

ONPHA

info
on

Duty to Accommodate under the *Human Rights Code* of Ontario

The duty to accommodate up to the point of undue hardship under the *Human Rights Code* (the “Code”) can be extremely challenging for housing providers and for other organizations. It is challenging because accommodation and the point of undue hardship are highly variable, dependent on the needs of each individual requesting accommodation and the resources of the housing provider.

A big concern for housing providers are the costs that they might be forced to incur in the event that they need to accommodate a tenant. However, not all successful accommodations are costly to implement. In some cases, the remedy might be an exception or change to current policy, additional assistance provided by housing provider staff, or the use of community partners to help to deliver services to maintain a successful tenancy. More than financial resources, an organization’s ability to accommodate depends on the creativity of the individuals seated at the table – staff, the tenant and their supports, community partners, and, potentially, funders.

The following Info On will touch on several issues related to an organization’s duty to accommodate their tenants. Staff must remember that their organization’s responsibility also extends to prospective tenants who may be looking for housing. The accommodation process will be outlined and examples provided which may shed some light on the activities that your organization can undertake to support its tenants. Finally, the influence of the *Code* on the Landlord and Tenant Board and practical tips for housing staff will be outlined.

Rules, Regulations, Policies and Procedures

Non-profit housing providers operate in a heavily legislated, rule-dominated environment. Doing so not only ensures equitable access to limited housing resources, it also ensures that organizations remain compliant with their legislative requirements, and that tenants are able to live together amicably. These requirements, as well as staff routines and practices and the buildings in which tenants reside, are often taken at face value and assumed, by staff, to be appropriate for all employees, prospective tenants, and tenants. Often, this is not the case.



The rules, regulations, policies and procedures, staff practices and routines, and building environments within which non-profit housing providers operate may violate the *Code*-protected rights of staff and tenants. As a result, organizations are required by the *Code* to adjust their expectations and operations to accommodate the needs of those individuals. But how can staff determine when they should be flexible and when they should adhere strictly to the rules, regulations, policies and procedures, and existing structures in which they typically operate?

If an organization believes that it must strictly adhere to its current practices, even when doing so directly or systemically¹ discriminates against a prospective tenant, tenant, or staff person in contravention of the *Code*, the onus shifts to the organization to demonstrate that the resulting discriminatory treatment is justified and that the practice is a *bona fide* requirement of the organization. To justify such discrimination, an organization must demonstrate that:

1. there is a rational connection between the general purpose of the rule or standard and the requirements of the job, tenancy, etc;
2. the rule or standard was adopted with an honest and good faith belief that it was necessary; and,
3. the rule or standard is reasonably necessary to accomplish the legitimate purpose. **To do so the organization must show that it is impossible to accommodate the individual without undue hardship.**

If the organization is unable to meet all three of these criteria, then the *Code* requires that it take steps to accommodate the needs of the prospective tenant, tenant, or employee.

An Organization's Duty to Accommodate under the *Code*

Sometimes the changes that need to be made to a policy or building environment, which are required to ensure that the needs of the individual who requires accommodation are met, are clear. In other cases, however, the necessary changes are more difficult to identify and may require a great deal of creativity on the part of staff, the individual and their supports, and others in the community.

An organization's duty to accommodate stem from Sections 9, 11 and 17 of the *Code*, which provide, among other things, that discrimination against an individual on *Code*-protected grounds is only permissible when there is no way to facilitate the individual's meaningful

¹ Systemic discrimination is defined by the Ontario Human Rights Commission as consisting of "patterns of behavior, policies or practices, that are part of the social or administrative structures of an organization, and that create or perpetuate a position of relative disadvantage for people identified by *Code* grounds. These may appear neutral on the surface, but nevertheless have an exclusionary impact based on *Code* protected grounds." Ontario Human Rights Commission. (2009). *Policy on human rights and rental housing*. Available online at www.ohrc.ca. pg. 46

participation in the exercise of their *Code*-protected rights (i.e. the right to equal treatment with respect to housing) without imposing undue hardship on the party or parties responsible for the accommodation.

As noted, the concept of “accommodation” is highly variable and depends entirely on the unique circumstances of each individual. Accommodations can be changes to the building environment to permit, ease, or improve access by an individual or can be exceptions to organizational policies or the provision of additional or specialized supports or assistance. In each case, the goal of the accommodation is to ensure that the individual is able, as much as possible, to reside in his or her unit and meaningfully participate in an activity or relationship in a dignified and equitable manner.

The Elements of Accommodation

There are two elements of accommodation which must be considered, and documented, by the organization – the procedural and the substantive. The *procedural* aspect of accommodation refers to the process that the organization and individual(s) requesting the accommodation undertake to identify appropriate accommodations. The *substantive* aspect refers to the accommodation(s) which are ultimately provided.

The Ontario Human Rights Commission identifies three principles to guide the accommodation process. These principles are:

1. Respect for dignity

Housing providers should provide accommodation and include the individual in the process of accommodation in a manner which respects, as much as possible, the dignity, privacy, and well-being of the individual making the request.

Many tenants of non-profit housing providers may require additional support or assistance to have successful tenancies. In some cases, this assistance can be provided by housing provider staff or by a tenant’s friend or family member. In other cases, however, community-based expertise may be required.

For example, individuals who hoard often require intensive, long-term support to keep their units safe and habitable. The level of support required may be impossible for housing provider staff alone to deliver. However, housing provider staff, in co-operation with community-based supports and the tenant’s friends and/or family, may be able to provide the tenant with the level of support and assistance required to help him or her maintain a successful tenancy. As with any activity involving multiple stakeholders, regular communication between individuals and organizations is encouraged, as is thorough documentation by housing provider staff.

Remember, in order to contact a tenant’s friend, family member, and/or community-based program on behalf of a tenant, you will need the tenant’s written consent. One of the responsibilities of the tenant in the accommodation process is to participate fully in identifying appropriate strategies for meeting his or her needs, which may involve securing outside supports. Tenants should be encouraged to contact community-based supports themselves or should give another person, such as a friend, family member or housing provider staff member, written consent to do so.

2. Individualization

Each request for accommodation should start fresh, with a new discussion about how the organization can accommodate the needs of each individual. While needs of individuals requesting accommodation must be individually assessed, housing providers will find that the changes made to accommodate previous individuals will assist future individuals and will also benefit their tenant communities as a whole.

3. Integration and Full Participation

The goal of every accommodation should be to maximize the integration and participation of the individual. Ideally, this would include the construction of units and communities using inclusive, barrier-free design, which facilitates individual autonomy. Where such design is impossible or would pose undue hardship, the principles of individual autonomy and equitable participation should guide decision-making.

Organizations are required by the *Code* to fully explore the accommodations which may be required in a given circumstance; failure to do so constitutes a violation of the *Code*.² It is important for the organization responsible for the accommodation to keep documentation outlining the process that it and the individual requesting the accommodation undertake. Under certain circumstances, staff may have a responsibility to ask individuals or households, whether they are current or prospective tenants or employees, if they require accommodation.³ Staff and organizations cannot argue that they did not know that an accommodation was required because they were not informed directly. If staff have reason to believe or suspect that accommodation(s) may be warranted, then they are required, under the *Code*, to engage the individual or household in a discussion regarding their potential needs. Regardless of whether or not an offer of accommodation is accepted, staff must remember to document the discussion and any activities which result from it.

During the accommodation process the individual(s) requesting the accommodation must co-operate and participate in the process. They are required to participate in good faith and to help to identify appropriate accommodations that will meet their needs.⁴ The goal is to collaboratively identify and implement the most appropriate accommodation, short of imposing an undue hardship. In this regard, the Ontario Human Rights Commission has stated that the most appropriate accommodation will result in an “equal opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges experienced by others or if it is proposed or adopted for the purpose of achieving equal opportunity, and meets the individual’s disability-related needs...in a way that most respects dignity...”

² See *Lane v. ADGA Group Consultants Inc.*, 2007 HRTO 34

³ See *Robdrup v. J. Werner Property Management*, 2009 HRTO 1372

⁴ See *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970

Examples of Accommodation

It is important to remember that accommodation does not always involve a cost and that, in many cases, an individual or household's needs can be accommodated through dialogue and using the creativity of staff, the tenant and their supports, and community partners. Many organizations that have eviction prevention policies⁵ in place are engaging in the accommodation process already by creating a framework for discussions between staff and tenants and their supports.

Example 1:

Staff have received complaints about Ted, a single tenant in his 50s, whose television's volume level is disturbing other tenants. Staff approach Ted and learn that he is experiencing progressive hearing loss which will, eventually, leave him severely hearing impaired. Ted is waiting for assistive devices which will help improve his hearing for day-to-day activities. Staff ask Ted if he is currently able to hear well enough to be awoken by fire alarms and the tenant states that he does not know. Staff offer to test the fire alarm in Ted's unit to determine if the tenant is awoken. At the same time, Ted agrees to ask his doctor for guidance on this matter and to request regular hearing tests to identify when a need for accommodation on the part of the non-profit may arise. Staff agree to prepare by investigating the costs and logistics of installing visual fire alarms or other technologies and to regularly follow-up with the tenant.

Example 2:

The Internal Transfer Policy of the housing provider states that tenants must reside in their current unit for a minimum of one year and that they must not have outstanding arrears in order to qualify for an internal transfer. Margot is a market-rent tenant who has been a tenant for four months and has arrears totaling one month's rent which she is re-paying to the non-profit in accordance with a payment plan she developed with staff. Margot has submitted a transfer request because she has been diagnosed with a degenerative condition which is affecting her mobility. While this request does not meet the requirements of the non-profit's Internal Transfer Policy, through discussions with the tenant, staff agree to add Margot's household to the internal transfer list in order to accommodate her changing needs.

Example 3:

Edward is a tenant who suffers from paranoid schizophrenia. Throughout his tenancy, Edward has displayed a pattern of alternating periods of functioning either relatively well despite ongoing symptoms or functioning poorly, with the resulting inability to care for himself and his unit. Of particular concern is that Edward's disability causes him to hoard items, including garbage, in his unit. As a result of Edward's hoarding, several tenants have complained

⁵ Eviction prevention policies and procedures typically detail the steps that staff must take in dealing with a household that has developed arrears or whose conduct is placing their tenancy in jeopardy and at risk of eviction.

about the odour emanating from his unit. After inspecting Edward's unit, staff discover that, in addition to the disturbing odours, the additional combustible and fire load caused by the hoarding is a serious life safety concern for Edward and the other tenants. As a result, staff meet with Edward, members of his family and his support worker, and an arrangement is made for the cleaning of the unit. As well, by working with the tenant, members of his family and his support worker, a crisis response plan is developed which includes a commitment by the tenant to obtain housekeeping services that are provided without charge by a local community organization and a commitment by Edward's family members to intervene at times when Edward begins to function poorly.

Example 4:

Susan is a tenant who is addicted to crack cocaine. As a result of her crack cocaine addiction, Susan often provides local drug users and dealers with access to, and/or the use of, her rental unit in exchange for drugs. Consequently, there is a steady flow of people coming to and from her unit at all hours of the day and night. The amount of guests, as well as the noises and related disturbances that the guests create, have caused Susan's neighbours to complain on numerous occasions. As a result, the housing provider meets with Susan and together they develop an accommodation plan. Pursuant to this accommodation plan, Susan agrees to attend, and complete, an outpatient addictions program at the local hospital and to access and maintain regular contact with a community support worker that provides support to individuals suffering from addiction-disabilities. The housing provider agrees to transfer Susan to another unit, away from the steady flow of guests that frequent her current rental unit. Both Susan and the housing provider agree to meet regularly to assess and re-evaluate the accommodation plan.

Example 5:

Jasper is a tenant who lives in an apartment building containing 30 units. The residential complex has a common living area that all tenants can use to, among other things, watch television and read. The common living area is on the first floor next to the lobby. To access the common living area, tenants need to go through a door and walk down three steps. Jasper has recently become disabled such that he is now confined to a wheelchair. Fortunately, the front entrance of the residential complex had a ramp installed at the time of construction. Jasper, however, cannot access the common living area as he has trouble entering through the door using his wheelchair and cannot use the stairs. Consequently, the housing provider retains an expert in barrier-free design and construction to determine its available options to make the common living area wheelchair accessible. Ultimately, the expert recommends that the housing provider install a power assisted door operator and an inclined stair platform lift. Although it will cause a financial strain, the housing provider makes these changes as they will not cause it undue hardship to do so.

The Test for Accommodation: Undue Hardship

Like accommodation itself, the point at which an organization reaches “undue hardship” is entirely dependent on the unique circumstances of the accommodations being explored. Sections 11 and 17 of the *Code* outline the three criteria that must be considered in order to determine whether the necessary accommodation(s) would pose an undue hardship to an organization. Those criteria are:

- the cost;
- the presence of outside sources of funding, if any; and,
- health and safety requirements for other tenants and staff, if any.

It is possible that the accommodation process will strain an organization and that it will endure some “hardship” in order to accommodate an individual. To argue that an organization has reached the point of undue hardship on the basis of cost, the organization must be able to clearly demonstrate that the accommodation in question would alter the essential nature of the enterprise or significantly affect its ongoing viability. For example, if an organization provides housing with supports and the cost of an individual’s accommodation would result in the dismissal of a support staff person, then that accommodation may meet the threshold of undue hardship, if alternative funders are not available. It is also important to note that the *Code* requires that organizations look at *all* options, including the resources of other programs offered, to potentially fund an accommodation. It is not sufficient to argue that the proposed accommodation would negatively impact the housing program(s); it must, instead, affect the viability of the *entire* organization.

If your organization believes that it has, or may, reach the threshold of undue hardship as a result of an accommodation, it is imperative that it be able to produce concrete information to support its claim. It is *insufficient* to provide subjective evidence (i.e. speculative opinions); the evidence to support this claim *must* be objective.

Requirements of Each Party in the Accommodation Process

The process of identifying the need for an accommodation and, later, identifying an appropriate one, demands that both the organization and the individual participate fully and to the best of their abilities.

There is a responsibility on the part of the individual to identify the need for accommodation, preferably (but not necessarily) in writing.⁶ The individual must provide information as

⁶ This responsibility does not rescind the organization’s responsibility to ask if accommodation is necessary. Staff cannot argue that they did not know that accommodation was required if they reasonably ought to have known or suspected that accommodation may have been appropriate.

necessary and be willing to answer reasonable questions regarding his or her needs and abilities. The individual must also participate actively in the process of identifying potential accommodations and co-operate with the organization to identify solutions. Finally, the individual is required to follow any medical or professional advice which may improve his or her condition or the situation.

As one might expect, the burden on the organization is greater than the burden on the individual. The organization is required to accept, in good faith, that the individual's request is legitimate and necessary, and it must respond to such requests in a timely manner. Organizations must accommodate the needs of individuals to the point of undue hardship and pay all costs of providing such accommodation.⁷ Staff are required to keep a record of the request for accommodation, and it is vital to record the actions taken by both parties. Finally, the organization must respect the individual's right to privacy and ensure that other tenants respect the individual's rights as well.

Accommodation, the *Code*, and the Landlord and Tenant Board

The *Code* is considered quasi-constitutional, which means that, unless otherwise stated, it takes precedence over all other pieces of legislation, including the *Residential Tenancies Act, 2006* (the "RTA"). In exercising their discretion under the RTA,⁸ the Landlord and Tenant Board (the "LTB") Adjudicators are required to consider the role of the *Code* in the decisions that they make.⁹

As a result, it is possible for an Adjudicator to grant a tenant relief from eviction, even if the non-profit housing provider has clearly proven that the provisions of the RTA were violated by the tenant's conduct. If the Adjudicator has reason to believe that the tenant is protected by the *Code*, that the tenant's conduct is caused by a *Code*-protected ground, and that the housing provider has not met its duty to accommodate the needs of the tenant, then s/he is quite likely to grant the tenant relief from eviction.¹⁰

It is therefore important, when staff are appearing at the LTB, that they consider the application of the *Code* to their case, and that they prepare in a manner which highlights the organization's activities related to any accommodation that may have been discussed or implemented. The notes and documents assembled during the accommodation process will help to prove to an Adjudicator that relief from eviction on *Code*-related grounds is unwarranted since the organization has already accommodated or attempted to accommodate the tenant.

⁷ Except for those costs where the organization was able to secure external sources of funding.

⁸ Section 83 of the RTA requires that LTB Adjudicators consider all applicable circumstances in making their decision, including the presence of *Code* issues.

⁹ See *Walmer Developments v. Wolch* (2003), 67 O.R. (3d) 246 (Ont. Div. Ct.)

¹⁰ If the housing provider feels that the Adjudicator's decision to grant relief from appeal is inappropriate, perhaps because the disability used as grounds for granting the relief has no, or has a tenuous link to the grounds upon which eviction was sought, it may be appropriate to appeal the decision.

LTB Adjudicators are also required to use the same three criteria to assess undue hardship as are other judicial and quasi-judicial bodies. As Adjudicators become more familiar with the implications of the *Code* on rental housing¹¹ it will become necessary for staff to be able to demonstrate that the necessary accommodations would amount to undue hardship on the organization. This may mean that senior staff may be required to attend LTB hearings to testify as to the effect of a proposed or necessary accommodation on the organization's viability or mandate, and that additional, often financial, evidence may need to be provided during the hearing. Alternatively, it may be appropriate to argue that the health and safety of staff, other tenants, or the community prevent the organization from accommodating the needs of the tenant in question without such accommodation amounting to undue hardship. For example, if a tenant has physically assaulted a staff person, then it may be appropriate to argue that accommodation is not possible in this case. If circumstances warrant this argument, it may be appropriate for staff to raise potential union issues, or to have staff and other tenants testify regarding their actual or perceived lack of safety in the presence of the tenant in question.

Tips for Non-Profit Housing Staff

At the outset, an organization's duty to accommodate the needs of its tenants and prospective tenants can seem overwhelming to the staff responsible for implementing such accommodations and, depending on the circumstances, accommodations can be complex. Similarly, the possibility of having one's actions scrutinized by the Ontario Human Rights Tribunal ("the Tribunal") in light of a complaint can provoke anxiety in staff and Board Members. However, housing providers must remember that, in many cases, the accommodations necessary to ensure that tenants are able to remain in their homes and to enjoy a successful tenancy can be provided by using limited financial resources and some creativity on the part of the parties involved. Further, routine practices like documenting meetings with the tenant can help to protect the organization from scrutiny and prove that staff made the best decisions possible in difficult circumstances. The following practical tips can strengthen an organization's position at the LTB and the Tribunal, address staff and LTB concerns, and help the organization to deliver the best, most responsive housing to its tenants.

Keep Your Eyes and Ears Open

Housing Provider staff have a responsibility to make appropriate inquiries if they have reason to believe that a tenant or a prospective tenant may require assistance or accommodation. The need for an accommodation may be obvious, if for example a tenant becomes disabled and requires the use of a wheelchair, or may be suggested through patterns of behavior that are noticed by staff or other tenants. In either case, an inquiry by staff can help to initiate a dialogue

¹¹ As a result of the Ontario Human Rights Commission's recently released *Policy on Human Rights and Rental Housing* and the Landlord and Tenant Board's Interpretation Guideline (*G17 Human Rights Guideline*).

between the tenant and the organization which will help the tenant to enjoy the highest possible quality of life.

If you operate a large organization with multiple staff, then it is important to educate all staff, regardless of their respective positions, to be aware of tenants who may request, or show signs of requiring accommodation. A process or protocol should be developed so that, when needs are identified to any staff member, there is a mechanism in place for referring the request or potential need to an appropriate individual or department.

Document, Document, Document

Staff must be in the habit of documenting any inquiries that they make of tenants and any discussion regarding the need for accommodation. Depending on the size and structure of your organization, it may be appropriate to have all requests for accommodation directed to a designated individual or department.

The Tribunal and the LTB both require that organizations be able to supply evidence that they have pursued accommodation to the point of undue hardship. It is therefore vital that the organization be in a position to provide evidence of the actions taken and limitations met in its efforts to provide accommodation to an individual who requires same. Not having supporting documentation can cast doubt on an organization's efforts and result in a failure to evict a problematic tenant or in a decision against the organization from the Tribunal.

Be Flexible, Be Creative

Developing a plan to accommodate an individual may require changes to the building environment, but may also involve changes to organizational policies and procedures or the provision of supports. Organizations should review their policies and procedures prior to receiving a request for accommodation with an eye toward ensuring that these procedures are necessary and are as compliant as possible with the *Code*. When discussing accommodation needs, try to be as flexible as possible in applying your organization's policies and procedures, identifying those policies and procedures where there is some flexibility and those which must be adhered to strictly for legal or health and safety reasons. Where you can, be flexible!

In other cases, an accommodation plan may require a level of support or assistance that the housing provider is unable to provide. In these cases partnering with the tenant, possibly their family and friends, and/or a community-based support agency may provide a level of assistance which will permit a successful tenancy. Housing provider staff must be aware of their responsibilities under privacy legislation when speaking to others and should secure written consent from the tenant prior to doing so.

Prepare Early, Prepare Well

When staff are preparing for a hearing before the LTB, thought should be given to whether or not the tenant, to the best of staff's knowledge, is covered by a *Code*-protected ground and whether or not that ground, if any, applies to the circumstances of that particular case. If there is reason to believe that the *Code* may apply, then evidence related to any accommodations and/or undue hardships that the organization perceives should be prepared and appropriate witnesses subpoenaed to attend the hearing. This type of preparation will help to ensure that the staff are able to prepare a thorough and convincing case. However, it is possible that a tenant will raise a *Code*-related issue with the housing provider for the first time in the hearing room. If staff are surprised by a tenant's claim at the LTB that the housing provider did not fulfill its duty to accommodate, they should be prepared to request an adjournment to investigate the matter further – organizations cannot be expected to accommodate needs that they are unaware of or could not reasonably have been aware of.

Additional Resources

Canadian Legal Information Institute (CanLII)
canlii.org

The Ontario Human Rights Commission
www.ohrc.on.ca
www.ohrc.on.ca/en/resources/factsheets/landlords

The Human Rights Tribunal of Ontario
www.hrto.ca

The Landlord and Tenant Board
www.ltb.gov.on.ca