

HUMAN RIGHTS CONFERENCE—2013

PAPER 5.1

## Need-to-Know: Consent Forms and Medical Certificates in Disability Management Programs

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## **NEED TO KNOW: CONSENT FORMS AND MEDICAL CERTIFICATES IN DISABILITY MANAGEMENT PROGRAMS**

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### **I. Introduction**

To respect, love, trust, feel affection for others and to regard ourselves as the objects of love, trust and affection is at the heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion.<sup>1</sup>

Workplace disability management programs (“DMPs”) typically provide early and ongoing supports and services (e.g., work duty modifications, rehabilitation services) to employees, for the purpose of maintaining their connection to the workplace and/or facilitating their return to work in a safe and timely manner. Disability-related absences take a personal and financial toll on employees, and have cost, efficiency and productivity implications for employers. Accordingly, both parties stand to benefit from the implementation of a proactive, deliberate, coordinated, respectful, and cooperative DMP aimed at getting employees back to work, and keeping them there.

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<sup>1</sup> Charles Fried, “Privacy” (1968) 77 Yale L.J. 475 at 477-78, cited in *R. v. Mills*, [1999], 3 S.C.R. 668 at para. 81.

But effective disability management may not always be possible without certain intrusions into employee privacy. In this paper, we discuss the permissible scope and nature of these intrusions in the context of unionized workplaces. Specifically, we look at the reasonable parameters of the consent forms and medical certificates commonly used in DMPs.<sup>2</sup>

Issues in relation to these parameters often arise when a unionized employee is initially enrolled in a DMP, or during the early stages of the DMP process. The employee is presented with a consent form, which she is required to sign if she wishes to participate in the program. She is provided with a medical certificate, which her physician must complete if she wishes to access DMP supports and services. Are these requirements appropriate? Is the consent form too broad and open-ended? Is the medical certificate too detailed and specific? In this paper we discuss the legal framework and principles for answering these types of questions.

The paper proceeds in three parts. After outlining some basic privacy principles, we lay out the approach taken by arbitrators in examining employer-imposed consent and disclosure requirements. We then discuss the related analysis under the *Human Rights Code*, R.S.B.C. 1996, c. 210 [Code].

## II. Privacy Principles

The right to privacy has been accorded constitutional protection in Canada, and is recognized as a fundamental human right under international law (see *Jones v. Tsige*, 2012 ONCA 32 at paras. 39, 44.

Given its constitutional status, and “because privacy is a fundamental Canadian value, it imbues the development of the common law and, as a subset of that law, the law of employment developed through arbitration” (*Peace Country Health v. UNA*, [2007] A.G.A.A. No. 17 (QL) at para. 118.

### A. Informational Privacy Generally

*Charter* jurisprudence recognizes an “informational privacy” interest, based on the notion of dignity and integrity of the individual (see *R. v. Dymnt*, [1988] 2 S.C.R. 417 at para. 22; *R. v. Tessling*, 2004 SCC 67 at para. 23; *Jones v. Tsige* at para. 41; *Peace Country Health* at para. 119). This notion of privacy “derives from the assumption that all information about a person is in a fundamental way his own” (*Dymnt* at para. 22; *Peace Country Health* at para. 119). Accordingly, individuals seek to “determine for themselves when, how, and to what extent information about them is communicated to others” (*Tessling* at para. 23; *Jones v. Tsige* at para. 41). The Supreme Court of Canada “has linked the privacy value to liberty and personal autonomy” (*Peace Country Health* at para. 121). For these reasons, we “abridge or curtail the right to privacy and dignity of the person only after the most searching of deliberation” (*BCTF v. BCPSEA*, [2004] B.C.C.A.A.A. No. 177 (Taylor) (QL) at para. 20 [*BCTF – Taylor*]).

### B. Privacy of Medical Information

Among the spectrum of privacy interests, the confidentiality of the doctor-patient relationship and personal medical information “is universally and legislatively recognized as one of the most significant...in modern Canadian society” (*Hamilton Health Sciences v. ONA*, [2007] O.L.A.A. No. 733 (QL) at para. 20. Confidentiality “is an important aspect of therapeutic relationships,” and “the privacy of therapeutic records protects this relationship” (*Surrey School District No. 36 v. CUPE, Local 728*, [2006] B.C.C.A.A.A. No. 47 (QL) at para. 92. As Arbitrator Dorsey noted in *Fording Coal Ltd. v. USWA, Local 7884*, [1996] B.C.C.A.A.A. No. 94 at para. 23, breaches of medical privacy may impact an individual’s health and well-being:

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2 In this paper, “consent form” generally refers to a form that authorizes the employer and/or its representatives and agents to collect, use and disclose an employee’s confidential personal (including medical) information. “Medical certificate” generally refers to a form containing a series of questions related to an employee’s illness/injury, which is completed by the employee’s physician and returned to the employer and/or its representatives or agents.

Confidentiality of medical records is a basic right to human dignity. Restoring and supporting dignity and the accompanying personal confidence is a therapeutic part of recovery, rehabilitation and adapting to life with a disability. Breaches of privacy may work against recovery.

But privacy principles do not exist in a vacuum. According to the arbitration board in *Peace Country Health* at para. 123:

... privacy is not just an end in itself, it is just one aspect of the various values that surround and support the concept of human dignity based on personal autonomy; that is the right to make free choices for oneself within one's personal sphere. However ... even such fundamental concepts as personal freedom and dignity and the privacy rights that support those values do, at times, have to give away to, or at least be balanced against, other sufficiently pressing values.

This balancing of values and interests lies at the heart of the arbitral approach to employer-imposed consent and disclosure requirements.

### III. Arbitral Framework

In the absence of collective agreement provisions clearly requiring the disclosure of employees' personal information, arbitrators have applied the analysis from the well-known decision in *KVP Co. v. Lumber & Sawmill Workers' Union, Local 2537*, [1965] O.L.A.A. No. 2 (QL) in examining consent and disclosure requirements unilaterally imposed by an employer (*West Coast Energy v. CEP, Local 449*, [2004] C.L.A.D. No. 504 (QL) at para. 7; see *BCTF v. BCPSEA*, [2002] B.C.C.A.A.A. No. 168 (Korbin) (QL) at para. 44 [*BCTF – Korbin*]; see generally *ICBC v. COPE, Local 378*, [2010] B.C.C.A.A.A. No. 22 (QL) and *Peace Country Health*).

Under the *KVP* test (see para. 34), a rule or policy unilaterally introduced by the employer and not agreed to by the union must satisfy a number of requirements, including the following:

- (1) It must not be inconsistent with the collective agreement.
- (2) It must not be unreasonable.
- (3) It must be clear and unequivocal.

Consistent with the *KVP* analysis, a “frequent starting point” for arbitral discussions about disclosure of employees' personal information is the principle, from *Victoria Times-Colonist v. Victoria Newspaper Guild, Local 223*, 1986 CLB 10895, that the information and authorization sought by an employer must represent a reasonable intrusion into the privacy of employees and must otherwise accord with the collective agreement (*Victoria Times-Colonist* at part IV; *West Coast Energy* at para. 7; *BCTF – Korbin* at para. 49).

More specifically, the information and authorization sought by the employer must be “at least ... reasonably necessary” in relation to the context and purpose of the request (*Surrey School District* at para. 97; see *Vancouver Public Library Board v. CUPE, Local 391*, [2008] B.C.C.A.A.A. No. 24 (QL) at para. 60 and *ICBC* at para. 70). The particular context and circumstances are important “in determining the reasonableness of procedures introduced by the employer and the limits of the medical information to which it is entitled” (*HEABC v. BCNU*, [2006] B.C.C.A.A.A. No. 162 (QL) at para. 45; see also *West Coast Energy* at para. 18). The employer must have a “demonstrated need” for the information sought (see *Peace Country* at para. 141; *ONA v. St. Joseph's Health Centre*, [2005] O.J. No. 2874 (Ont. Sup. Ct. J. Div. Ct.) (QL) at para. 26).

Arbitrators have described the inquiry in these types of cases as a balancing of legitimate interests, namely, the employee's privacy interests and the employer's business interests (*West Coast Energy* at para. 17; *BCTF – Taylor* at para. 22). A proportionality principle is implicit in this analysis. The “higher the degree of intrusiveness and interference with privacy that results from an employer's policy, the more the employer will be called upon to demonstrate the importance of the business interest that would be threatened or lost without the policy” (*Society of Energy Professionals v. Ontario Power Generation*, [2009] O.L.A.A. No. 348 (QL) at para. 96 [*Ontario Power Generation*]).

This general framework, including the balancing of interests approach, is reflected in BC's *Personal Information Protection Act*, S.B.C. 2003, c. 63 ["*PIPA*"], which limits the collection and use of personal information to only what is necessary to fulfil specific, legitimate purposes. Section 2 of *PIPA* provides as follows:

The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of individuals to protect their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

Similar themes are reflected in BC's *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 (see e.g., s. 26), as well in federal privacy legislation (see *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, s. 3 and Schedule 1; see also *Privacy Act*, R.S.C. 1985, c. P-21).

## **A. General Legal Principles**

The jurisprudence establishes or supports the application of various general legal principles in relation to employer-imposed consent and disclosure requirements.

### **I. Means of Obtaining Information**

Employers are required to use the "least intrusive" means to obtain necessary personal information from employees, taking into account the stage of the inquiry (see *Telus Communications v. TWU*, [2010] C.L.A.D. No. 11 (QL) at para. 80; *Vancouver Public Library* at para. 60; *Hamilton Health Sciences* at para. 25). Where employee privacy rights are at stake, "the most complete information, and the most efficient processes, have not been benchmarks employed by arbitrators" (*Vancouver Public Library* at para. 60). An employee's privacy rights are not trumped or modified by expediency or efficiency (*Hamilton Health Sciences* at para. 27; see *CEP, Local 1-S v. SaskTel*, [2011] S.L.A.A. No. 13 (QL) at para. 96, nor should they be compromised on the basis of an employer's objective to monitor, guide and assist in an employee's health care (see *Peace Country Health* at para. 157).

### **2. Amount of Information**

An employer is entitled to the least amount of medical information necessary for its purpose (*Complex Services v. OPSEU, Local 278*, [2012] O.L.A.A. No. 409 (QL) at para. 84. Disclosure of medical information should be on a "need to know basis" (see *HEABC* at para. 71). Private and sensitive employee information collected by the employer "should receive no broader distribution than is reasonably necessary for the purpose for which it was obtained and at all times its confidentiality must be respected" (*BCTF – Korbin* at para. 70; *BCTF – Taylor* at para. 24). An employer's approach to employee disclosure should allow for individual circumstances to prevail over blanket rules where such circumstances show that the requested disclosure is unnecessary, unjustified, or disproportionately invasive, given the employer's needs (see *Peace Country Health* at para. 153).

### **3. Safeguards and Industry Norms**

Sufficient safeguards must be in place to protect an employee's privacy interests once her information is disclosed (see *Peace Country* at para. 153). However, a promise by the employer to treat all medical information received in a highly confidential manner, and to disseminate it solely on a need-to-know basis, "does not expand an employer's entitlement to information" (*Hamilton Health Sciences* at para. 38; see also *Peace Country Health* at para. 169).

Additionally, with respect to the scope and nature of consent forms and medical certificates, the "mere fact that an industry norm has developed does not necessarily mean that the practice is acceptable" (*Hamilton Health Sciences* at para. 15; see *SaskTel* at para. 140).

## **B. Disclosure of Information (Medical Certificates)**

An employee should generally not be required to disclose her medical files, specific diagnosis, or the nature of her treatment (see *Complex Services* at para. 84; see also *Vancouver Public Library* at para. 104 and *BCTF – Korbin* at para. 58). Medical information requested by the employer “must be relevant for the purposes for which it is sought.” Information requests “which have no objective connection to the circumstances of an employee’s illness or condition cannot be supported” (*Capital Health Authority v. UNA, Local 33*, [2006] A.G.A.A. No. 60 (QL) at para. 60; see *ONA* at paras. 20, 22).

Requests for the following information from an employee’s physician are generally permissible in the context of a DMP:

- (1) Nature of illness or injury (see *Canadian Merchant Service Guild v. Seaspan International*, [2007] C.L.A.D. No. 57 (QL) at para. 33-35 [*Seaspan*]; see generally *Victoria Times-Colonist* at part IV).
- (2) Whether a course of treatment has been prescribed or recommended, and whether the employee is following the course of treatment as prescribed or recommended (see *Seaspan* at paras. 48-49).
- (3) Whether medical follow-ups are occurring (see *Seaspan* at para. 37; see generally *BCTF – Korbin* at para. 62).
- (4) Whether the employee has been referred to a specialist (see *Seaspan* at para. 39; see generally *BCTF – Taylor* at para. 79).
- (5) Functional limitations or restrictions (see *Seaspan* at para. 46).
- (6) Prognosis for recovery (see *Seaspan* at para. 51).

Similarly, in the process of accommodating an employee with a disability (whether under the auspices of a DMP or outside of such a program), an employer will generally require information regarding what the employee “can and cannot do, a sense of the stability of the [employee’s] medical condition, and some estimate of how long the disability is expected to last” (*Capital Health Authority* at para. 42). More specifically, according to the arbitration board in *Capital Health Authority* at para. 70, in accommodation situations, an employer may reasonably require some or all of the following information:

- (1) Nature of illness. The diagnosis itself is not required.
- (2) Whether the condition is permanent or temporary, and the estimated timeframe for improvement.
- (3) Functional restrictions and limitations in relation to current and possible alternative job duties.
- (4) How the medical conclusions were reached. However, clinical notes and results of diagnostic and other tests need not be provided to the employer.
- (5) Treatment or medication that will impact the employee’s accommodation or job performance.

Although it may be permissible to ask whether an employee has been referred to a specialist, an employer’s inquiry in this respect should generally “go no further to ensure the nature of the treatment and diagnosis is not inadvertently disclosed” (*ICBC* at para. 119). The specialty of the attending physician “falls under the kind of information related to diagnoses,” and “discloses technical medical detail about an employee’s illness or injury” (*ICBC* at para. 122; see *SaskTel* at para. 154).

It is not permissible to ask an employee’s doctor about non-medical barriers to the employee’s functional recovery. This type of inquiry is “intensely personal and private,” and should be directed to the employee (see *BCTF – Taylor* at para. 93). Similarly, a catch-all request for “additional comments” is inappropriate (*SaskTel* at para. 153).

## C. Authorizing Disclosure (Consent Forms)

The case law establishes or supports the application of a number of general legal principles in relation to consent forms authorizing an employer to collect, use and disclose an employee's personal information.

### I. Informed

Except where required or permitted by law, an employer cannot seek and a doctor cannot disclose any patient medical information without the patient's "freely given informed specific authorization and consent" (*Hamilton Health Sciences* at para. 21). For consent to be knowledgeable, the employee must know the information she is consenting to disclose; the authorization cannot be an open-ended consent to future communications with the employee's physician (see *Ontario Power Generation* at para. 112).

General, open-ended consent forms authorizing benefits providers to disclose personal and medical information may allow for the disclosure of files that "could have accumulated a wealth of information or misinformation, contested or biased opinion, that might not be helpful in making decisions on rehabilitation or back to work planning" (see *HEABC* at para. 185).

### 2. Limited and Specific

A consent form must be focused on its particular purpose and limited to a particular medical professional. Separate consent forms are required for each medical professional. A "basket" consent form "that purports to authorize anyone who the employer may ask to release confidential medical information is not appropriate" (*Hamilton Health Sciences* at para. 35; see also *Vancouver Public Library* at para. 93).

It is not appropriate to require an employee to sign a "forward-looking consent that may exclude her from the confidential medical loop" (*Hamilton Health Sciences* at para. 35). In this respect, Arbitrator Surdykowski notes the following in *Hamilton Health Sciences* at para. 35:

The overwhelming weight of the arbitral jurisprudence takes a dim view of consents that purport to give an employer prospective permission, particularly where the consent purports to permit the employer to unilaterally (with or without notice to the employee) initiate direct contact with a doctor or other custodian of confidential medical information.<sup>3</sup>

Every contact with a doctor or other custodian of confidential medical information "should be through, or at the very least with the knowledge and consent of the employee" (*Hamilton Health Sciences* at para. 35). Additionally, "a separate consent should be required for every contact, and every consent should be limited to the completion of the appropriate form or the specific information required, as appropriate" (*Hamilton Health Sciences* at para. 35). Communication between the employee's doctor and the employer should generally be restricted to written reports "in response to a specific format of permissible questions" (*Vancouver Public Library* at para. 95).

The possibility that accommodation obligations may arise in some individual cases does not establish the reasonable necessity of a more intrusive inquiry or a broad, blanket consent in all cases (*Ontario Power Generation* at para. 109).

## IV. The Human Rights Code

The arbitral framework discussed above shares much in common with the discrimination analysis around consent and disclosure requirements under the *Human Rights Code*.

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<sup>3</sup> See also *Vancouver Public Library* at para. 95; *Seaspan* at para. 42; *West Coast Energy* at para. 51; *ICBC* at para. 117.

The *Code* analysis applies in situations where consent and/or disclosure requirements are imposed on a person with a “disability,” defined broadly to include “a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors” (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665 at para. 79; see also *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703).<sup>4</sup>

In general under the *Code*, consents required and information collected pursuant to a DMP should reflect an individualized approach, balancing the employer’s need for information with the employee’s right to medical privacy and autonomy. In this fundamental sense, the discrimination analysis under the *Code* reinforces the approach generally taken by arbitrators.

## A. Discrimination Analysis Generally

Section 13 of the *Code* prohibits discrimination in employment on the basis of disability. The analysis under s. 13 proceeds in two well-known stages.

First, to establish a *prima facie* case of discrimination, an employee must establish that she has (or was perceived to have) a disability, she experienced an adverse impact, and her disability was a factor in the adverse impact (*Moore v. B.C. (Education)*, 2012 SCC 61 at para. 33; *HEABC (Kootenay Regional Boundary Hospital) v. BCNU*, 2006 BCCA 57 at para. 38 [*Kootenay Regional Boundary Hospital*]).

Second, once a *prima facie* case has been made, the burden shifts to the employer to justify its rule or conduct by showing that it acted for a rational purpose and in good faith, and that its rules/conduct were reasonably necessary to accomplish the intended purpose (see *British Columbia Public Service Labour Relations Commission v. B.C.G.E.U.*, [1999] 3 S.C.R. 3 at para. 54 [*Meiorin*] and *Kootenay Regional Boundary Hospital* at para. 45). In other words, the employer must justify the impugned rule or conduct as a “*bona fide* occupational requirement,” or “BFOR” (*Code*, s. 13(4); *Meiorin* at para. 54).

## B. Medical Information

In certain circumstances, excessively invasive requests for consent and/or medical information may constitute discrimination under the two-part *Code* analysis.

### I. Prima Facie Discrimination

It is important to note at the outset of the analysis that “there is nothing inherently discriminatory” about requesting medical information during accommodation or return-to-work processes (see *Stewart v. Brewers Distributor Ltd.*, 2009 BCHRT 376 at paras. 47-48). However, overly intrusive inquiries into the medical information of a person with a disability, and significant intrusions into her medical autonomy, may constitute adverse treatment related to her disability and therefore *prima facie* discrimination under the *Code* (see *Gichuru v. Law Society of BC*, 2009 BCHRT 360 at paras. 560, 565).

In *Gichuru*, the BC Human Rights Tribunal (the “Tribunal”) “dealt at length with the appropriateness or otherwise of seeking sensitive medical information in an employment context” (*Dudra v. Labour Unlimited Temporary Services*, 2012 BCHRT 256 at para. 10. The Tribunal found the following question, posed by the Law Society to prospective articling students, to be systemically discriminatory:

Have you ever been treated for schizophrenia, paranoia, or a mood disorder described as a major affective illness, bipolar mood disorder, or manic depressive illness?

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<sup>4</sup> For further discussion of the meaning and scope of disability-related grounds under Canadian human rights statutes, see Catherine Sullivan & Jonathan Chapnick, “Human Rights 101: The Prohibited Grounds of Discrimination in Employment” (Paper presented to the CLE conference, *Human Rights Conference – 2009*, November 2009).



The Tribunal held that this question, and the processes that flowed from it, adversely affected people who answered in the affirmative. The question itself was based on stereotypical assumptions about people with the listed conditions, and triggered a more intensive and intrusive evaluation of the applicant (paras. 464-65, 555). In the case of the complainant, after having acknowledged being treated for one of the listed conditions, he was subject to increasingly intrusive requests for medical information by the Law Society (paras. 560, 565).

Consistent with its decision in *Gichurn*, the Tribunal in *Dudra* denied a preliminary application to dismiss a complaint related to medical disclosure in the employment context. In *Dudra*, the complainant was told that he would be denied employment if he did not complete every question on a medical information form. Among other things, the form required the complainant to disclose any current medications and recent illnesses, injuries or surgeries. He refused, and was not offered work by the respondent. Referencing *Gichurn*, the Tribunal found that it could not determine on a preliminary basis that the respondent's conduct could not contravene the *Code*.

In the DMP context, then, employers should exercise caution when requiring the completion of a broad or invasive consent form or medical certificate as a matter of course upon enrollment in the program or on a routine basis during the course of the DMP process (where, for example, the alternative to completion of these documents is exclusion from the program or other negative consequences). In addition to running afoul of arbitral principles, such a requirement could constitute adverse treatment related to an employee's disability, thereby satisfying the test for *prima facie* discrimination under the *Code*.

## 2. BFOR/Justification Test

Where a *prima facie* case has been made in relation to a DMP rule regarding completion of a consent form or medical certificate, the burden shifts to the employer to justify this rule as a BFOR. In most cases, this will come down to an assessment of the reasonable necessity of the rule.

In certain circumstances, and particularly in accommodation situations, questions surrounding the necessity of employer consent forms and medical certificates will arise in the context of the employer's obligation and entitlement to make reasonable inquiries into an employee's health status and functional limitations.

### a. Duty to Inquire

The *Code* imposes a procedural obligation on employers to seek information necessary to evaluate whether accommodation is possible. Specifically, an employer is required to "obtain relevant information about the employee's current medical condition, prognosis for recovery, ability to perform job duties and capabilities for alternate work" (*Mackenzie v. Jace Holdings Ltd. (c.o.b. Thrifty Foods)*, 2012 BCHRT 376 at para. 38; see also *Gordy v. Painter's Lodge (No. 2)*, (2004) BCHRT 225 at para. 84).<sup>5</sup> Concomitant with the employer's duty to inquire is the duty of an employee seeking accommodation to cooperate with reasonable employer requests for information (see, e.g., *Matheson v. School District No. 53 (Okanagan Similkameen) and Collis*, 2009 BCHRT 112 at para. 11; *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970).

In *Thorburn v. Vancouver Coastal Health Authority*, 2013 BCHRT 260, however, the Tribunal commented (at para. 24) on the limits of an employer's entitlement to inquire into an employee's medical information under the auspices of the duty to inquire:

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5 For a more fulsome discussion of the "duty to inquire" under the *Code*, see Diana Juricevic, "Employer's Duty to Inquire under Section 13 of the Human Rights Code: Physical and Mental Disability" (Paper presented to the CLE conference, *Human Rights Conference — 2011*, November 2011); Carman J. Overholt & Matthew Curtis, "Employer Rights and Obligations in Connection with Employee Personal Medical Information" (Paper presented to CLE conference, *Human Rights Conference — 2011*, November 2011); Lorene Novakowski, "Obtaining Medical Information During the Accommodation Process" (Paper presented to CLE conference, *Human Rights Conference — 2007*, November 2007).

An employer does not have an unfettered right to inquire into an employee's medical condition. It must have the employee's clear and express authorization for the disclosure of any confidential medical information and, even though the employer may be complying with a duty to inquire, it must do so in a non-discriminatory manner.

Thus, an employer's general right or obligation to inquire into an employee's medical condition or functional restrictions will not be a full answer to the question of whether there has been a contravention of the *Code*. The appropriateness and reasonable necessity of the employer's rules and actions must be assessed, taking into account the specific circumstances of the case.

## **b. Reasonable Necessity of Inquiry**

Under the BFOR analysis, the determination as to whether a workplace requirement is reasonably necessary involves an assessment of whether there is another option that is less discriminatory while still accomplishing the employer's purpose (see *Gichuru* at paras. 616-17). When the workplace requirement relates to employee medical information or autonomy, this involves assessing whether other options are less onerous, intrusive and invasive of the employee's privacy (see *Gichuru* at para. 617).

Thus, standardized or overbroad requests for consent or medical information, imposed on all employees, may not meet the test of reasonable necessity. In this respect, the Supreme Court of Canada's strong, repeated emphasis on the "importance of the individualized nature of the accommodation process" is instructive (see *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 at para. 22).<sup>6</sup> To ensure compliance with their obligations under the *Code*, employers must confine requests for consent and medical information to that which is reasonably necessary for an individualized consideration of return-to-work plans, accommodation options, or other workplace supports and services.

Thus, in the DMP context, an employer should consider whether, on a case-by-case basis and considering the circumstances, there are less onerous and intrusive alternatives to its consent form or medical certificate. Otherwise, the employer runs the risk of failing to meet the BFOR test and therefore violating the prohibition in s. 13 of the *Code* against discrimination in employment.

## **V. Conclusion**

A disability management program, properly designed and implemented, is a worthwhile workplace initiative. Yet, like so many other employment-related programs and processes (e.g. long-term disability benefits, workplace accommodation, workers compensation benefits), the fair and effective administration of a DMP may not always be possible without certain intrusions into employee privacy. The key, for all participants in DMPs (employees, employers and unions), is to identify the reasonable parameters of these intrusions.

In this paper, we have discussed the legal framework and principles for determining these parameters, particularly in respect of the consent forms and medical certificates commonly used in DMPs. A number of important themes and imperatives emerge from this discussion. Chief among these are the following: any information or consent sought from an employee must be reasonably necessary in relation to the context and purpose of the request; the least intrusive means must be used to obtain necessary personal/medical information from an employee, taking into account the stage of the inquiry; and employee consent should be freely-given, knowledgeable, informed and specific.

We hope this paper provides a useful summary of some of the relevant analysis and evolving case law in relation to DMPs in unionized workplaces.

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<sup>6</sup> See also the foundational discussion of the individualised nature of accommodation in *Meiorin* at paras. 64-67.