A recent Ontario arbitral award is reshaping the way employers and employees must approach the legal duty to accommodate employees with disabilities in the workplace.

**Employees Are Required to Disclose Confidential Medical Information for Accommodation Purposes**

George Waggott and Paul Boshyk, McMillan LLP

Entrenched in both federal and provincial human rights legislation, the duty to accommodate imposes a legal obligation on employers to accommodate employees with disabilities unless such accommodation would cause undue hardship on the part of the employer. In *Complex Services Inc. v. Ontario Public Service Employees Union [Complex Services]*, released earlier this year, a board of arbitration opined that the duty to accommodate also requires employees to disclose confidential medical information regarding their disability to employers in order to help facilitate the accommodation process.

In *Complex Services*, a casino employee brought a grievance against her employer for allegedly failing to properly accommodate her disability upon her return from a lengthy medical leave of absence. Although the employee sought numerous forms of accommodation as part of a proposed return to work plan, she failed to provide her employer with supporting medical documentation and ultimately refused to disclose the exact nature of her disability (though she did vaguely describe it as a "mental illness"). The employee also refused to meet with an independent medical examiner for the legitimate specified purpose of accommodating her disability.
Following numerous failed attempts by the employer to clarify the nature of her disability and ascertain the associated limitations, the employee was placed on a second medical leave of absence until the employer could be sure that she was fit for employment and able to be safely accommodated. The employee subsequently brought her grievance seeking reinstatement and an order that her employer "create an accommodation and return to work policy and procedure."

In dismissing the grievance, the board of arbitration held that an employer must be able to satisfy itself that an employee who seeks a return to work following an illness or injury is able to do so safely and with the appropriate form of accommodation. The board explained that it is not possible for an employment accommodation to proceed properly unless the employer has at least some information respecting the nature of the disability—particularly in cases where the disability is a mental illness. Accordingly, there is a positive duty on employees to provide medical information required by the employer in order to facilitate an accommodated return to work. Indeed no employer can be faulted if an employee fails or refuses to provide the information that is necessary to establish the form and extent of accommodation required in the circumstances.

Exactly what needs to be disclosed by the employee will depend on the facts of each case. Based on past case law, however, disclosure of the following information will generally be required for accommodation purposes:

1. the nature of the illness and how it manifests as a disability, together with any work-related restrictions;
2. whether the disability is permanent or temporary in addition to the anticipated time frame for improvement;
3. the restrictions or limitations that flow from the disability, particularly as they relate to the employee's duties and responsibilities;
4. the basis for the medical conclusions, including the examinations or tests performed (but not necessarily the test results or clinical notes made in that respect); and

5. the treatment, including medication (and possible side effects), which may impact the employee's ability to perform their job, or interact with management, other employees, and customers.

The board of arbitration also held that employees have an obligation to permit an independent medical review of their confidential medical information for the specified purpose of accommodating disabilities in the workplace. The board elaborated that employers must be allowed to review the employee's medical information with a medical specialist or expert in order to ensure that the disability is properly accommodated.

It is important to note that although personal medical information is generally considered private and confidential, an employee's right to privacy is not absolute. According to the board, an employee seeking accommodation cannot thwart her employer's attempts to provide such accommodation by keeping her confidential medical information entirely private. The board also commented that the emerging tort of "intrusion upon seclusion" (established in the recent Ontario Court of Appeal decision Jones v Tsige) in no way alters an employer's right to compel the disclosure of confidential information where such disclosure is required or permitted by law. However, an employee is only required to disclose the least amount of confidential medical information that is necessary in order to enable appropriate accommodation.

The duty to accommodate is a reciprocal concept; the employer and employee must work together in order to establish appropriate accommodation. An employer is not obliged to accept an employee's subjective perspective as to what amounts to appropriate or "perfect" accommodation. Indeed no employee is entitled to a superior accommodation arrangement "merely because that is what [the employee] wants or thinks is best."

The board did caution, however, that while an employer may legitimately refuse to allow an employee to continue or return to work (as well as deny the employee benefits) until the necessary confidential medical information or other relevant information is provided, an employer may not discipline an employee for failing to hold up the employee's end of the accommodation bargain.

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1  2012 CanLII 8645 (ON LA).

• CANADA TO CHANGE THE REGULATION OF “FOOD-LIKE” NATURAL HEALTH PRODUCTS •

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On April 17, 2012, Health Canada announced that it will classify and transition all “food-like” natural health products (“NHPs”) to the regulatory framework that governs the sale of food products in Canada. Health Canada’s Natural Health Product Directorate will no longer accept NHP applications for products that are represented, packaged and sold as foods.
**Background**

Products with added vitamins, minerals or amino acids that appear to be foods, as well as foods advertised with certain health claims, have up to now been marketed as NHPs under the *Natural Health Products Regulations* ("NHP Regulations"). Some examples of these food-like NHPs are caffeinated energy drinks; juices and waters fortified with vitamins and minerals; yogurts and bars with specific health claims; and granulated and powdered products added to food or drinks.

After almost a decade of regulating these products as NHPs, Health Canada is now of the view that consumers have not been able to distinguish a food-like NHP from a food product—creating confusing and safety concerns.

Health Canada officially began the transition process with its announcement in 2011 that it would regulate caffeinated energy drinks as foods. Health Canada has, however, now expanded the products subject to this transition to include all food-like NHPs.

**Practical Implications**

Any product that has been regulated as an NHP and that has "food-like qualities" will now be regulated as a food. These products will be subject to the prescribed nutrition, ingredient and allergen labelling requirements of the *Food and Drug Regulations* ("FD Regulations"), because they will be regulated as foods. In particular, the label for each product must display a nutrition facts panel, which provides consumers with information regarding the nutrient and caloric content of the food.

Further, only nutritional, general health and risk-reduction claims as prescribed in the FD Regulations will be permitted for food-like NHPs; therapeutic-use claims will not be permitted.

A number of food-like NHPs make claims or contain products that contravene the FD Regulations—for example, non-prescribed vitamins, amino acids or minerals. It is anticipated that the FD Regulations will be amended so that these products can continue to be marketed.

Recognizing the potential challenge in transitioning label claims from NHPs to food products, Health Canada’s Food Directorate has indicated that it is willing to work with interested companies to ensure that claims used on their food labels are compliant with the *Food and Drugs Act* and its regulations.

**Transitional Arrangements**

Health Canada has a transition process in place for both new and existing NHPs on the market (*i.e.*, NHPs that have been issued either a Natural Product Number or an Exemption Number, or that are considered subject to an "application in progress").

For existing products that could not be legally sold as a food without a change to the FD Regulations, Health Canada will transition these NHPs to foods through the issuance of Temporary Marketing Authorization Letters ("TMA Letters") and/or Interim Marketing Authorizations (subject to the conditions set out in the TMA Letters).

Products that can transition from NHPs to foods "as is" and require no regulatory amendment to accommodate their market access will only need to comply with the mandatory food and allergen labelling requirements under the FD Regulations. Health Canada has suggested that compliance is expected by December 2012, and it has stated that it intends to release submission standards and processing timelines with respect to TMA submissions in July 2012.

For an updated list of foods transitioned from NHP Regulations to the FD Regulations through a TMA Letter, please see the link below.

**Timing**

The transition process is expected to be completed by December 2012 to coincide with the repealing of the *Natural Health Products (Unprocessed Product Licence Application) Regulations*, which is scheduled for February 4, 2013.
Josée Cavalancia, Norton Rose Canada LLP

In a judgment rendered on April 19, 2012,1 the Quebec Court of Appeal sided with the respondents Wyeth Consumer Healthcare Inc.2 and Johnson & Johnson Inc. and confirmed the dismissal of the appellant’s motion for authorization to institute a class action. The appellant, Isabelle Perreault, was seeking to represent parents who had purchased certain over-the-counter cough and cold medicines for children under the age of six. She alleged that the respondents had not provided any warning about the lack of efficacy of the medicines and their potential health risks.

Context

In October 2007, the U.S. Food and Drug Administration, Health Canada and the respondents issued public advisories warning of the potential risks related to dosage errors for over-the-counter cough and cold medications intended for children under the age of two. The respondents voluntarily withdrew their products intended for children in this age group. Fourteen months later, in December 2008, Health Canada issued a further advisory, which stated that the medicines should not be given to children under the age of six without a doctor’s recommendation, as there was insufficient substantive evidence of efficacy in this age group. Health Canada also issued new labeling requirements to come into effect in fall 2009.

The appellant had purchased Dimetapp and Infants’ Tylenol and had administered them to her 22-month-old twins to alleviate their cold symptoms. Her children did not experience any side effects. After learning about these advisories, she filed a motion with the Superior Court seeking authorization to institute a class action against the respondents. The proposed class action claimed reimbursement of the price paid for the medicines, compensation for stress, trouble and inconvenience and punitive and exemplary damages.

After the Superior Court dismissed her motion, she limited her appeal to reimbursement of the cost of the medicines and punitive damages. The appellant contended that even in the absence of injury, she had sufficient interest under the Consumer Protection Act [CPA]3 to have the court sanction the use of practices prohibited by the Act and to obtain a remedy for the false and misleading misrepresentations she attributed to the respondents.

Decision of the Court of Appeal

The Court acknowledged that, even in the absence of damages arising from a failure by the manufacturer to fulfill an obligation under the CPA, the consumer benefits from a presumption of prejudice. The Court added that, to take advantage of this presumption and claim the remedies provided under art. 272 CPA, the consumer has to prove that there has been a violation of the Act. As the appellant failed to provide such proof, the presumption of prejudice in the CPA could not help her.
In this case, the allegations in the appellant’s motion did not demonstrate that the products purchased by the appellant were objectively harmful for the health of children under six years old when used as directed, or that the respondents had made false or misleading representations or had neglected to diligently disclose an important fact concerning the safety of their products. The appellant, therefore, did not establish *prima facie* that the respondents had failed in fulfilling their obligations under the *CPA*.

As concerns punitive damages, the Court reaffirmed the principle that a mere violation of an obligation imposed by the *CPA* does not give rise to the automatic application of the right to punitive damages and that the judge must consider the whole of the merchant’s conduct to determine whether the merchant displayed significant carelessness towards the consumer. In this case, the respondents’ attitude showed the opposite to be true.

The Court also held that the appellant had acted far too hastily in commencing her action and was, therefore, not a proper representative plaintiff (art. 1003 (d) C.C.P.).

In conclusion, it is interesting to note that the Court drew on the rule of proportionality to point out that the respondent Wyeth had implemented a program to voluntarily refund the purchase price of its products to consumers and that the appellant should have seriously considered the possibility of using this amicable compensation method before undertaking a legal remedy to arrive at the same ends.

This is the second Quebec Court of Appeal decision dismissing a pharmaceutical class action in Quebec.

*[Editor’s note: Josée Cavalancia is an associate at Norton Rose Canada LLP. Her practice focuses on litigation, including in the areas of pharmaceutical product liability and class actions.]*

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2. Norton Rose Canada LLP acted as counsel for the respondent Wyeth Consumer Healthcare Inc.
well as the legislation of other jurisdictions. The decision is particularly significant for the Subsequent Entry Biologics ("SEB") sector, where information related to even very minor details in the manufacturing process can be of crucial value to a competitor in attempting to replicate the final product.

**Details about the Decision**

The Court held that while the Minister of Health is not automatically required to give notice to the owner of confidential information before disclosing the information under the access to information regime, the threshold that will trigger the obligation to do so is fairly low. In other words, the Minister cannot disclose pharmaceutical data without notice unless the evidence supports the conclusion that there is no reason to believe that the record might contain exempted material.

The Supreme Court held that the institution must give notice if it is in doubt about whether the information is exempt. In giving notice, the institution cannot simply shift the responsibility to review the records onto the third party, but must make a serious attempt to apply the exemptions by reviewing each individual record to determine which portions may be exempted. It is also prudent for a third party, who is generally in a better position to identify information that falls within one of the s. 20(1) exemptions, to be as helpful as it can be in identifying precisely why disclosure is not permitted.

The Supreme Court also held the court below erred by narrowly interpreting the meaning of "trade secret" and "confidential information" in s. 20(1) of the Act and by requiring an unduly onerous standard of proof to establish the exemption. The Court noted the applicable standard of proof is the civil standard of the balance of probabilities.

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**ONTARIO REGULATIONS PROHIBITING THE LISTING OF PRIVATE LABEL DRUG PRODUCTS UPHELD**

Richard Y. Cheung and Laverna Chow, Fasken Martineau DuMoulin LLP

In December 2011, the Court of Appeal for Ontario reversed the Divisional Court decision in *Shoppers Drug Mart Inc. v. Ontario (Health and Long-Term Care)* and ruled that certain provisions of the Regulations made under the *Ontario Drug Benefits Act* and the *Drug Interchangeability and Dispensing Fee Act* [collectively, the Regulations] preventing the listing of "private label" generic drug products on the Ontario Drug Benefit Formulary were within the power of the Minister under the parent statutes. Private label generic drug products are products that pharmacy retailers, in this case the Shoppers Drug Mart and Katz group of companies (the "Pharmacies"), market under their own trade names.

The Divisional Court had previously declared the prohibition on listing private label generic
drug products on the formulary to be of no force and effect as, among other reasons, the provisions in the Regulations prohibited rather than regulated private label generic drug products and were extraneous to the purpose of the Regulations. The Government of Ontario appealed this decision.

In allowing the appeal, the Court of Appeal concluded that the provisions of the Regulations were not prohibitive, but merely imposed conditions on generic drugs. In this regard, the Pharmacies were not precluded from engaging in the purchase and sale of drugs in Ontario, as long as they did so in accordance with the legislative and regulatory scheme. Specifically, even with the limitations imposed on private label generic drug products, the Pharmacies were still entitled to participate in many (but not all) stages along the “fabricator/manufacturer/wholesaler/pharmacy/patient continuum of the Ontario drug supply chain.”

The Court of Appeal went on to state that a core purpose of the parent statutes is to achieve low prices for generic drugs and that it is open to the Ontario Government to craft a legislative scheme that attains this goal by directly regulating drug prices (e.g., banning rebates) and indirectly regulating the compensation model for some participants, such as pharmacies (e.g., prohibiting the listing of private label generic drug products). While the Court of Appeal conceded that the actual effect of private labels on the market is hard to predict, it nonetheless concluded that it would be reasonable to find that the existence of private label generics could reduce competition in ways that would adversely affect long-term generic drug prices.

Notwithstanding the impact that this decision may have on pharmacy retailers, it is notable that the Court of Appeal partly framed its decision by recognizing that the parent statutes constitute “‘a specialized legislative scheme’ in a highly important and complex domain of public policy, namely, health and economics.” This complexity, coupled with the “several billion dollars of public funds” required to deliver drug products in Ontario, led the Court of Appeal to conclude that courts, in general, must be careful in evaluating government decisions in the area of pharmacy sales and reimbursements for generic prescription drugs in Ontario.

In early February 2012, the Pharmacies filed applications for leave to appeal to the Supreme Court of Canada.

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