Ontario’s Human Rights Code

Heather Conklin | Research Officer

November 2022
Ontario’s Human Rights Code (the Code) establishes a right to equal treatment and freedom from discrimination in relation to five social areas. This paper provides an overview of the rights and corresponding duties established under the Code and describes Ontario’s human rights system.

The Legislative Research (LR) branch is dedicated to serving Ontario’s Parliament, by providing Members of the Provincial Parliament (MPPs), their staff, and legislative committees with confidential, non-partisan research and analysis on request. LR also prepares research papers on key public policy topics of interest to parliamentarians.

Every effort is made to ensure that research papers are accurate as of the date of publication, but the papers may not be updated subsequently. LR accepts no responsibility for any references or links to, or the content of, information maintained by third parties.

Research Officers are available to discuss research papers and other topics with MPPs and their staff.

© Legislative Research
Ontario’s Human Rights Code
Publication No. RP 21-08
Ce document est également disponible en français.
Content

INTRODUCTION 1
PROHIBITED GROUNDS OF DISCRIMINATION 1
ONTARIO’S HUMAN RIGHTS SYSTEM 2
  Human Rights Tribunal of Ontario 3
  Ontario Human Rights Commission 3
  Human Rights Legal Support Centre 4
THE DUTY TO ACCOMMODATE 4
ESTABLISHING DISCRIMINATION 5
  Defences and Exceptions 5
HUMAN RIGHTS BEST PRACTICES 6
CONCLUSION 8
NOTES 9

Recent Research from Legislative Research

Municipal Governance in Canada
RESEARCH PAPER 21-03
Michael Vidoni

Federal Transfers to Ontario
RESEARCH PAPER 20-11
Jason Apostolopoulos

Women on the Frontlines in Ontario’s Fight Against COVID-19
RESEARCH PAPER 21-01
Laura Anthony and Sude Bahar Beltan

Access to Justice:
Initiatives to Improve Access to Legal Services and Dispute Resolution
RESEARCH PAPER 20-08
Lauren Warner

Public Health and Epidemiology:
An Overview
RESEARCH PAPER 21-04
Erica Simmons

Hospital Overcrowding
RESEARCH PAPER 11-19
Jason Apostolopoulos
Introduction

The Ontario Human Rights Code (the Code) was enacted in 1962 with the purpose of recognizing the dignity and worth of every person by providing for equal rights and opportunities without discrimination. The Code is quasi-constitutional in nature, meaning that it has a special importance, above other provincial laws. Because of its special status, the Code takes precedence over any other statute of Ontario, unless that statute specifically states that it applies despite the Code.

The aim of the Code, as identified in its Preamble, is

the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province.

Prohibited Grounds of Discrimination

To this end, the Code provides that every person has a right to freedom from discrimination on the basis of a number of grounds in relation to five social areas:

- services, goods, and facilities
- accommodation (housing)
- contracts
- employment
- vocational or professional associations, trades, or trade unions

Prohibited grounds of discrimination (also sometimes referred to as “protected grounds”) include race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status, and disability.¹

Additionally, in the social area of employment, individuals have a right not to be discriminated against because of a “record of offences” (meaning either a criminal offence for which a pardon has been granted, or any provincial offence).² As well, in the social area of accommodation, individuals have a right not to be discriminated against because they receive public assistance (e.g., Ontario Works or Ontario Disability Support Program benefits).
The Code also prohibits harassment on the basis of prohibited grounds and sexual harassment in accommodation and in employment. Harassment is defined as “a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.”

The Code also prohibits reprisals against individuals (e.g., intimidation, dismissal, or other penalizations) for claiming and enforcing their rights under the Code, or for refusing to infringe a right of another person.

Importantly, unlike the Canadian Charter of Rights and Freedoms, which applies only to government action (including government employers and service providers, as well as government policies, programs, and laws), the Code applies to both public and private sector organizations.

Ontario’s Human Rights System

Ontario’s human rights system consists of the Human Rights Tribunal of Ontario (HRTO), the Ontario Human Rights Commission (OHRC), and the Human Rights Legal Support Centre (HRLSC).
Human Rights Tribunal of Ontario

The Human Rights Tribunal of Ontario is an adjudicative tribunal that resolves claims of discrimination and harassment brought under the Code. The provincial Cabinet appoints Tribunal members in accordance with a competitive selection process using criteria set out in Part IV of the Code.

Individuals who believe they have experienced discrimination or harassment on the basis of a prohibited ground can file an application with the HRTO. The Tribunal handles applications according to its own Rules of Procedure, which provide for mediation assistance and also allow hearings to be held in person, in writing, by telephone, or by other electronic means. HRTO proceedings must allow parties the opportunity to make oral submissions, and adjudicators must give written reasons for final decisions.

Remedies for a finding of discrimination or harassment can include monetary compensation, a non-monetary award (e.g., human rights training, building an accessible entrance), and/or an order to promote future compliance with the Code (e.g., developing human rights policies).

A more detailed explanation of the application and hearing process is available on Tribunals Ontario’s Application and Hearing Process webpage. The Canadian Legal Information Institute publishes the decisions of the HRTO.

The courts have also found that other provincial administrative tribunals have jurisdiction to consider the Code (e.g., in relation to matters raised at the Landlord and Tenant Board or before the Social Benefits Tribunal). This includes authority to find that a provision of an Act does not apply if it conflicts with the Code. For example, in the leading case of Tranchemontagne v. Ontario (Director, Disability Support Program), the Supreme Court held that the Social Benefits Tribunal (SBT) could decide whether provisions of the Ontario Disability Support Program Act, 1997 (ODSPA) that prevented applicants from qualifying for benefits on the sole basis of alcohol or drug addiction were discriminatory.

Ontario Human Rights Commission

The Ontario Human Rights Commission is an arm’s-length agency of government with a broad mandate to promote and advance human rights in Ontario. Commission members are appointed by the provincial Cabinet and must have “knowledge, experience or training with respect to human rights law and issues.”

Section 29 lists the OHRC’s specific functions. The OHRC explains that it “develops policies and provides targeted public education, monitors human rights, does research and analysis, and conducts human rights inquiries.” In matters that affect the broad public interest, the OHRC can also bring its own cases to the HRTO, or intervene in human rights cases that are before the Tribunal.

Section 30 authorizes the OHRC to prepare, approve, and publish human rights policies to provide guidance on interpreting Code provisions. According to the OHRC, the Commission’s policies and guidelines “set standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the Code.” They also represent the OHRC’s interpretation of the Code at the time of publication.

The OHRC is required to make annual reports and can also make other reports about the state of human rights in Ontario. The 2020–2021 Annual Report highlighted the OHRC’s top outcomes, including the publication of its Policy statement on a human rights-based approach to managing the COVID-19
The OHRC has also developed a series of Questions and Answers on individuals’ human rights and obligations during the COVID-19 pandemic.

**Human Rights Legal Support Centre**

Part IV.1 of the Code establishes the Human Rights Legal Support Centre with a mandate to provide legal services throughout Ontario to applicants bringing human rights disputes to the HRTO. The HRLSC is independent from, but accountable to, the provincial government. It operates under the direction of a board of directors appointed by the provincial Cabinet, and must make annual reports.12

The HRLSC is empowered to establish policies and priorities for the provision of its services and has developed an eligibility criteria guideline to inform decisions about the level of service it will provide to applicants, on a case-by-case basis.13

According to the guideline, every applicant receives initial support, including advice about whether their claim falls within the Tribunal’s jurisdiction. In general, the HRLSC explains that it prioritizes applicants with meritorious claims who would face barriers to self-representing—especially where the application is complex, raises public interest issues, or could have a broad impact on other human rights claims.

**The Duty to Accommodate**

The rights and protections afforded by the Code impose a corresponding duty on service providers, employers, housing providers, and others to make genuine efforts to accommodate Code-related needs. As explained by the OHRC, without the duty to accommodate, human rights would be “functionally meaningless.”

The duty to accommodate recognizes that people may need different solutions in order to gain equal access and treatment in areas like public and private services, housing, and employment. The duty to accommodate only applies to Code-protected grounds.14

It is also important to note that the duty to accommodate is not unlimited. Rather, organizations and individuals must provide accommodation up to the point of undue hardship (meaning an unreasonable or disproportionate burden), considering cost, outside sources of funding, and health and safety requirements.

What might constitute undue hardship on a business or other organization would depend on individual facts and circumstances.
Establishing Discrimination

“Discrimination” is not defined by the Code. Instead, case law has established the elements of discrimination. In order to prove that they have been discriminated against, a person must generally be able to show that

- they have a characteristic that is protected from discrimination;
- they have experienced a negative treatment or impact within a protected social area; and
- the protected characteristic was a factor in the negative impact.\(^{15}\)

Intent is irrelevant (i.e., discrimination can be inadvertent). A claimant must be able to demonstrate on a “balance of probabilities” that discrimination took place. This means that, considering the particular circumstances, discrimination is “more reasonable and probable than not.”\(^{16}\)

In some cases, discrimination may be obvious. However, in many cases, proving that a person has been discriminated against on the basis of a prohibited ground can be challenging. This is often the case when there is no direct statement or written document explicitly demonstrating that a protected characteristic was a reason for negative treatment. Courts and tribunals have recognized that cases of discrimination can be shown through an analysis of all relevant factors, including evidence that is circumstantial (also often referred to as indirect evidence). Relying on circumstantial evidence, a claimant can argue that related facts or events, when taken together, “make it reasonable to conclude or ‘infer’ that discrimination was at play.”\(^{17}\)

As well, human rights case law has established that to make a finding of discrimination, a Code ground need only be one factor (of possibly several) in the decision or treatment at issue.\(^{18}\)

Once a claimant has established discrimination, the burden shifts to the respondent (e.g., service or housing provider, employer) to show that the conduct fits within one of the defences and exceptions outlined in the Code.

Defences and Exceptions

As the OHRC explains, the Code includes specific defences and exceptions that allow behaviour that would otherwise be discriminatory.\(^{19}\) For example, in situations where a requirement, such as a job qualification, might appear to be neutral, but actually results in a negative impact on members of a protected group (often referred to as “adverse effect” or constructive discrimination), section 11 allows the responsible person or organization to demonstrate that the requirement at issue is reasonable and bona fide—meaning genuine or real—in the circumstances. In such cases, the organization is also required to accommodate the individual’s needs up to the point of undue hardship (as discussed above).

The OHRC provides the example of an employer requiring all male employees to be clean shaven. While not intended to exclude Sikh men (who may refrain from shaving as a requirement of their religion) from employment, the rule has this effect and therefore would be considered discriminatory.\(^{20}\)
The OHRC explains that in the above example, the requirement could be genuine if the goal is to ensure hygiene when preparing food; however, in that case, “Sikh men can easily be accommodated by allowing them to wear a net to cover their beard, which should not cause the employer undue hardship.”

The Code also allows “special programs” that are designed to relieve hardship or economic disadvantage, or to help historically disadvantaged persons or groups achieve equal opportunity (sometimes referred to as “affirmative action” programs). The Code also recognizes Canada’s constitutional separate school rights and explicitly states that requirements, such as a minimum drinking age, are not discriminatory, among other exemptions.

Section 24 of the Code establishes certain exemptions that are specific to employment. For example, the right to equal treatment is not infringed where a religious, philanthropic, educational, or social organization that serves persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status, or disability gives preference in employment to similarly identified persons, if the qualification is reasonable and genuine because of the nature of the employment.

This section also permits discrimination based on age, sex, record of offences, or marital status if the age, sex, record of offences, or marital status of the applicant is a reasonable and bona fide qualification because of the nature of the employment (often referred to as a bona fide occupational requirement or “BFOR”). In order for such discrimination to qualify as a BFOR, any reviewing tribunal or court must be satisfied that the employer cannot accommodate the employee without undue hardship.

For example, this provision has supported mandatory retirement policies in physically demanding and/or high-risk professions, such as policing and suppression firefighting.

The Supreme Court of Canada has developed the following three-part legal test for an employer to demonstrate that a discriminatory standard or qualification (whether the discrimination is direct or adverse effect) is a bona fide occupational requirement:

- The purpose of the requirement must be rationally connected to the performance of the job.
- The employer must have adopted the requirement “in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose.”
- The requirement must be reasonably necessary to the accomplishment of that legitimate work-related purpose. (In order to demonstrate that the requirement is “reasonably necessary,” the employer must demonstrate that they cannot accommodate the employee without undue hardship.)

Human Rights Best Practices

The OHRC maintains a guide to developing human rights policies and procedures (Guide). Among other things, the Guide recommends that organizations undertake a proactive review of potential barriers related to Code grounds, including

- physical accessibility;
organizational policies, practices, and decision-making; and

organizational culture.

Once an organization has identified barriers to inclusion, they should then develop plans to remove them. A barrier removal plan should

- set specific, measurable goals and create clear timelines for achieving them;
- allocate adequate resources;
- ensure accountability and responsibility; and
- include a mechanism for regularly reviewing and evaluating progress towards the identified goals.²⁶
Conclusion

Ontario’s Human Rights Code has a special status, enshrining rights that are quasi-constitutional in nature. The right to be free from discrimination applies only to Code-protected grounds in relation to five social areas. The duty on service providers and employers to accommodate human rights-related needs can be limited by health and safety requirements, as well as cost. As well, certain defences and exceptions established under the Code allow behaviour and/or requirements that would otherwise be discriminatory.

The Code sets out the provincial human rights system, consisting of the Ontario Human Rights Commission, the Human Rights Tribunal of Ontario, and the Human Rights Legal Support Centre. The Commission provides resources and guidance about human rights matters in Ontario; the Tribunal adjudicates human rights disputes; and the Human Rights Legal Support Centre provides legal advice to applicants bringing human rights claims to the Tribunal.
Ontario’s *Human Rights Code*

---

2. Code, s. 10(1) (definition of “record of offences”).
3. Code, ss. 2(2), 5(2), and 7.
4. Code, s. 10(1) (definition of “harassment”).
7. Code, s. 45.2 (“Orders of Tribunal: applications under s. 34”); Human Rights Tribunal of Ontario, “Application and Hearing Process.”
9. The Social Benefits Tribunal subsequently found that the provisions discriminated on the basis of disability. That finding was upheld by the courts; see Ontario (Disability Support Program) v. Tranchemontagne, 2010 ONCA 593 (CanLII). The provisions at issue (s. 5(2)) remain in the Act, but are not applied to ODSP applications; legislation passed in 2021 will repeal s. 5(2) of the ODSPA, once the relevant provision (Sched. 21, s. 25(1)) is proclaimed into force.
10. Code, ss. 27(2)-(3).
12. Code, s. 45.11; see also Human Rights Legal Support Centre (HRLSC), “Our Mission.”
13. Code, s. 45.12(b).
14. HRLSC, “Understanding the Duty to Accommodate.”
16. Ibid.
17. HRLSC, “Proving Discrimination,” 7. What if there is no evidence that directly proves discrimination? What is circumstantial evidence?
18. OHRC, “Policy on ableism and discrimination based on disability.”
22. Code, s. 14. As well, s. 15 allows the age of sixty-five years or over as a qualification for preferential treatment.
23. Code, s. 24(1)(a).
24. Code, ss. 24(1)(b) and 24(2).