 1028 (this study examined the outcomes of employment discrimination charges filed under the *Americans with Disabilities Act of 1990*, 42 USC ch 126 § 12101 (1990), by individuals with psychiatric disabilities).

¹²⁰ Patrick W Corrigan, “Mental Health Stigma as Social Attribution: Implications for Research Methods and Attitude Change” (2006) 7:1 *Clinical Psychology Science & Practice* 48 at 52.

¹²¹ Westbrook, Legge & Pennay, *supra* note 118.

outcome with anger.¹²² As Kite and Whitley have noted, “as with other stigmas, disabilities perceived to be controllable are viewed more negatively than those perceived to be uncontrollable.”¹²³

In addition to controllability, characteristics such as dangerousness and incompetence are often attributed to mental illness. The perception that people with mental health issues are dangerous is widespread and aggravated by media reports.¹²⁴ Studies have demonstrated that fear in reaction to media representations of mental illness creates a desire to “stay away” from individuals perceived to be suffering from a mental health condition.¹²⁵ A significant percentage of the general public views people with mental illness as incompetent or unable to make sound decisions.¹²⁶

Stigma has also been described as labeling, exclusion, stereotyping and discrimination occurring within a context of differential power between the stigmatized group and those responsible for the stigmatization.¹²⁷ Subtle workplace discrimination has been shown as “intrinsically linked to power differences”¹²⁸ that exist within groups. Since the 1960s, legislation and societal norms have gradually come to reject overt forms of discrimination, such as views of certain groups being inherently inferior to others. Some forms of discrimination, however, manifest as “unconscious, negative, or ambivalent feelings”¹²⁹ towards certain groups “often based on seemingly rational arguments, expressed by individuals who commonly believe in equal rights.”¹³⁰ Stigma “entails interpersonal discrimination that is often enacted unconsciously or unintentionally and that is entrenched in common, everyday interactions, taking the shape of harassment, jokes, rudeness, avoidance, and other types of disrespectful treatment.”¹³¹

Given what we know about the effects of stigmatization and discrimination on the employment outcomes of persons with mental health issues, it is

¹²² Pamela A Dooley, “Perceptions of the Onset Controllability of AIDS and Helping Judgments: An Attributional Analysis” (1995) 25:10 *J Applied Social Psychology* 858; Ladonna L Rush, “Affective Reactions to Multiple Social Stigmas” (1998) 138:4 *J Social Psychology* 421.

¹²³ Mary E Kite & Bernard E Whitley Jr, *Psychology of Prejudice and Discrimination*, 3rd ed (New York: Psychology Press, 2016) at 522.

¹²⁴ Bruce G Link et al, “Public Conceptions of Mental Illness: Labels, Causes, Dangerousness, and Social Distance” (1999) 89:9 *Am J Public Health* 1328; Bernice Pescosolido et al, “The Public’s View of the Competence, Dangerousness, and Need for Legal Coercion of Persons with Mental Health Problems” (1999) 89:9 *Am J Public Health* 1339.

¹²⁵ Matthias C Angermeyer & Herbert Matschinger, “The Stigma of Mental Illness: Effects of Labeling on Public Attitudes Towards People with Mental Disorders” (2003) 108:4 *Acta Psychiatrica Scandinavica* 304.

¹²⁶ Michael Rahav, Elmer L Struening & Howard Andrews, “Opinions on Mental Illness in Israel” (1984) 19:11 *Social Science & Medicine* 1151.

¹²⁷ Bruce G Link & Jo C Phelan, “Conceptualizing Stigma” (2001) 27:1 *Annual Review Sociology* 363 at 377.

¹²⁸ Koen Van Laer & Maddy Janssens, “Ethnic Minority Professionals’ Experiences with Subtle Discrimination in the Workplace” (2011) at 3, online: Katholieke Universiteit Leuven <lirias.kuleuven.be/bitstream/123456789/302779/1/2011-03-23%20-%2015631.pdf>.

¹²⁹ *Ibid* at 4.

¹³⁰ *Ibid*.

¹³¹ *Ibid*.

understandable why they might prefer to keep private as much information as possible while as they navigate through the accommodation process. In the next part, I examine how courts and tribunals determine how much information an employee with mental illness is required to disclose and what privacy protections that employee is entitled to. I explain why, due to this determination, accommodation has not resulted in the inclusion of persons with mental illness in the workplace.

Structural stigma has been described as the “societal-level conditions, cultural norms, and institutional practices that constrain the opportunities, resources, and wellbeing of the stigmatized.”¹³² Pugh, Hatzenbuehler and Link suggest that structural stigma “refers to the inequities and injustices inherent in social structures that arbitrarily restrict the means and freedoms of a specific population. … [I]nterpersonal discrimination occurs within the broader context of structural stigma.”¹³³

The willingness of courts and tribunals to allow employers’ requests for extensive medical information, forcing employees to disclose the details of their mental health problems, entrench a perspective of mental illness as an issue of individual accountability.¹³⁴ The following case illustrates how the full disclosure approach may leave persons with mental illness particularly vulnerable to stigmatization.

Code Electric Products Ltd. v International Brotherhood of Electrical Workers, Local 258 provides an example of a recent case where an adjudicator sided with an employer seeking medical information about an employee returning to work from disability to assess whether the employee could return to work and resume his duties.¹³⁵ The employee’s physician provided the employer with a note that the employee was fit to return to work.¹³⁶ The employer, citing the employee’s history with disability, requested a more extensive report (including a workplace assessment by a doctor) and refused to proceed with the provision of accommodation (to allow him to return to his previous position) until he presented such a report.¹³⁷ The employee argued that

¹³² Mark L Hatzenbuehler & Bruce G Link, “Introduction to the Special Issue on Structural Stigma and Health” (2014) 103 Social Science & Medicine 1 at 2.

¹³³ Tracy Pugh, Mark Hatzenbuehler & Bruce Link, “Structural Stigma and Mental Illness”, Commissioned Paper for the Committee on the Science of Changing Behavioral Health Social Norms (August 2015) at 2, online: National Academy of Sciences, Engineering and Medicine <sites.nationalacademies.org/cs/groups/dbassesite/documents/webpage/dbasse_170045.pdf>.

¹³⁴ OHRC, *supra* note 30.

¹³⁵ *Code Electric Products Ltd v International Brotherhood of Electrical Workers, Local 258 (Kinder Grievance)*, [2005] BCCAAA No 14, 80 CLAS 92 [Code Electric Products cited to BCCAAA]. The adjudicator also considered employee and employer and their previous accommodations, the safety concerns and a competing doctor’s assessments.

¹³⁶ *Ibid* at paras 25, 34.

¹³⁷ *Ibid* at para 41. Initially, the employer wished that the employee’s doctor conduct the workplace assessment, but the employee’s doctor refused (*ibid*). The employer then retained their own doctor, “an expert psychiatrist”, to conduct the workplace visit (*ibid* at para 44). The employer required a workplace

this request was discriminatory.¹³⁸ The arbitrator, however, found that the employer was within its rights and had discharged its duty to accommodate to the point of undue hardship.¹³⁹ The arbitrator also required the employee to authorize his psychiatrist to contact the employer if there were “concerns about the [employee]’s condition”.¹⁴⁰

As one commentator has observed, the rhetoric used by the courts suggests that persons with mental health disabilities should learn to “pull [themselves] up by [their] bootstraps.”¹⁴¹ In *Code Electric Products*, the employer wrote the following in a letter to the employee’s union:

We will not tolerate [the employee]’s lengthy absences from the workplace any longer. To our mind, these absences have been triggered by [the employee]’s own misconduct, and the time has come to say enough is enough. [The employee] must demonstrate he is responsible or his employment will be terminated.¹⁴²

The aggression in the employer’s language and the arbitrator’s support for the employer’s position suggests that persons with mental health issues are solely responsible for the challenges they face at work and thus excluded from equality protections that ought to ensure their right to privacy. The arbitrator’s agreement that the employee should have disclosed further medical details and his decision to authorize the employee’s doctor to contact the employer shows how the privacy rights of people with mental illness seeking accommodation comes secondary to the employer’s need for information when courts and tribunals adopt the full disclosure model.

In *Knibbs v Brant Artillery Gunners Club Inc.*, the Human Rights Tribunal of Ontario recognized how the improper handling of an employee’s medical information resulted in reprisal, stigmatization and emotional trauma.¹⁴³ *Knibbs* involved a bartender at a private club who took a medical leave of absence due to depression and stress. The employee complained that her employer harassed and discriminated against her on the basis of her mental illness and improperly shared her medical information.¹⁴⁴ The employee alleged that, while she was on a leave of absence, her employer demoted her, disseminated her confidential medication information and laid her off.¹⁴⁵ Her employer, in response, argued

assessment by a physician due to the potentially dangerous nature of the employee’s role as a forklift driver.

¹³⁸ *Ibid* at para 65.

¹³⁹ Definitions of “undue hardship” vary. For the purposes of the *Canadian Human Rights Act*, RSC 1985, c H-6, the Canadian Human Rights Commission states that “[t]he point of undue hardship is reached when all reasonable means of accommodation are exhausted and only unreasonable or impracticable options remain.” CHRC, *supra* note 29 at 6.

¹⁴⁰ *Code Electric Products*, *supra* note 135 at para 166.

¹⁴¹ Sheldon, *supra* note 22 at 188.

¹⁴² *Code Electric Products*, *supra* note 135 at para 41.

¹⁴³ *Knibbs v Brant Artillery Gunners Club Inc.*, 2011 HRTO 1032, 72 CHRR D/231 [*Knibbs* cited to HRTO].

¹⁴⁴ *Ibid* at para 1.

¹⁴⁵ *Ibid* at para 2.

that they had demoted her from full-time to part-time because of operational needs and only laid her off temporarily.¹⁴⁶ The employer also stated that the complainant had “lost her priority” with respect to scheduling because of her absence, which also accounted for her demotion.¹⁴⁷

While the complainant was on medical leave, her employer posted a letter in the building in public view stating:

Attention members,

It has come to the attention of the executive that some of you are curious as to the status of [name redacted].

Currently, [name redacted] is on a medical leave. She has been suffering from symptoms of depression as a result of the passing of her father. This was causing some problems with the staff.

She is also being evaluated for her condition of level 1 diabetes. Also, she is being evaluated for a high cholesterol count.

She has to know whether she needs to take injected insulin to control her problem. She also has to have her cholesterol under control.

Our insurance company will not cover any employee who does not have complete medical clearance to work. Because of the nature of work here, it is possible she would be alone here. If she has a problem while she is alone and something serious happens, we would be liable and our insurance would not pay.¹⁴⁸

The employer’s representative testified that he did not consider the information about the complainant’s diabetes to be confidential “because she had told other people about it.”¹⁴⁹ He then admitted, however, that he was unsure whether other employees knew of her struggle with mental illness.¹⁵⁰ The complainant testified that she was very private about her depression and felt “sick to her stomach, personally invaded, in turmoil, humiliated, and embarrassed by the public display of [her] private medical information”.¹⁵¹ She also stated that immediately after finding out about the letter that had been posted and seen by dozens of people, “her blood sugar levels shot up because of the stress, and she was nearly hospitalized.”¹⁵² The complainant’s doctor testified that while her diabetes and depression had been improving prior to the incident, her mental health declined after the events and she became “totally disabled”.¹⁵³

¹⁴⁶ *Ibid* at para 4.

¹⁴⁷ *Ibid* at para 73.

¹⁴⁸ *Ibid* at para 54

¹⁴⁹ *Ibid* at para 58.

¹⁵⁰ *Ibid*.

¹⁵¹ *Ibid* at para 59.

¹⁵² *Ibid*.

¹⁵³ *Ibid* at para 116.

The adjudicator held that the employer's decision to demote the employee was "directly related to [her] disability-related leave, and was therefore discriminatory."¹⁵⁴ He stated that the employer's testimony that the complainant "had lost her priority in scheduling because she was not working was essentially an admission that her status changed because she was on a disability-related leave."¹⁵⁵ He concluded that the employer's dissemination of the complainant's medical information was discriminatory because it "stigmatized her and poisoned her work environment."¹⁵⁶

As the jurisprudence discussed in the next section shows, some courts and tribunals have begun to reject the full disclosure approach that requires an employee to provide his or her employer with complete information and sets no limits on which individuals within an organization may have access to an employee's medical information. While these cases appear to be outliers, they demonstrate a recognition of the stigmatizing and discriminatory effects of disclosure illustrated in *Knibbs* and represents approaches that are more likely to result in both social and institutional inclusion for persons with mental illness in the workplace.

IV. Towards the Decoupling of Social and Institutional Inclusion

In this part, I describe how social and institutional inclusion can be decoupled in the existing legal and policy structures governing the accommodation process. The current approach to addressing the exclusion of persons with mental illness in an employment context assumes that accommodation alone, without accounting for the impact of structural stigma, is sufficient to address both social and institutional inclusion. By decoupling these concepts, which the prevailing approach attempts to address jointly, the accommodation process is more likely to provide a meaningful solution for the unequal treatment of persons with disabilities in the workplace.

I also describe how, for such a decoupling to occur, the duty to accommodate must incorporate three main features. First, the duty must shift away from requiring an employee to reveal their full medical file and diagnoses to their employer in order to receive accommodation and must instead place weight on doctors' understanding of the barriers that an employee faces. Second, the duty to accommodate must embrace the duty of employers to initiate an accommodation dialogue and inquire to obtain more information when they see objective signs that an employee is experiencing a workplace barrier.

¹⁵⁴ *Ibid* at para 133.

¹⁵⁵ *Ibid* at para 137.

¹⁵⁶ *Ibid* at para 143.

Third, the duty to accommodate must protect employee privacy by limiting the extent to which an employee's information is accessible to others within an organization, restricting access of such information to a designated individual or internal body. I suggest that these considerations be taken into account as part of a comprehensive law and policy review on the issue of workplace accommodation.

A. From Disclosing to Informing

Decoupling social and institutional inclusion would involve recognizing that requiring full medical disclosure from an employee may leave them susceptible to structural stigma. Jurisprudence that has begun to incorporate this understanding has held that, when requesting accommodation, an employee need not necessarily have to disclose the nature of his or her illness but does have to "provide enough information to the employer about [the] disability so that appropriate accommodation can be provided."¹⁵⁷

This principle has been articulated in *Simpson v Commissionaires (Great Lakes)*, where the Human Rights Tribunal of Ontario stated that

[i]n order to trigger the duty to accommodate, it is sufficient that an employer be informed of the employee's disability-related needs and effects of the condition and how those needs and effects interact with the workplace duties and environment. As such, an employee does not necessarily have to disclose a detailed diagnosis of the disability in order for an employer to respond to a request for accommodation. This is not to detract from the well-established principle that accommodation is a collaborative process and the applicant should endeavour to provide as much information as possible to facilitate the search for accommodation.¹⁵⁸

This suggests that for employees to establish that their employers' duty to accommodate had been triggered, employees must prove that they identified their need for accommodation with respect to a job requirement that presented a barrier. Additionally, they must show that this information was available to their employer. In *Gardiner v British Columbia (Attorney General)*, for example, the British Columbia Human Rights Tribunal held that the "awareness" criterion was not satisfied because the disability in question did not have any impact on the employee's behaviour or create any symptoms for extended periods of time. Under these circumstances, where an employer cannot be aware of the existence of an employee's disability "and no accommodation is requested, the duty to accommodate is not triggered."¹⁵⁹

Courts and tribunals have recognized that an employee may validly withhold a mental illness diagnosis from his or her employer in order to avoid

¹⁵⁷ CHRC, *supra* note 29 at 13.

¹⁵⁸ *Simpson v Commissionaires (Great Lakes)*, 2009 HRTO 1362 at para 35, [2009] OHRTD No 1336 [emphasis added].

¹⁵⁹ *Gardiner v British Columbia (AG)*, 2003 BCHRT 41 at para 168, 47 CHRR D/277.

the risk of stigma and discrimination. In *Lane v ADGA Group Consultants*, for example, an employee did not reveal that he was living with bipolar disorder when he was hired.¹⁶⁰ A week into the job, the employee notified his manager of his condition and requested that the employer notify his wife or doctor if he displayed symptoms signifying the onset of a manic episode. The employee was fired shortly after making the request. The Human Rights Tribunal of Ontario held that the employer had discriminated against him and agreed that if the employee had disclosed his need for accommodation immediately, the employer may have questioned his ability to do the job and been reluctant to hire him.¹⁶¹ Upon judicial review of the case, the Ontario Superior Court of Justice described the information that a medical note should contain as follows:

The procedural duty to accommodate involves obtaining all relevant information about the employee's disability, at least where it is readily available. It could include information about the employee's current medical condition, prognosis for recovery, ability to perform job duties, and capabilities for alternate work.¹⁶²

In *Mager v Louisiana-Pacific Canada Ltd.*, the British Columbia Human Rights Tribunal held that an employee who did not explicitly disclose her medical condition was still entitled to human rights protection.¹⁶³ In that case, an employee had told her company's personnel director that she was extremely depressed, could not eat or sleep and that "there was something really wrong with me".¹⁶⁴ She resigned from her position but at the hearing, her union alleged that her supervisors had pressured her to quit.¹⁶⁵ When she asked to return to work, the employer informed her that she could not return due to the collective agreement.¹⁶⁶ The Tribunal held that the employer "ought to have known that she was not medically fit"¹⁶⁷ and that "[t]he fact that [the employee] did not present [her employer] with a medical diagnosis does not disentitle the [employee] to the protection of the *Code*".¹⁶⁸

Some tribunals have held that, in order for employers to be able to offer appropriate accommodation, they must have enough information to be able to understand the extent of an employee's disability. One arbitrator explained the employee's role as follows:

¹⁶⁰ *Lane v ADGA Group Consultants Inc*, 2007 HRTO 34, 61 CHRR D/307 [*Lane* cited to HRTO].

¹⁶¹ *Ibid* at para 97.

¹⁶² *Lane v ADGA Group Consultants Inc* (2008), 91 OR (3d) 649 at para 106, 295 DLR (4th) 425 (Ont Sup Ct J (Div Ct)).

¹⁶³ *Mager v Louisiana-Pacific Canada Ltd.*, [1998] BCHRTD No 36 at para 63, 33 CHRR D/457.

¹⁶⁴ *Ibid* at para 6.

¹⁶⁵ *Ibid* at para 20. The employee's shop steward testified that the employee had been told by the personnel director to "[j]ust quit and that when she got her problem straightened out ... she could come back to work" (*ibid*).

¹⁶⁶ *Ibid* at para 15.

¹⁶⁷ *Ibid* at para 63.

¹⁶⁸ *Ibid* at para 56.

The employer may bear the “primary duty” in a practical sense. If there is an accommodation to be made, in most cases it will be the employer which must make the greatest effort. But that does not relieve the employee from the responsibility to inform the employer that an accommodation is wanted. It does not spare the employee from the obligation to contribute to the process of identifying and arranging the accommodation if possible. Nor does it diminish the employee’s duty to accept an accommodation even if it is not perfect.¹⁶⁹

Once an employee submits medical evidence certifying their ability to return to work, the employer may only request additional information if it has reasonable grounds to do so. The arbitrator in *Re Thompson General Hospital and Thompson Nurses* explained that

once an employee produces a medical certificate stating unequivocally that he is fit to return to work, the onus shifts onto the employer to establish that he is not fit to return to work. If the employer has reasonable grounds on the facts of the case to question the validity or the completeness of the opinion stated in the medical certificate, then it must explain clearly to its employee the reason the medical certificate is not acceptable and what specific information is requested so that the employee can return to its treating physician and obtain the proper information.¹⁷⁰

Despite an employee’s responsibility to provide information regarding the barriers he or she is facing on the job and how those barriers connect to his or her medical condition, the employee is not unilaterally responsible for suggesting what accommodation should be offered, although the employee may do so. In *Renaud*, Justice Sopinka stated that, while the employee has a role to play,

[t]his does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer’s business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfill the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed.¹⁷¹

This suggests that the medical documentation an employee is required to provide does not need to delineate precisely what modifications are needed to remove the barriers that create the disadvantage. The Ontario Human Rights Commission has also recognized that “[p]ersons with disabilities

¹⁶⁹ *Westmin Resources Limited v National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 3019*, [1998] BCCAAA No 345 at para 54, 52 CLAS 7.

¹⁷⁰ *Re Thompson General Hospital and Thompson Nurses MONA, Local 6* (1991), 20 LAC (4th) 129 at 135, 23 CLAS 91 (Man Arbitration).

¹⁷¹ *Renaud*, *supra* note 26 at 994–95.

are not necessarily required to disclose private or confidential matters".¹⁷² The Commission advises that persons with disabilities need only disclose private or confidential information to their employer that "pertains to the need for accommodation".¹⁷³ In its policy guidelines on accommodation, the Commission states that

[m]aintaining confidentiality for individuals with mental illness may be especially important because of the strong social stigmas and stereotyping that still persist about such disabilities.

Documentation supporting the need for particular accommodation (flexible hours, a different supervisor, a particular technical aid, for example) should be provided only to those who need to be aware of the information. It may be preferable in some circumstances for information to be provided to the company's health department or human resources staff rather than directly to the supervisor, to further protect confidentiality. Medical documentation should be kept separate from the person's corporate file.¹⁷⁴

The Canadian Human Rights Commission makes its internal policy regarding the accommodation of mental illness in the workplace available to other organizations as a model that they may adapt for their own use.¹⁷⁵ The policy seems to recognize that social and institutional inclusion must be decoupled in order for employees to be protected from structural stigma in the workplace. It is consistent with the approach of not requiring an employee to disclose an illness, stating that the content of the medical certificate should "be limited to the information that is indispensable to the employer in order to minimize any infringement of the employee's privacy rights."¹⁷⁶ The document states that an employee may request accommodation by speaking to his or her immediate supervisor and suggesting what type of accommodations are required, if possible. The employer may then ask for additional information, such as supporting medical documentation or expert advice, when such information is "reasonably required to verify the need for accommodation and to develop an accommodation plan."¹⁷⁷ The Commission, therefore, seems to take the view that the information provided by an employee should take the form of a doctor's opinion on how the employee's condition affects his or her job as it is currently structured, rather than providing medical details from

¹⁷² OHRC, *supra* note 30 at 21.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ CHRC, *supra* note 29.

¹⁷⁶ Marie-Claude Chartier, "Human Rights and the Return to Work: The State of the Issue" (28 April 2006) at 4–5, online: Canadian Human Rights Commission <www.chrc-ccdp.gc.ca/sites/default/files/returntowork_en_3.pdf>.

¹⁷⁷ CHRC, *supra* note 29 at 10.

which the employer should draw its own conclusions.

B. The Awareness-Knowledge Model

There exists a body of literature and jurisprudence which suggests the existence of an emerging “duty to inquire” owed by the employer with regards to accommodation of an employee’s mental illness. I refer to this structure as the “awareness-knowledge model”. Under such a duty, if there is a basis for an employer to believe that an employee may be living with an illness or disability, employers cannot turn a blind eye.¹⁷⁸ Some courts have found an employer’s failure to make inquiries regarding the health of an employee “before taking steps that adversely affect that employee’s employment situation”¹⁷⁹ to be discriminatory. This suggests that under a duty to inquire, the accommodation process is triggered when the employer notices that an employee may be living with a health condition requiring support. The emergence of this duty suggests that courts are perhaps placing greater importance upon privacy rights of employees with mental illness, recognizing that persons with mental illness may be reluctant to disclose their medical needs because of the stigma attached to mental illness, may be unwilling to ask their employer for assistance, or may not even be aware that they are suffering from a disability and are therefore unable to ask their employer for accommodation.¹⁸⁰ As such, an employer’s duty to inquire makes it less likely that they will be able to take advantage of a situation where an employee is unable or unwilling to disclose the fact that they have a mental health issue. Such a duty would compel employers to be proactive in their accommodation under the threat that a court or tribunal might find that an employer had received constructive notice of an employee’s need for accommodation if the employer was made aware that the employee was experiencing a barrier to work¹⁸¹; the failure to accommodate in this situation would, of course, allow

¹⁷⁸ Daniel Lublin, “Dealing with Mental Illness in the Workplace”, *The Globe and Mail* (12 May 2015), online: <www.theglobeandmail.com/report-on-business/careers/career-advice/experts/dealing-with-mental-illness-in-the-workplace/article24396180/>.

¹⁷⁹ *Mackenzie v Jace Holdings and another* (No 4), 2012 BCHRT 376 at para 31, 75 CHRR D/311 [Mackenzie]. The Tribunal Member in *Mackenzie* cites the following cases in support of this proposition (*ibid*): *Willems-Wilson v Allbright Drycleaners Ltd* (1997), 32 CHRR D/71, 98 CLLC 230-007 [*Willems-Wilson* cited to CHRR]; *Martin v Carter Chevrolet Oldsmobile*, 2001 BCHRT 37, 41 CHRR D/88; *Principe v Stong's Markets* (No 2), 2009 BCHRT 81, [2009] BCHRTD No 81; and *Sylvester v British Columbia Society for Male Survivors of Sexual Abuse*, 2002 BCHRT 14, 43 CHRR D/55 [*Sylvester*].

¹⁸⁰ Julie Flatt, *Hangin' In There: Strategies for Job Retention by Persons with a Psychiatric Disability* (Ottawa: CMHA, 2000) at 15, online: CMHA <toronto.cmha.ca/files/2012/09/Hanging-InThere.pdf>. Additionally, *Bonner v Ontario (Ministry of Health)* (1992), 16 CHRR D/485 at paras 18-19, 92 CLLC 17019 (Board of Inquiry) [Bonner] provides an example of this. The grievor in *Bonner* stated that he did not make his need for accommodation explicit after overhearing his manager refer to people with mental illness as “Loonies” (*ibid* at paras 19-20).

¹⁸¹ Kerri Joffe, C Tess Sheldon & Karen R Spector, “Human Rights and Disability Law: a Primer” in “Disability Law Primer” (Toronto: ARCH Disability Law Centre, 2013) ch 3 at 27, online: ARCH <www.legalaidbc.ca>.

the employee to succeed with a grievance.

The Canadian Human Rights Commission seems to recognize that employers may have a positive duty to initiate the accommodation process when an employee has not done so. It states, in its internal policy document, that employers and managers have “a responsibility to both the individual and the organization to take action”¹⁸² if they suspect that an employee has a mental health illness. The Commission argues that intervening might allow employers to provide an employee with an opportunity to receive the workplace accommodation he or she needs so that the employee can continue working productively.¹⁸³ It suggests that an employer’s duty to accommodate arises when the employer become aware of the disability.¹⁸⁴

Jurisprudence exists which also establishes that an employer has a positive duty to accommodate in certain circumstances even when the mental illness has not been diagnosed by a doctor. In *Re Sealy Canada and United Steelworkers of America*, for example, an employee was found not to be responsible for a disruptive incident stemming from a manic episode of bipolar disorder that had not yet been diagnosed.¹⁸⁵ The arbitrator ordered the employee to be reinstated, finding that where an employee’s misbehaviour results from an undiagnosed medical condition, “the nature of the act changes from one that is subject to automatic discharge with little possibility of reinstatement to one where the [employee’s] rehabilitation and prognosis become crucial facts in the application of a remedy.”¹⁸⁶

In *Willems-Wilson v Allbright Drycleaners Ltd.*, the British Columbia Human Rights Tribunal held that an employer had a duty to make inquiries about an employee’s mental health before dismissing her for misbehaviour.¹⁸⁷ The employee testified that she was unwilling to disclose her medical condition with her employer due to the stigma attached to mental illness.¹⁸⁸ The Tribunal held that the employee’s decision to keep her illness private was “not fatal to her complaint”,¹⁸⁹ finding that she was fired before even having the chance to ask for accommodation. The employer was found to have had enough information to question whether the employee was suffering from some sort of mental condition and had a duty to inquire further before dismissing her.¹⁹⁰

¹⁸² archdisabilitylaw.ca/sites/all/files/DISABILITY%20LAW%20PRIMER%20-%20English%20(PDF).pdf>.

¹⁸³ CHRC, *supra* note 29 at 15.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Re Sealy Canada and United Steelworkers of America*, Local 5885 (2006), 147 LAC (4th) 68, 84 CLAS 191 (Alta Arbitration) [*Sealy Canada* cited to LAC].

¹⁸⁷ *Ibid* at 88.

¹⁸⁸ *Willems-Wilson*, *supra* note 179.

¹⁸⁹ *Ibid* at paras 4, 32.

¹⁹⁰ *Ibid* at para 33.

¹⁹⁰ *Ibid* at para 37.

Human rights tribunals have also found that an employer, under certain circumstances, has a duty to make reasonable inquiries about the accommodation needs of an employee who requests medical leave but does not volunteer more information regarding how his or her condition might affect the employee's work when they return. In *Sylvester v British Columbia Society of Male Survivors of Sexual Abuse*, an employee sent her employer a letter stating that she required a leave of absence without specifying that she was suffering from a mental illness. The British Columbia Human Rights Tribunal held that, given the fact that supervisors had observed objective signs that the employee was experiencing barriers at work, the employer had a duty to at least initiate an accommodation dialogue. The Tribunal stated that

[t]he reasonable step for an employer to take when notified of a "medical" leave is make reasonable inquiries about the nature of the medical condition and the length of the leave to determine how the workplace would be affected and what accommodation, if any, was possible. The Respondent failed to make these inquiries.¹⁹¹

Similarly, in *Krieger v Toronto Police Services Board*, the Human Rights Tribunal of Ontario reached the conclusion that employers must pay particular attention to objective signs that an employee may be suffering from a mental health issue and that they have a duty to inquire further if they notice such indications.¹⁹² Within months of beginning his employment with the Toronto Police Service, Constable Krieger was involved in a violent altercation with a suspect, after which he experienced post-traumatic stress disorder (PTSD).¹⁹³ This led to another incident in which he overreacted in a situation involving a customer at a restaurant.¹⁹⁴ During and after this second incident, Krieger's behaviour led his supervisors to believe that he was experiencing PTSD.¹⁹⁵ However, they did not act on their suspicions; instead Krieger was suspended for being "unfit for duty"¹⁹⁶ and the incident in the restaurant was investigated as "simply a case of professional misconduct."¹⁹⁷

The Tribunal held that Krieger's employer had discriminated against him by failing to initiate the accommodation process. Even though Krieger couldn't recognize his symptoms as PTSD, his supervisors suspected that he was unwell, which the Tribunal found, had triggered their duty to accommodate.¹⁹⁸ The Police Service was ordered to reinstate Krieger and develop an

¹⁹¹ *Sylvester*, *supra* note 179 at para 40.

¹⁹² *Krieger v Toronto Police Services Board*, 2010 HRTO 1361, 70 CHRR D/405 [Krieger cited to HRTO].

¹⁹³ *Ibid* at paras 17–19. The incident in question involved a struggle over a firearm, his partner's firearm being discharged in what Krieger perceived to be a "life or death struggle" (*ibid*).

¹⁹⁴ *Ibid* at paras 27–29.

¹⁹⁵ *Ibid* at para 37.

¹⁹⁶ *Ibid* at para 50.

¹⁹⁷ *Ibid* at para 3.

¹⁹⁸ *Ibid* at paras 134, 137, 157.

accommodation policy for officers with disabilities.¹⁹⁹ This case suggests that employers have a substantive duty to accommodate an employee's mental illness where the employee's disability prevents them from expressing that they need assistance. *Krieger* affirms that an employer's duty to accommodate can arise before the employer is given medical documentation describing an employee's illness or when an employee has not taken steps to initiate the accommodation process, if that employee exhibits objective signs of mental illness while on the job.

The Saskatchewan Board of Inquiry in *Zaryski v Loftsgard* also reached the conclusion that the employer, upon realizing that Zaryski, the employee, may be suffering from a mental illness, had a duty to seek out medical information for accommodation purposes.²⁰⁰ Soon after beginning the job, the employee in this case began to display apparent symptoms of mental illness.²⁰¹ The event which precipitated her termination involved Zaryski getting into a confrontation with another employee, wherein she was "yelling and screaming... accentuating her words with arm motions"²⁰² before bursting into tears and walking off the job in the middle of a shift. While the complainant herself had never informed the company that she was suffering from clinical depression, her husband had made contact with the employer and stated that she was seeing a doctor for a medical condition.²⁰³ Due to the complainant's behaviour, however, the employer terminated her employment.²⁰⁴ The Board of Inquiry found that the employer failed in its duty to accommodate her as it was under an obligation to take her delicate "emotional state" into account when addressing her behaviour.²⁰⁵ The Board held that the employer was under an obligation to make further inquiries into the complainant's medical condition after speaking with her husband and being informed that she was suffering from an illness.²⁰⁶

The findings in *Krieger* and *Zaryski* are two exceptions to the approach illustrated by the *Matthews* decision. While the adjudicator in *Matthews* held that the medical documents in question were insufficient to trigger an employer's duty to accommodate because the documents did not explicitly describe the modifications needed, other cases discussed above have ruled that employers have an obligation to intervene when they are aware of the existence of a disability, even when an employee has not yet reached out for assistance.

¹⁹⁹ *Ibid* at para 198.

²⁰⁰ *Zaryski v Loftsguard* (1995), 22 CHRR D/256, 95 CLLC 230-008 (Sask Board of Inquiry) [*Zaryski* cited to CHRR].

²⁰¹ *Ibid* at paras 4-5. The employee was "often moody and irritable", had difficult concentrating and had difficulty controlling her temper (*ibid*).

²⁰² *Ibid* at para 8.

²⁰³ *Ibid* at paras 9-10.

²⁰⁴ *Ibid* at para 10.

²⁰⁵ *Ibid* at paras 15-16.

²⁰⁶ *Ibid* at para 17.

Recognizing that an accommodation dialogue must sometimes be initiated by an employer removes the burden on those employees who would otherwise be unable or unwilling to initiate such a dialogue themselves, perhaps due in part to the fear of excessive disclosure and stigma. For this reason, this approach appears more likely to achieve both social and institutional inclusion, and thus full access to employment on an equal basis with others.

C. Safeguarding Medical Information

A central question about the practical application of the duty to accommodate is that within a single organization, which individuals are allowed access to the medical information supplied by a person with a disability. It appears that an employer's need for access to an employee's medical information does not extend to all representatives of the company.²⁰⁷ In *Re Halton (Municipality) and Ontario Nurses Association*,²⁰⁸ the arbitrator held that an employer's need for access to information is "subject to its undertaking to maintain the confidentiality of that information and its restriction to those members of the corporation's staff who reasonably require access to it."²⁰⁹ Additionally, employers regulated by the federal government are required to have a system in place for collecting and filing employees' personal information that preserves their right to confidentiality.²¹⁰ The jurisprudence has not set clear limits, however, on which individuals may act as the employer's representative and have access to this information.

Recent case law establishes that consent to obtain information from an employee does not give an employer the right to disclose that information to third parties. It is unclear, however, who constitutes a third party. In *Re MacMillan Bloedel (Powell River Division) and Communications, Energy and Paperworkers Union*, the arbitrator found that the company's disclosure of

²⁰⁷ See e.g. *Individual Objects to Temporarily Assigned Workers Handling Payroll Information* (4 December 2003), PIPEDA Case Summary #2003-242, online: Office of the Privacy Commissioner of Canada <www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2003/pipeda-2003-242/>. In this matter before the Privacy Commissioner of Canada "[t]he complainant, who worked for a transportation company, objected to injured fellow workers, temporarily employed in the company's office, handling confidential payroll information." The Assistant Commissioner found that "[t]his practice posed a serious risk that the workers could have accessed sensitive personal information to which they should not have been privy." She recommended "making the handling of payroll information part of the permanent duties of a few authorized office personnel." She further recommended that those involved sign a confidentiality agreement and receive training in order to understand fully what such an agreement entails.

²⁰⁸ *Re Halton (Municipality) and Ontario Nurses Association* (1993), 32 LAC (4th) 137, 29 CLAS 659 (Arbitration) [*Re Halton* cited to LAC].

²⁰⁹ *Ibid* at 149.

²¹⁰ PIPEDA, *supra* note 97, Schedule 1, 4.7. The Office of the Privacy Commissioner of Canada has prepared a handbook for companies to help them meet their obligations: *Privacy Toolkit: A Guide for Businesses and Organizations* (Gatineau, QC: Office of the Privacy Commissioner of Canada), online: <https://www.priv.gc.ca/media/2038/guide_org_e.pdf>.

an employee's medical information (which the company itself had lawfully obtained from the employee's worker's compensation board file) to a doctor hired by the company violated British Columbia's *Workers' Compensation Act*.²¹¹ The arbitrator held that

[t]he essential difference between Dr. Hartzell [the doctor the company hired] and an employee of the Employer arises from the subject of control of the documents. Once the Employer disclosed the documents to Dr. Hartzell, it had relinquished control over them. There came into existence the potential for someone other than Dr. Hartzell to see the documents and violate the privacy principle which is the very foundation of s. 95 [of the *Workers' Compensation Act*].²¹²

The case affirms that the consent an employer needs to obtain employees' medical information stands apart from the consent required to disclose that information to third parties.

The Canadian Human Rights Commission, in line with the jurisprudence on this issue, does not draw a distinction between the "employer's" access to information and the "manager's" access. The Commission states employers should keep any notes taken during the accommodation process "in a secure location."²¹³ It suggests that a "locked filing cabinet and password-protected computers are key to maintaining an employee's confidentiality."²¹⁴ The Commission does not seem to envision any issue with an employee's immediate superiors having knowledge of the employee's mental illness. It lists, as a best practice, that managers and supervisors should "share information with Human Resources about their accommodation practices, with any identifying information removed, so that others within the Commission may benefit from their knowledge and experience."²¹⁵ This policy, therefore, suggests managers and supervisors that have control over an employee's workplace outcomes be allowed access to the employee's medical information.

V. Conclusion

The poor employment outcomes for persons with mental illness can be exacerbated both by treating them the same as other employees or by subjecting them to stigma as a side effect of the accommodation process.²¹⁶

²¹¹ *Re MacMillan Bloedel Ltd (Powell River Division) and Communications, Energy and Paperworkers Union, Local 76*, (1997), 67 LAC (4th) 443, 50 CLAS 151 (BC Arbitration) [*Re MacMillan* cited to LAC].

²¹² *Ibid* at 447.

²¹³ CHRC, *supra* note 29 at 16.

²¹⁴ *Ibid*.

²¹⁵ *Ibid* at 11.

²¹⁶ In her study on inclusion in American Law, Martha Minow has observed that "problems of inequality can be exacerbated both by treating members of minority groups the same as members of the majority and by treating the two groups differently." Martha Minow, *Making All Difference: Inclusion, Exclusion, and*

This article has demonstrated the paradoxes inherent in attempts to make workplaces more inclusive for persons with mental illness by illustrating the judicial struggle to balance an employer's need for access to information with the privacy rights of employees.

The accommodation process, as it stands, does not remedy all of the disadvantages that persons with disabilities face in the workplace. While many courts and tribunals have prescribed an individualized approach to accommodation, a process that protects the privacy of persons with mental illness and minimizes the chance that they will face stigmatization must include systemic dimensions. If an employer's decision regarding what medical documentation is needed from an employee and who within the organization has access is merely *ad hoc*, sensitive information that an employee wishes to keep confidential may be disclosed. A systemic approach, by contrast, would have safeguard procedures built into the accommodation process. It would ensure that employees with mental illness are not subject to the inconsistencies in the jurisprudence regarding the disclosure of medical information, as shown by the differences in the two models I have presented in this article. Thus, a process with built-in safeguards that addresses the need for privacy and the reality of stigma in an anticipatory way would be less marginalizing for persons with mental illness than an entirely individualized approach.

The significance of mental illness in Canada suggests that employers will increasingly be required to provide a psychologically healthy and supportive environment for employees. Large companies, in particular, have the benefit of built-in representatives in the form of human resources personnel that can act as gatekeepers to employees' confidential medical information. Implementing such an approach would provide a safeguard to prevent stigmatization and discrimination in situations of differential power by not placing a vulnerable employee's private information directly into the hands of his or her immediate superiors. In order to prevent the unnecessary disclosure of private information, employees should be able to rely on clearly articulated rules that guide them with respect to how the accommodation dialogue is triggered, what information to obtain from a medical professional and what their rights and obligations are throughout the process.

By perpetuating structural stigma, we risk not taking steps towards the true inclusion of persons with mental illness in society. An examination of the body of law that follows the awareness-knowledge model of triggering the duty to accommodate has illustrated how employees with mental illness can maintain the privacy of their diagnoses. A shift away from the full disclosure model, which is based on the assumption that employees

with mental illness cannot be accommodated without supervisors having complete or near-complete access to medical files, would benefit employers and employees alike. Adopting systemic processes of collecting and using medical information may begin to break down the difference dilemma that forces accommodated workers to risk stigmatization. Moving towards this approach will not be an easy task, but it is exceptionally important for improving the workplace outcomes of workers living with mental illness.

The government has much to gain by taking an interest in how a growing number of Canadians may not be reaching their productive potential at work. A coordinated national strategy to ensure full access to employment for persons with disabilities that incorporates an understanding of both social and institutional inclusion would be a significant step forward in addressing an issue which has significant implications in areas of Canadian society ranging from human rights, to public health, to the economy.

Accommodation is not an end in itself. It is the way that the right to accommodation is fulfilled that will shape what the inclusion of persons with disabilities in the workplace can achieve.