

Human Rights 101

Conference of Ontario Boards and
Agencies

November 6, 2008

This PowerPoint presentation was originally prepared by Ruth Carey, Member, Landlord and Tenant Board (formerly Executive Director of the HIV/AIDS Legal Clinic) and Cindy Wilkey, Lawyer, Income Security Advocacy Centre as part of a training programme for Legal Aid Ontario community clinic staff.

The original slides have been adapted, with permission, for COBA, by Kathy Laird, Human Rights Tribunal of Ontario.

Why and when do non-human rights tribunals have consider and apply the *Code*?

⌘ The Supreme Court of Canada has said that Ontario tribunals can and must apply the *Code* to a legal issue properly before the tribunal, unless their own statutes specifically provide otherwise.



Tranchemontagne v. Ontario (ODSP), [2006] 1 S.C.R. 513.) para. 34-39

Is my tribunal the most appropriate forum for a human rights issue?

“Where a tribunal is properly seized of an issue pursuant to a statutory appeal, and especially where a vulnerable appellant is advancing arguments in defence of his or her human rights, I would think it extremely rare for this tribunal to not be the one most appropriate to hear the entirety of the dispute.”

In *Tranchemontagne*, the SCC was not swayed by factors such as lack of human rights expertise or practical constraints such as tribunal caseload.

Tranchemontagne, para. 44-45; 47, 50

Public policy reasons cited by SCC

- “I am unable to think of any situation where such a tribunal would be justified in ignoring the human rights argument, applying a potentially discriminatory provision, referring the legislative challenge to another forum, and leaving the appellant without benefits in the meantime”.
- “ Encouraging administrative tribunals to exercise their jurisdiction to decide human right issues fulfills the laudable goal of bringing justice closer to the people. ” *Tranchemontagne*, para.49, 50 and 52

Paramountcy of *Code*

Section 47(2) of the *Code*:

"Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act."

"As a result of this primacy clause, where provisions of the Code conflict with provisions in another provincial law, it is the provisions of the Code that are to apply."

Tranchemontagne, para. 34.

Interpretation of Human Rights Laws

⌘ Human rights statutes have been held to be quasi-constitutional law that must be interpreted liberally :

Insurance Corp. of British Columbia v. Heerspink, [1982] 2 S.C.R. 145;

University of British Columbia v. Berg, [1993] 2 S.C.R. 353,

Zurich Insurance Co. v. Ontario (Human Rights Commission), [1992] 2 S.C.R. 321,

C.N.R. v. Canada (Human Rights Commission), [1987] 1 S.C.R. 1114,

Ontario (Human Rights Commission) v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536,

Winnipeg School Division No. 1 v. Craton, [1985] 2 S.C.R. 150).



Definition of Discrimination

- ⌘ The word "discrimination" is not defined in Ontario's *Code*.
- ⌘ The Commission's "Guide to the Human Rights Code" makes a distinction between the following:
 - ⌘ Direct discrimination: You are treated differently and negatively because of your membership in one of the protected groups.
 - ⌘ Constructive discrimination: You get treated the same as everyone else but it has a negative and differential impact on you because of your membership in the protected group.

Constructive or Adverse Impact Discrimination

Section 11 of the Code provides:

- A right ..is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member"

When is an exclusion justifiable?

- ⌘ If the requirement, qualification or factor is reasonable and *bona fide* in the circumstances, then it will not be considered to be discrimination.
- ⌘ However, the requirement, qualification or factor cannot be found to be *bona fide* or reasonable unless the needs of the group of which the claimant is a member cannot be accommodated without undue hardship, having regard to cost, outside sources of funding and health and safety requirements.

Grounds

- ⌘ The first step in assessing a human rights argument is to determine the grounds relied upon.
- ⌘ This means identifying the personal characteristics that are alleged to be the basis for differential treatment or a differential negative impact.



Grounds

In Ontario's Human Rights Code the following grounds or markers for discrimination are identified:

- Race, colour, or ethnic origin
- Citizenship, ancestry or place of origin
- creed or religion
- marital status, family status
- Record of offences
- Receipt of public assistance
- physical or mental disability
- sex
- sexual orientation
- age

Disability as a Prohibited Ground

- ⌘ The definition of disability in the *Code* (section 10) is extremely broad.
- ⌘ Temporary illnesses or disabilities, are often not considered to be disabilities under the *Code*, unless a related claim was made the *Workplace Safety and Insurance Act*.
- ⌘ However, "mental disorders", even temporary ones, are included in the definition.



Discrimination need only be one factor

- ⌘ It does not matter if the main reason a person was treated badly was because of a reason not covered by the *Code*.
- ⌘ Discrimination may be found even if only **ONE** of the reasons for the negative treatment was an included ground in the *Code*.



Velenosi v. Dominion Management (1997), 148 DLR (4th) 575 (OCA.)

Social Areas

The second step is to figure out if the area of activity involved is covered.



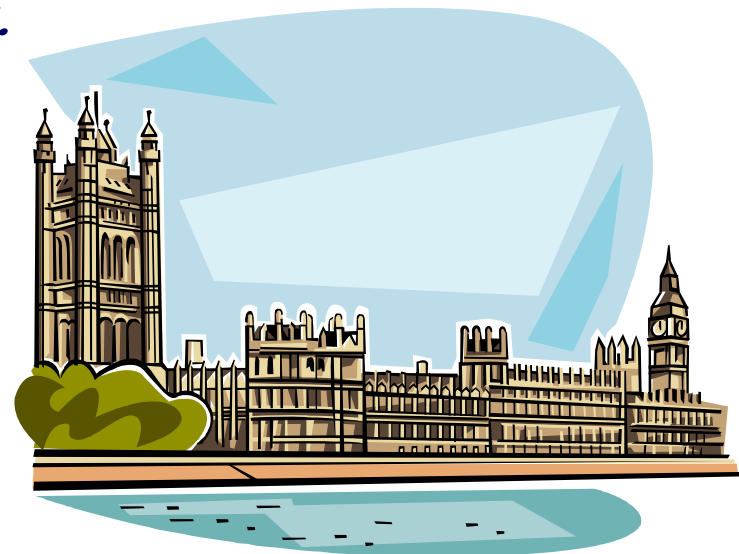
The *Code* covers:

- & Goods, services and facilities (s. 1)
- & Housing and accommodation (s. 2)
- & Contracts (s. 3)
- & Employment (s. 5)
- & Unions, guilds, or trade associations (s. 6)

Goods, Services and Facilities

Governmental programs have been held to be "services". A tribunal would likely be considered to be a service:

Ontario Human Rights Commission v. Ontario (1994), 19 O.R. (3d) 387 (C.A.)



Not all Grounds apply in all Social Areas



⌘ *Record of offences* is included as a prohibited ground only in the area of employment.

⌘ *Receipt of public assistance* is only an included ground in housing/accommodation.

Employment

⌘ The prohibition against discrimination in employment includes a prohibition against harassment in employment: Ss.5(2).



Harassment

- ⌘ Harassment "means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome".
- ⌘ Harassment claims are usually based on more than one incident.
- ⌘ The "ought reasonably" language implies there is an element of objectivity in the standard.



Housing

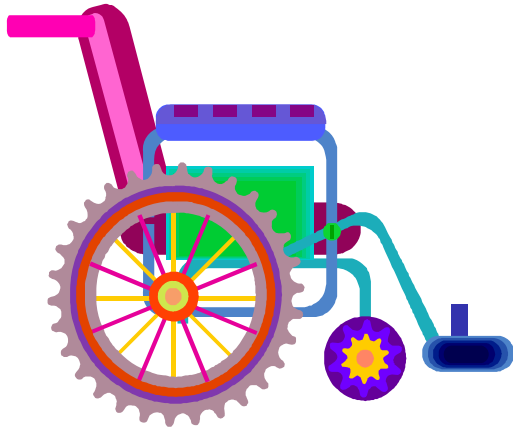
⌘ As with employment, the prohibition against discrimination in housing includes a prohibition against harassment.



⌘ The housing harassment provision applies to harassment by other occupants: Ss. 2(2).

The Duty to Accommodate

In disability discrimination cases, the concepts of:



- “reasonableness”
- “*bona fide* requirements”
- “undue hardship”

are at issue as in constructive discrimination cases.

Duty to Accommodate: Special Needs

Section 17 states that:

- ⌘ A right of a person... is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.
- ⌘ A court or tribunal shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs.



Shifting Onus: Duty to Accommodate

In human rights jurisprudence, once a claimant shows that a neutral rule has a discriminatory impact, the onus shifts to the respondent to establish that the exclusion or restriction is reasonable and *bona fide* and that no reasonable accommodation is possible.



The Duty to Accommodate

- ⌘ The Commission's publication "Policy and Guidelines on Disability and the Duty to Accommodate" contains a comprehensive guide to the factors to be considered in the "undue hardship" determination.
- ⌘ It is available online at <http://www.ohrc.on.ca/english/publications/disability-policy.shtml>



Remedies

S. 41 of the current Code describes the kinds of remedies available. Amendments effective on June 30, 2008 will continue to provide for:

1. **Forward looking remedies:** requiring the respondent to take positive steps to ensure compliance with the Code, both in respect of the complaint and with respect to future practices
2. **Restitution:** including monetary compensation for the complainant to put the complainant in the position s/he would have been in, if the discrimination had not occurred. Includes compensation for injury to dignity and self-respect.

Remedies

Examples of forward-looking remedies that can be awarded by the Human Rights Tribunal:

- ⌘ cease and desist a discriminatory practice
- ⌘ change a program to eliminate discriminatory elements - such as offering same sex benefits under an employee benefit plan
- ⌘ mandated physical modifications to theatres, restaurants, polling stations, work places
- ⌘ development of non-discrimination action plans
- ⌘ development of an affirmative action plan
- ⌘ posting of notices notifying employees, customers of Code provisions
- ⌘ provide information into the future to allow monitoring of progress towards anti-discrimination goals

Remedies

Examples of restitution-type remedies typically awarded by Human Rights Tribunal:

- ⌘ Payment of retroactive benefits
- ⌘ Reinstatement in employment
- ⌘ Payment of lost wages
- ⌘ Difference in rent
- ⌘ Compensation for insult to dignity/mental anguish/infringement of rights under the Code

International Human Rights Covenants as Interpretive Guides

The Ontario *Human Rights Code* makes explicit reference to the Universal Declaration of Human Rights in the Preamble.

"...the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review...[international law] is also a critical influence on the interpretation of the scope of the rights included in the *Charter*"

Baker v. Canada (Minister of Citizenship and Immigration)



Resources

Ontario Human Rights Commission Policies

Found at:

<http://www.ohrc.on.ca/english/publications/index.shtml#policy>

- Guidelines on Accessible Education (11/04)
- Guidelines for collecting data on enumerated grounds under the *Code* (9/03)
- Guidelines on Special Programs (11/97)
- Policy and Guidelines on Disability and the Duty to Accommodate (1/00)
- Policy and Guidelines on Racism and Racial Discrimination (6/05)
- Policy On Creed and the Accommodation of Religious Observances (10/96)
- Policy on Discrimination Against Older Persons Because of Age (3/02)
- Policy on Discrimination and Harassment because of Sexual Orientation (1/06)
- Policy on Discrimination and Language (6/96)
- Policy on Discrimination and Harassment Because of Gender Identity (3/00)
- Policy on Discrimination Because of Pregnancy and Breastfeeding (10/01)
- Policy on Drug and Alcohol Testing (9/00)

Resources - continued

Ontario Human Rights Commission Policies continued

- Policy on Employment-related Medical Information (6/96)
- Policy on Female Genital Mutilation (FGM) (11/00)
- Policy on Height and Weight Requirements (6/96)
- Policy on HIV/AIDS-Related Discrimination (11/96)
- Policy on Requiring a Driver's License as a Condition of Employment (6/96)
- Policy on Scholarships and Awards (7/97)
- Policy on Sexual Harassment & Inappropriate Gender Related Comments & Conduct (9/96)

- **Note:** Policies and guides reflect the Commission's interpretation of the Ontario *Human Rights Code* provisions and should be read in conjunction with the specific provisions of the Code, and are subject to the decisions and interpretations of Superior Courts. Any questions about policies should be directed to the staff of the Ontario Human Rights Commission.

- **See also:** Commission Discussion Papers, Pamphlets, Annual Reports, etc at the same url.