

## PART II

# Hiring

You may be surprised to learn that a number of legal issues can arise even before an employer hires an employee. Employers must satisfy several legal obligations under both statute and common law during the recruitment, selection, and hiring process. The most significant obligations arise from human rights legislation because the employer must ensure that no discrimination occurs while it selects and hires an employee. The protection afforded by human rights law extends from the pre-employment stage to the end of the employment relationship.

Chapter 2 discusses Ontario's *Human Rights Code* as it relates to the hiring process. The chapter begins with a brief discussion of the scope of prohibited conduct under the Code and a review of the 16 prohibited grounds of discrimination. It also considers the limited circumstances where discrimination is allowed. The chapter then reviews the provisions in the Code that relate to advertisements, applications, interviews, testing programs, and conditional offers of employment.

Chapter 3 addresses the key common law issues that arise during the hiring process. The most basic of these is the employer's obligation not to mislead candidates about the job that it is offering. The chapter also reviews the different categories of employees, including full-time, part-time, temporary (or contract), and agency employees.

Chapter 4 discusses the benefits of a written employment contract and reviews common contractual terms. It also explores key grounds on which the enforceability of those terms may be challenged.



# Human Rights Issues: Hiring

# 2



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## LEARNING OUTCOMES

After completing this chapter, you will be able to:

- Trace the development of human rights law in Ontario.
- Identify the key features and requirements of Ontario's *Human Rights Code*.
- Identify the 16 prohibited grounds of discrimination under the *Human Rights Code*.
- Understand the requirements of the *Human Rights Code* in relation to hiring, including job advertisements, applications, interviews, and conditional offers of employment.
- Understand the human rights issues raised by pre-employment testing, including medical and drug and alcohol testing.

## Introduction

There was a time when even the most blatant forms of discrimination were legal in Canada. Under the common law, stores could refuse service, landlords could refuse housing, and employers could refuse to hire individuals for whatever reason they chose, including race, gender, or marital status. The 1939 case of *Christie v The York Corporation* provides a striking illustration of how accepted discrimination once was (see the “Case in Point” feature below). However, the days of *Christie v The York Corporation* are long gone. Over the past 55 years, every jurisdiction in Canada has enacted human rights legislation that prohibits discrimination in key social areas, including employment, services (such as stores, restaurants, hospitals, and schools), and accommodation (housing).

### CASE IN POINT

## Freedom of Commerce Eclipses Human Rights

*Christie v The York Corporation*, [1940] SCR 139

### Facts

One evening in 1936, the plaintiff went with some friends to the Montreal Forum to see a hockey game. After the game, they all went to the Forum’s tavern, where the plaintiff ordered a beer. The barman refused to serve him because the “house rules” prohibited serving “coloured persons.” Christie brought an action against the corporate owners of the tavern, claiming \$200 for the humiliation that he suffered. The defendant corporation claimed that it was merely protecting its business interests and was free to serve whomever it chose.

### Relevant Issue

Whether it is illegal to refuse to serve an individual in a public establishment on the basis of race.

### Decision

The Supreme Court of Canada found that the refusal to serve an individual on the basis of race was legal. The court ruled that in the absence of a law specifically forbidding a company from refusing service, the general principle of freedom of commerce prevails, and merchants are free to deal as they choose with individual members of the public.

Unlike the *Canadian Charter of Rights and Freedoms*, which directly applies only to government actions, human rights statutes apply to the actions of individuals and corporations as well. Moreover, the scope of human rights law has been steadily expanding. Ontario’s first comprehensive human rights statute, passed in 1962, prohibited discrimination on only six closely related grounds: race, creed, colour, nationality, ancestry, and place of origin. In contrast, Ontario’s current *Human Rights Code* prohibits discrimination in employment on 16 grounds.

The definition of “discrimination” has also expanded since the first human rights laws were enacted in Ontario. Initially, discrimination was limited to intentional acts, such as an employer’s refusal to hire an individual because of his religious beliefs. Today, however, the *effect* of a rule or action matters as much as the intention behind it. For instance, a seemingly neutral and business-related rule, such as a retail

## FYI

*Help Wanted, Male*  
**MARRIED MAN**  
 For Circulation Department,  
 Metropolitan Daily Newspaper  
 to work with and train teen-age boys  
 Requirements— Age 25 to 40;  
 good appearance;  
 high school matric. or equivalent.  
 To arrange for interview,  
 telephone *The Telegram*.

This ad  
 appeared in  
 a Toronto  
 newspaper  
 in June 1962.

Advertisements  
 such as this  
 are now illegal  
 in Canada.

store's requirement that all full-time employees be available to work on Saturday, may infringe the Code if it has a negative effect on someone who is unable to work on Saturday for religious reasons.

Today, a rule or qualification that has a negative effect on a protected group is discriminatory, and thus illegal, unless an employer can demonstrate that it is a **bona fide occupational qualification (BFOQ)** or a **bona fide occupational requirement (BFOR)**. To be considered a BFOR, a contested job requirement must pass the three-part test set out by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v BCGSEU* (known as the *Meiorin* case). *Meiorin* involved a female firefighter who, after three successful years on the job, was terminated when she failed to meet one aspect of a new physical fitness test imposed by the employer. The court held that to be a BFOR, the discriminatory rule or requirement must be:

1. adopted for a purpose rationally connected to the performance of a job;
2. adopted in an honest belief that it was necessary to satisfy a legitimate business purpose; and
3. reasonably necessary to accomplish that purpose. To establish this, the employer must show that it was impossible to accommodate the individual or group without creating undue hardship for itself.

In the 2008 case of *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, the Supreme Court of Canada further clarified the third part of the *Meiorin* test by stating that the employer does not have to show that accommodation itself is impossible but rather that it is impossible to accommodate the individual or group without undue hardship. However, despite this clarification, the third part of the test continues to set a high standard for employers in justifying a discriminatory job requirement or rule. A detailed discussion of the duty to accommodate and of the characteristics of undue hardship is presented in Chapter 5.

**bona fide occupational qualification (BFOQ) or requirement (BFOR)**

a reasonably necessary qualification or requirement imposed in a sincere belief that it is related to job performance

## Overview of Ontario's Human Rights Code

The Ontario *Human Rights Code* opens with a preamble that sets out the spirit and intent of the legislation. Inspired by the 1948 *Universal Declaration of Human Rights*, it recognizes the “inherent dignity and the equal and inalienable rights of all members of the human family” and provides for equal rights and opportunities without discrimination to create a climate of understanding and mutual respect.

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

AND WHEREAS it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim 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;

AND WHEREAS these principles have been confirmed in Ontario by a number of enactments of the Legislature and it is desirable to revise and extend the protection of human rights in Ontario ...

As a statement of principles, the preamble does not contain specific legislative requirements. However, it affects the interpretation of the Code. Where a provision is silent or ambiguous about an issue, courts and tribunals often use the preamble as an internal aid in deciding to interpret the Code in its broadest sense. For example, in *Rocha v Pardons and Waivers of Canada*, the Human Rights Tribunal pointed to the preamble in its decision to give a liberal and expansive interpretation to the category of “employment” by finding that it includes unpaid internships.

Another factor that has encouraged a broad and liberal interpretation of rights in the Code is its role as **remedial legislation**. This means that it exists to right a societal wrong and give the affected person or group a remedy, not to allocate blame or punish an offender.

Finally, the Code is a *quasi-constitutional* law. This means that where there is a conflict between the Code and another Ontario law, such as the *Employment Standards Act, 2000*, the Code prevails unless the other law specifically states that it applies despite the Code (see *Human Rights Code*, s. 47(2)).

### remedial legislation

law intended to right a societal wrong and provide a remedy, rather than to punish an offender

### F Y I

#### Key Features of Ontario's Human Rights Code

1. The Code applies to both the private and the public sector and to the conduct of individuals. Unlike the *Charter of Rights and Freedoms*, its application is not limited to the actions of government.

2. Discrimination in employment is prohibited on 16 grounds: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status, and disability. The Code also prohibits sexual harassment as well as harassment based on other prohibited grounds of discrimination in the workplace.
3. To infringe the Code, it is not necessary to intend to discriminate. The effect of an employer's action or rule matters as much as the intent. The employer has a duty to accommodate the special needs of protected individuals or groups unless doing so would create undue hardship for the employer.
4. No one can contract out of the Code. For example, the negotiated terms of a collective agreement or individual employment contract do not override obligations under the Code.
5. The Code provides for civil remedies, such as ordering an employer to compensate employees for lost wages or mental suffering or ordering it to change its employment policies. The Code does not provide for criminal penalties, such as imprisonment.
6. The Code is quasi-constitutional legislation in that if there is a conflict between its provisions and those of another statute, its requirements prevail unless the other statute specifically states that it applies despite the Code.
7. The Code applies to every stage of the employment relationship, from recruitment through to termination.

## Areas Covered

The Code provides that everyone has the right to be free of discrimination in five areas of social activity:

- services, goods, and facilities;
- accommodation (housing);
- contracts;
- employment; and
- membership in vocational associations and trade unions.

Although employment is only one of the five areas covered by the Code, over 75 percent of human rights complaints arise in the workplace (Pinto, 2012, p. 214). The term “employment” has been interpreted broadly to include full- and part-time employment, contract work, temporary work, probationary periods of employment, unpaid internships, and in some cases volunteer work.

## Prohibited Grounds of Discrimination in Employment

Section 5 of Ontario's *Human Rights Code* provides that every person is entitled to equal treatment with respect to employment without discrimination on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual

orientation, gender identity, gender expression, age, record of offences, marital status, family status, or disability. Note that only some of the grounds are defined in the Code. Definitions are given in section 10 for age, disability, family status, marital status, and record of offences, but no definitions are given in the Code for race, colour, ancestry, place of origin, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, or gender expression. However, courts and tribunals have considered how many of the grounds that are not defined in the Code should be interpreted and have thereby provided guidance on their scope.

Each of the 16 prohibited grounds is considered in the list below, together with any applicable statutory exemptions. Exemptions are discussed more fully in the section “Exemptions: Where Discrimination Is Allowed,” on page 70.

**special service organization**

a non-profit social, religious, or other organization that serves the interests of a group that is protected under the *Human Rights Code*

1. *Race*. Race is not a defined ground but it can often be related to other grounds, such as colour or ethnic origin.  
An exemption exists for **special service organizations** (non-profit social and other organizations that serve a protected group). For a discussion of the special service organization exemption, see the heading “Special Service Organizations,” as well as Table 2.2, below.
2. *Colour*. Colour refers to skin colour.  
An exemption exists for special service organizations.
3. *Ancestry*. Ancestry refers to family descent and is closely related to place of origin.  
An exemption exists for special service organizations.
4. *Place of origin*. Place of origin refers to a country or region of birth, including a region in Canada.  
An exemption exists for special service organizations.
5. *Ethnic origin*. Ethnic origin has more of a cultural component than ancestry. Protection is not limited to people who have recently arrived in Canada; it can apply to third- or fourth-generation Canadians.  
An exemption exists for special service organizations.  
Although “language” is not explicitly listed as one of the prohibited grounds, it can be an element of a complaint based on the related grounds of ancestry, ethnic origin, place of origin, or race. Similarly, because a person’s accent is usually related to those same grounds, the Code can be infringed when someone is discriminated against because of an accent. In *Gajecki v Surrey School District (No 36)*, a supply teacher who was originally from Poland found out that the reason he was not receiving any temporary assignments was because there was a note attached to his file which said that he did not speak English. His human rights application was successful: the tribunal found that he had been discriminated against because of his accent, which was directly related to his ancestry or place of origin (Ontario Human Rights Commission, 1996).  
This principle was again highlighted in *Liu v Everlink Payment Services Inc*, where the tribunal found that the applicant’s English language skills, which were at least a factor in his termination, were related to the protected



ground of *place of origin*. Furthermore, the tribunal rejected the employer's defence that English language proficiency was a BFOR for the applicant's role as a Help Desk Support Analyst, because there was no evidence the employer had developed, applied, or communicated to the employee an objective language proficiency standard for that role. As a result, Mr. Liu was awarded 11 months of lost wages and a further \$15,000 as compensation for injury to his dignity, feelings, and self-respect. This decision underlines the importance of establishing objective language proficiency standards as appropriate, advising employees of that standard, and giving them an opportunity to address any specific concerns (Sherrard Kuzz LLP, 2014).

6. **Citizenship.** Citizenship refers to discrimination on the basis of citizenship status, including status as a permanent resident, refugee, or temporary resident.

Exceptions are set out in section 16 of the Code. Discrimination on the basis of citizenship is allowed in the following cases: where the law requires or authorizes citizenship as a qualification or requirement; where the requirement for Canadian citizenship or permanent residence in Canada has been adopted to foster participation in cultural, educational, **trade union**, or athletic activities; and where an employer imposes a preference that the chief or senior executive is, or intends to become, a Canadian citizen.

7. **Creed.** This ground protects people from discrimination on the basis of their religion or faith, or lack thereof, as recent case law has interpreted this ground to include atheism and agnosticism (see *RC v District School Board of Niagara*, 2013 HRTO 1382). While the Code does not define the term "creed," the OHRC's 2015 *Policy on Preventing Discrimination Based on Creed* defines it as a belief system that "substantially influences a person's identity, worldview and way of life."

Note that historically, creed has not covered discrimination based on political convictions. For example, someone who is discriminated against because she is a member of a particular political party probably cannot file a successful application. However, the 2012 case of *Al-Dandachi v SNC-Lavalin Inc* has opened the door to a possible broadening of this interpretation. In that case, the Ontario Superior Court of Justice dismissed the employer's motion to strike down an employee's human rights application on the basis that his claim that he was terminated for his political views on the Syrian civil war was not protected by the Code. The court commented that it could not conclude that the plaintiff's views could not amount to creed (Gorsky, 2013, p. 6).

Prohibiting discrimination based on creed takes two additional forms. First, it prohibits one person from attempting to force another to accept or comply with a particular religious belief or practice. Second, it may require an employer to take positive measures, such as allowing breaks for prayer at certain times. Religious beliefs and practices are protected, even if they are not essential elements of a particular religion, provided that they are sincerely held. As such, according to the OHRC's policy, questioning an

#### **trade union**

an association formed for the purpose of representing a group of employees in all aspects of their employment relationship with their employer

individual's sincerity of belief should be as limited as possible and should only occur where there is a legitimate reason to doubt it.

It should be noted that human rights protections do not extend to practices and observances that incite hatred or violence against other individuals or groups or contravene criminal law (Ontario Human Rights Commission, 2015).

An exemption exists for special service organizations.

8. *Sex.* Discrimination on this ground extends to sex (e.g., male or female) and (under s. 10(2)) pregnancy. According to the OHRC's 2014 *Policy on Preventing Discrimination because of Pregnancy and Breastfeeding*, this includes discrimination against those who are trying to become pregnant, are recovering from childbirth, or are receiving fertility treatments. This category also protects the right to breastfeed in public areas and workplaces.

Exemptions exist for special service organizations and BFORs under section 24(1)(b).

*Mottu v MacLeod and others* illustrates an employer's discriminatory conduct in insisting that its female employee wear a bikini top for a special event at its nightclub.

Based on this, and several other similar decisions, in 2016 the Ontario Human Rights Commission released its *Policy Position on Sexualized and Gender-Specific Dress Codes*. The policy states that sex-based differences in an employer's dress code, such as expecting women to wear high heels, short skirts, tight clothing, or low-cut tops, undermine their dignity and may well make them more vulnerable to sexual harassment. Similarly, requiring female serving staff to exclusively wear skirts, while allowing male staff to wear pants, is no longer acceptable unless the distinction can be legitimately linked to the requirements of the job.

As discussed in the "In the News" section below, in response to these concerns some employers are now changing their dress codes to provide employees with a range of attire options. Furthermore, in November 2017, with the passage of Bill 148 amendments, employers generally are now *prohibited* from requiring employees to wear footwear with elevated heels. High-heeled footwear can now only be made mandatory for safety reasons or if the worker is a performer in the entertainment and advertising industry.

## CASE IN POINT

### Discrimination Based on Sex

*Mottu v MacLeod and others*, 2004 BCHRT 76, [2004] BCHRTD no 68

#### Facts

Mottu started work at MacLeod's nightclub in March 2000, when she was 21 years of age. She usually wore a black top and skirt or pants at work. In April 2001, there was an annual fundraiser with a beach theme at the nightclub.

The employer informed Mottu that if she wanted to work that evening, she must wear a bikini top and surfer shorts. She decided to work, but she wore a top and sweater over her bikini top. She also contacted her union about the matter. The employer appeared to be annoyed with her, and

over the next several days tension increased between them. The employer cut Mottu's hours and relegated her to selling drinks in a dark corner at the back of the club. She eventually quit her job and filed a human rights complaint based on sex discrimination.

### Relevant Issue

Whether the employer's conduct constituted discrimination on the basis of sex.

### Decision

The British Columbia Human Rights Tribunal found that the employer's actions constituted discrimination on the basis of sex. The fact that the female servers were required to wear

a gender-specific outfit that was sexual in nature while the male bartenders and door staff wore their usual attire constituted discrimination. The tribunal also found that the employer's subsequent attitude and actions were retaliatory and intended to force Mottu to resign. The tribunal awarded the employee almost \$3,000 for lost wages and tips, plus \$3,000 for injury to her dignity and self-respect. It also ordered the employer to refrain from committing similar contraventions of human rights legislation in the future.

## IN THE NEWS

### Earls Restaurant Makes OHRC Policy-Inspired Updates to Its Dress Code

A major Canadian casual dining restaurant chain has decided to update its policies about the clothing worn by its staff. The announcement by Vancouver-based Earls Restaurants came on the same day as the Ontario Human Rights Commission released a policy paper on International Women's Day, calling for an end to sexualized dress codes.

Earls issued a statement, stating it hopes to soon have a dress code policy with the same style suggestions for both male and female staff. The previous "suggested dress code" for female servers at Earls is described in its issued statement:

Although our female service staff have a choice in what they wear, we understand that even our suggested dress code could be considered discriminatory as, although pants are allowed on request, the current suggested dress code is a black skirt, no shorter than one inch above the knee for women, where we should be wording our suggested dress code as a black skirt, no shorter than one inch above the knee or a straight cut plain black pant.

In its policy position, the OHRC states that sexualized and gender-specific dress codes can include both formally encoded policy and informal practice. "Employers must make sure their dress codes don't reinforce sexist stereotypes," said OHRC Chief Commissioner Renu Mandhane. Otherwise, employers "send the message that an employee's worth is tied to how they look. That's not right, and it could violate the *Ontario Human Rights Code*."

Earls says it decided to make changes to its dress code policy when it learned that it was in contravention of the *Ontario Human Rights Code*.

It's unclear if other major chains such as Moxie's, Jack Astor's, or Joey Restaurants—all of which were profiled in a CBC investigative story on sexism in the restaurant industry—will make similar changes to their dress codes.

"Excellent customer service doesn't have a cup size," said Kathy Laird, Executive Director of the Human Rights Legal Support Centre. "I hope women will call us for legal help if cleavage is deemed an essential skill in their workplace."

SOURCE: Adapted from Evans, Pete. Earls Restaurants Change Dress Code in Wake of CBC Report on Sexism Concern. *CBC News*, March 9, 2016; Ferreras, Jesse. Earls Restaurant Dress Code Changed Following Ontario Policy Paper. *The Huffington Post B.C.*, March 9, 2016; Sthankiya, Anita. Earls Restaurant Updates Sexualized Dress Code. *Kelowna Now*, March 9, 2016.

Another, surprisingly common, type of sex-based discrimination occurs when an employee is fired after her boss finds out she is pregnant. This occurred in *Maciel v Fashion Coiffures*, where the employer let Maciel go on her first day on the job as a receptionist after she disclosed that she was four months pregnant. The Human Rights Tribunal found that the employer's explanation that Maciel herself had changed her mind and only wanted to work part-time, while they needed a full-time receptionist, lacked credibility. The employer was ordered to pay Maciel more than \$35,000 in general damages, lost wages, and benefits as a result of its discriminatory actions against her.

## F Y I

### Is Basing Seniority on "Days Worked" Discriminatory?

In *Bender v Limestone District School Board*, the Human Rights Tribunal was asked whether a collective agreement provision was discriminatory because it provided that casual employees who filled in for absent regular employees would only accrue seniority based on actual "days worked." The applicant in that case argued that it was contrary to the Code for the agreement to deny her any ability to accrue seniority while on statutory pregnancy/parental leaves or sick leaves. The tribunal rejected this position, finding that given the sporadic and unpredictable nature of casual work, a negotiated seniority clause providing for seniority based on days worked was reasonable, and therefore not discriminatory, regardless of the reason for not working.

9. *Sexual orientation.* Sexual orientation concerns a person's sexuality and includes lesbian, gay, bisexual, and heterosexual people.
10. *Gender identity.* This ground refers to a person's intrinsic sense of self, especially with respect to their sense of being a woman, a man, both, neither, or falling anywhere along the gender spectrum. It includes people who identify as transgender and is fundamentally different from a person's sexual orientation.

11. *Gender expression.* This ground refers to how a person publicly represents their gender. This includes a person's behaviour and outward appearance, such as dress, hair, body language, and voice (Ontario Human Rights Commission, 2014).

In 2012, the Code was amended to add both gender identity and gender expression to the prohibited grounds of discrimination. Before that time, transgendered and transsexual individuals could file claims of discrimination, but they had to do so under the grounds of sex or sexual orientation. However, on the basis of evidence of persistent and severe discrimination against these groups, the Ontario legislature decided to make their protection explicit. Although there is little case law on these two new grounds to date, it is possible to get a sense of their potential scope by looking at relevant arbitral decisions (from unionized workplaces) and several related tribunal decisions. For example, rules in unionized workplaces that prohibit males from having longer hair, wearing earrings, or having facial jewellery have been struck down where the policy is based on sex stereotyping. As with other prohibited grounds of discrimination, employer arguments that the requirements are based on "customer preference" will not be successful. As noted above, gender-neutral dress codes, such as requiring all employees to dress "professionally" (rather than requiring males to wear dress pants and females to wear skirts), are the safest (Edmonds and Ip, 2013, pp. 15–16).

In the case of *XY v Ontario (Government and Consumer Services)*, the tribunal found that legislation requiring a person to have "transsexual surgery" before they can change the sex designation on their birth registration is discriminatory because it reinforces the stereotype that transgendered persons must have surgery to live in their felt gender (Ontario Human Rights Commission, 2013, p. 10). In light of this finding, employers should not insist that an employee who is transitioning to become a woman, for example, be treated as a man until her sex reassignment surgery is complete. Similarly, employers should not require medical documentation before accommodating an employee on the basis of gender identity: how the employee self-identifies is the determining factor. Once an employee decides to make the changed gender identity known in the workplace, it is up to the employer to update its records: internal documents, business cards, email signatures, and the like. It must also respect the employee's preferences, up to the point of undue hardship, regarding whether, when, and how they want their decision to transition to be known to others in the workplace (Edmonds and Ip, 2013, p. 17). It is the employer's responsibility to provide a workplace that is respectful and harassment-free. Proactively implementing a gender transition policy, before there is an immediate need, and sensitizing employees to issues faced by transgendered people, will lay the groundwork for a harassment-free workplace (Edmonds and Ip, 2013, p. 16).

## FYI

**Gender Identity, Gender Expression, and Gender-Specific Facilities**

One workplace issue related to gender identity and expression is in the area of washroom usage. The Law Society of Upper Canada's 2013 model policy for law firms and other organizations on LGBTQ+ inclusion provides the following:

Washroom and other Gender-Specific Facilities—The Firm respects the needs of those who identify as transgender regarding the use of washrooms and gender-specific facilities. It is that person's right to use a washroom that is in accordance with their gender identity and presentation (Edmonds and Ip, 2013, p. 19).



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- 12. Age.** Based on the Code's definition of age in section 10, the Code prohibits age-based discrimination against people who are 18 years or older. For example, this ground protects a 19-year-old who is denied a position because of negative stereotypes about teenagers as well as a 67-year-old who is rejected because he does not "fit the company's youthful image."

According to the definition of "age," someone under 18 cannot make an age-based application related to employment. However, that person could use the Code to challenge discrimination based on another prohibited ground, such as sex or race.

Before December 2007, "age" was defined in the Code as being between the ages of 18 and 64, which allowed employers to have policies requiring employees to retire at age 65. As a result of a legislative change removing the ceiling of age 64 in the definition, mandatory retirement at age 65 was effectively eliminated in Ontario. (Moreover, in the 2018 decision of *Talos v Grand Erie District School Board*, the tribunal held that the provision of the Code—s. 25(2.1)—which still permitted employers to cease, among other things, benefit coverage at age 65 is unconstitutional based on the equality rights provisions (s. 15) of the Canadian Charter of Rights and Freedoms.

The following case, heard under Alberta's human rights legislation, illustrates the type of age-based discriminatory behaviour that the law seeks to eliminate, as well as the extent of remedies available.

## CASE IN POINT

### The Dangers of Making Assumptions About Age

*Cowling v Her Majesty the Queen in Right of Alberta as represented by Alberta Employment and Immigration*, 2012 AHRC 12

#### Facts

Cowling was first hired on contract as a provincial labour relations officer in 1999 when she was 59 years old. Her contract was renewed every two to three years, and she received positive performance reviews and bonuses every year for eight years. Just before her final contract ended in 2007, Cowling was told that her department was restructuring and her position was being downgraded. It would become a permanent “growth” or “developmental” position. When Cowling applied for the new position, she found that the responsibilities were virtually identical to her former position; however, she wasn’t hired. The new position was never filled, and the job description was then upgraded. Cowling filed a complaint with the Alberta Human Rights Commission.

#### Relevant Issue

Whether the employer’s actions constituted age-based discrimination.

#### Decision

The tribunal held that the employer’s actions did constitute age-based discrimination. Given the non-renewal of the contract after eight years of strong performance reviews, Cowling’s exemplary qualifications, her ongoing pursuit of training opportunities, and her consistent achievement of bonuses, it was reasonable to infer that age was a factor in denying her continued employment (para. 169). Furthermore, the language used (“growth” and “developmental”) to describe the “new” position created the inference that the employer was looking for someone younger to fill Cowling’s duties and that she was being targeted because of her age (para. 188). As the tribunal stated, “[D]iscrimination is rarely practiced openly. Accordingly, it is appropriate to draw reasonable inferences based on circumstantial evidence” (para. 166). Cowling was awarded \$15,000 in general damages, plus five years’ pay (minus 30 percent to reflect the more tenuous nature of contract employment), interest, and costs. It also ordered that Cowling, now aged 72, be reinstated.

#### F Y I

##### Establishing a *Prima Facie* Case of Discrimination

The *Cowling* case illustrates how the burden of proof operates in human rights cases. Cowling, as the applicant, initially had to prove a ***prima facie*** (on the face of it) case of discrimination on a protected ground. To do this, three elements are required. The applicant has to show that she is a member of a group protected by the Code (in this case, a member protected on the ground of age); that she was subject to adverse treatment (here, job loss); and finally, that there was a connection between the adverse treatment and the ground of discrimination. Once this threshold is reached (and it is a fairly low bar), the evidentiary burden then shifts to the respondent employer to show that, on a **balance of probabilities**, there is a credible and rational explanation for its conduct. In other words, once the inference of discrimination has been shown to be more probable than not, the respondent has to “explain or risk losing” (*Peel Law Association v Pieters* (para. 73)). Here, the employer was unable to meet this burden of proving that age-based discrimination did *not* play a part in its decision to not renew the employee’s contract. This reversal of the burden of proof after a *prima facie* case

***prima facie***  
on the face of it

**balance of probabilities**  
the degree of proof required in civil law cases wherein a proposition is established as fact if it is shown that the proposition is more likely than not to be true

has been shown makes it imperative that employers carefully document the reasons behind their hiring and other employment-related decisions and that those reasons not touch on a prohibited ground of discrimination—*unless* they can be shown to be a BFOR by meeting the three-part *Meiorin* test.

Exemptions exist for special service organizations and BFORs under section 24(1)(b).

- 13. Record of offences.** Record of offences means provincial offences or pardoned federal offences. This ground means that, unless one of the exceptions applies, employers cannot discriminate against prospective or current employees because they have been convicted of a provincial offence (typically a less serious offence) or a criminal offence for which they have received a pardon. Conversely, it is legal to discriminate on the basis of a criminal offence for which no pardon has been obtained. Moreover, the Code does not prohibit discrimination in employment as a result of being charged with a crime (*de Pelham v Mytrak Health Systems*).

An exemption exists for BFORs under section 24(1)(b).

In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Maksteel Québec Inc*, the Supreme Court of Canada examined the scope of this ground in relation to a person who lost his job because he had been incarcerated.

## CASE IN POINT

### Discrimination Based on Incarceration

*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Maksteel Québec Inc*, 2003 SCC 68, [2003] 3 SCR 228

#### Facts

In 1989, the employee pleaded guilty to charges of fraud and breach of trust. His sentencing was postponed. By the time that he was sentenced to a prison term of six months less a day, he was employed as a maintenance mechanic with Maksteel. The employer dismissed him the day after he failed to report to work because of his incarceration. The employee was released on parole after several days of imprisonment and attempted to return to work. When the employer refused to hire him back, he filed a complaint with the Quebec Human Rights Commission, claiming that he had been discriminated against because he had been convicted of a criminal offence, contrary to Quebec's human rights legislation. The Human Rights Tribunal ruled in favour of the employee, maintaining that the employer failed in its duty to accommodate his incarceration. It awarded the employee lost wages and \$5,000 in damages. The case was eventually appealed to the Supreme Court of Canada.

#### Relevant Issue

Whether the employer's termination of the employee constituted discrimination on the basis of criminal record.

#### Decision

The Supreme Court of Canada ruled in favour of the employer. It held that the protection against discrimination on the basis of a criminal record protects employees only in cases where the criminal record is the cause of the employer's actions. The purpose of the legislation is to shield employees from an "unjustified social stigma" that tends to exclude people with criminal convictions from the labour market. However, here the dismissal resulted from the employee's failure to report for work because of his prison sentence, not from his criminal conviction.



14. *Marital status.* Marital status refers to a person's being married, single, widowed, divorced, separated, or living in a common law relationship. The Supreme Court of Canada has held that this ground also includes the identity of the complainant's spouse (see the discussion of family status below).

Exemptions exist for special service organizations, BFORs under section 24(1)(b), and **nepotism policies** (policies that allow the employer to discriminate either in favour of or against specified close relatives of employees).

15. *Family status.* The Code defines "family status" as "the status of being in a parent and child relationship." Given that human rights legislation is interpreted liberally, adopted children, stepchildren, and foster children qualify, although it is not yet known whether this definition would apply to grandparents and grandchildren. This ground also increasingly includes the duty to accommodate for family obligations arising from family status (see the discussion in Chapter 5 under the heading "Accommodating Employees' Family Status").

In *B v Ontario (Human Rights Commission)*, the Supreme Court of Canada held that this ground does not only cover a person's status as being in a parent and child relationship. It also includes the *identity* of the complainant's family members.

An exemption exists for nepotism policies.

#### **nepotism policies**

employer policies that allow an employer to discriminate in favour of, or against, specified close relatives of employees

## CASE IN POINT

### Discrimination Based on Family Status

*B v Ontario (Human Rights Commission)*, 2002 SCC 66, [2002] 3 SCR 403

#### Facts

The employee, A, had worked for the employer for 26 years when his superior, B, who was also his brother-in-law, fired him. The reason for the termination was that A's daughter and wife had accused B of sexually abusing the daughter. On the first workday after the confrontation between B and A's wife and daughter, B shouted at A about the allegations and told him that he was terminated. A filed a complaint with the Ontario Human Rights Commission, alleging that he had been discriminated against on the basis of family and marital status.

#### Relevant Issue

Whether discrimination on the basis of family and marital status includes discrimination on the basis of the identity of the family member or spouse.

#### Decision

The Supreme Court of Canada found in favour of A. It gave the *Human Rights Code* a broad interpretation by deciding that the grounds of family and marital status not only protect employees from being discriminated against on the basis of whether, for example, they are married or single or have children; they also protect employees who are adversely affected because of the identity of their spouse or child. In this case, A was dismissed because of who his family members were, so he was arbitrarily disadvantaged on the basis of his marital and family status. The matter was returned to the Board of Inquiry (the predecessor to the Ontario Human Rights Tribunal) to determine the appropriate remedy.

16. *Disability*. Disability is extensively defined in section 10 to cover a spectrum of disabilities, including:
- a. physical disability or disfigurement caused by injury, illness, or birth defect;
  - b. psychiatric disability;
  - c. disability for which benefits were claimed or received under the workers' compensation system;
  - d. substance abuse (addiction to drugs or alcohol); and
  - e. a “perceived” disability, a subject examined in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City)*.

## CASE IN POINT

### What Constitutes a Perceived Disability?

*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City)*,  
2000 SCC 27, [2000] 1 SCR 665

#### Facts

The job applicant was a horticulturalist who applied for a job in the employer city's parks department. She was hired subject to passing a pre-employment medical test. The results of this test showed that she had a slight curvature of the spine that might lead to physical impairment in the future. The applicant was not aware of this condition, experienced no symptoms, and would have been able to perform the usual duties of the job. However, the employer decided not to hire the applicant because it believed that she was at greater risk than other candidates of having future costly back problems.

#### Relevant Issue

Whether the employer's refusal to hire the applicant on the basis of a perceived back problem constituted discrimination on the basis of disability.

#### Decision

The Supreme Court of Canada decided that the employer had discriminated against the applicant on the basis of disability. What matters is how a person experiences and is affected by a disability, not its precise nature or cause.

Similarly, in *Johnson v D & B Traffic Control and another*, the BC Human Rights Tribunal held the employer liable for discrimination based on perceived disability after it failed to assign an employee, Johnson, as a flagger on construction sites due to his obesity. While Johnson's weight did not prevent him from performing his job duties and while he had not made any request for accommodation based on disability, the employer perceived that he had a disability, and this perception was at least a factor in the decision not to offer him work. Johnson was awarded \$2,000 for injury to his dignity, feelings, and self-respect.

(Note that in Ontario, where physical “disability” is specifically defined as being caused by “bodily injury, birth defect, or illness,” obesity is only considered a disability if it results from an underlying physical condition. However, even where human rights law has not recognized a specific condition as a disability, the Code's protections will be engaged if a person is perceived to have a disability [Ontario Human Rights Commission, 2016].)

## FYI

**Is Genetic Discrimination Prohibited?**

Can an employer use genetic tests to determine if a prospective employee is genetically predisposed to certain diseases and then base a hiring decision on the findings?

For federally regulated employers, the answer is now a clear “no.” In May 2017 changes were made to federal legislation to specifically protect individuals from genetic discrimination. One such change was to the *Canada Labour Code*, which now prohibits federally regulated employers from requiring employees to undergo genetic testing or to disclose their results. Similarly, the *Canadian Human Rights Act* now expressly includes “genetic characteristics” as a prohibited ground of discrimination, thereby protecting both future and present employees from adverse employment decisions based on genetic characteristics. For example, an employer cannot refuse to hire a job candidate because genetic testing results disclosed a heightened risk of a future disability claim (Sherrard Kuzz LLP, 2017).

In Ontario, a Conservative MPP has introduced a private member’s bill, Bill 40—the *Human Rights Code Amendment Act (Genetic Characteristics), 2018*, that would add “genetic characteristics” as a prohibited ground of discrimination to Ontario’s Code. Under the bill, which as of the time of writing has already passed second reading and been sent to committee, genetic characteristics would be defined as “genetic traits of an individual, including traits that may cause or increase the risk to develop a disorder or disease.”

Despite the breadth of the term “disability,” it has been interpreted, in *Ouimette v Lily Cups Ltd*, not to include a minor, temporary illness to which the general public is susceptible, such as the flu or common cold.

Exemptions from the obligation not to discriminate on the basis of disability exist for special service organizations. The Code also recognizes that there will be situations where the nature of a disability prevents an individual from performing a job. For example, an employer is not required to hire someone who is blind to drive a school bus. However, the Code places strict limits on an employer’s ability to claim that an employee is unable to perform a job. Under section 17, the employer must eliminate the non-essential requirements of the job and modify the existing job requirements to enable a disabled person to carry out the **essential job duties** unless this causes undue hardship to the employer. Modifications include providing specialized equipment or services to allow the person to do the job.

Chapter 5 contains a more detailed discussion of the duty to accommodate in cases of disability.

**essential job duties**  
the core duties and requirements of a job

**Additional Grounds of Discrimination*****Discrimination Because of Association***

In addition to the 16 listed prohibited grounds of discrimination, the Code protects an individual from being discriminated against because of her relationship with people *identified by a prohibited ground*. For example, an employee cannot be denied a position because she associates with a person of a certain religious belief (s. 12).

On the other hand, if an employee is discriminated against because of her association with a particular political party, for example, that situation would *not* be covered because political conviction is not currently one of the prohibited grounds of discrimination.

### ***Discrimination Through Reprisal***

The Code also provides that people have the right to enforce their rights under the Code without reprisal (s. 8). An employer who retaliates against someone for asserting his rights or for refusing to discriminate against another person on the basis of a prohibited ground infringes the Code. For example, if a recruiter is demoted for refusing to discriminate against an applicant on the basis of her sexual orientation, that recruiter could file a human rights application under section 8 of the Code.

### **Discrimination Not Covered by the Code**

To engage the protection of the Code, the discriminatory treatment *must be based on one of the 16 prohibited grounds*. Although the prohibited grounds of discrimination are numerous and broadly defined, they are not exhaustive. Someone who is discriminated against on the basis of a ground not covered in section 5, such as political conviction or social status, cannot file an application under the Code. Similarly, discrimination on the basis of physical appearance does not infringe the Code unless it touches on a prohibited ground. For example, a person who wears a nose ring as a fashion statement does not engage the protection of the Code, but a person who wears the same nose ring for religious reasons does.

The prohibited grounds of discrimination in other provinces are similar, but not identical, to the grounds in Ontario. For example, some provinces, such as British Columbia and Manitoba, prohibit discrimination on the basis of political belief or opinions. Others do not include all the grounds found in Ontario. For example, Saskatchewan's human rights legislation does not include gender expression or gender identity as a prohibited ground of discrimination.

## **Exemptions: Where Discrimination Is Allowed**

The right to be free of discrimination in employment on the basis of the 16 grounds is not absolute; the Code sets out specific exemptions where even intentional discrimination is permissible.

*However, these exemptions are of limited application and are interpreted narrowly.* Furthermore, in many cases, the employer cannot explore whether the exemptions apply until later in the hiring process, usually at the job interview stage or possibly after it makes a **conditional offer of employment**. This is because the Code restricts the types of questions that an employer may ask at the job application stage in order

#### **conditional offer of employment**

a job offer that is subject to certain requirements being met

to encourage an employer to consider a broad range of qualified job applicants early in the hiring process.

The statutory exemptions are set out below.

## 1. Special Service Organizations

Under section 24(1)(a), the right to equal treatment in employment is *not* infringed where a special service organization—a religious, philanthropic, educational, fraternal, or social organization that primarily serves people identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status, or disability—gives employment preference to members of that group. However, this exemption is limited to situations where the preference is a reasonable and bona fide requirement for the job in question. For example, a faith-based organization can stipulate that counsellors must be of the relevant faith; however, it probably cannot stipulate that janitors be of that faith because such a requirement is not related to job function. This exception is one of the rare instances under the Code where the hiring organization is not required to accommodate the person or group negatively affected by the job requirement.

Note that to fall within the special service organization exemption, the organization *cannot* be operated for private profit. Moreover, it must serve, as well as hire, people identified by a particular enumerated ground, although as shown in the case of *Ontario Human Rights Commission v Christian Horizons*, the courts are willing to take a broad interpretation of this requirement if it falls within the spirit of the legislative exemption.

### CASE IN POINT

## Court Takes Broader View of Special Service Organization Exemption

*Ontario Human Rights Commission v Christian Horizons*, 2010 ONSC 2105

### Facts

Christian Horizons was an evangelical Christian organization that operated residential homes for people with developmental disabilities. It required all of its employees to sign an employment contract that included a lifestyle and morality statement that, among other things, prohibited homosexual relationships. Most of its employees were categorized as “support workers,” whose job functions included cooking, cleaning, doing laundry, taking residents on outings and to appointments, as well as participating in prayer, Bible reading, and hymn singing (para. 104). After one employee, a support worker named Heintz, confided to two co-workers that she was a lesbian, she received uncharacteristically poor performance reviews and criticism, and eventually she quit because of stress. Heintz filed a human rights complaint

on the basis of sexual orientation. The employer argued that as a religious organization it had the right to restrict employment to those who followed its values, which were clearly stated. However, the Ontario Human Rights Tribunal found that Christian Horizons’ actions were not protected by the special service organization exemption for two reasons. First, it did not restrict its activities to serving only those who shared its creed. It was a government-funded general residential care provider and provided its services to people with developmental disabilities regardless of creed, so it fell outside that exemption. Second, the organization was unable to show that following the lifestyle requirements prohibiting homosexual relationships was a BFOR for Heintz’s position as a support worker. It ordered the employer to pay Heintz \$23,000 for its discriminatory

conduct against her and ten months' salary for wrongful dismissal. It also ordered the employer to stop imposing the lifestyle statement on employees. Christian Horizons appealed the decision.

### Relevant Issue

Whether the employer's actions regarding Heintz were protected by the special service organization exemption.

### Decision

The Ontario Divisional Court disagreed with the tribunal on the first issue but not on the second. It stated that the tribunal's interpretation of the requirement for a charitable organization to serve only individuals who shared its beliefs ignored the exemption's underlying purpose: to allow such organizations to join together, share their views, and carry out their joint activities (Smith, 2010, p. 3). To deny the Code's exemption for organizations that broaden the scope of their charitable activities to serve individuals outside their faith is an unnecessarily narrow view of the exemption:

In the case of the members of Christian Horizons, the charitable work they do is an exercise of their religious beliefs and values. The tribunal's interpretation of section 24(1)(a) has the effect of severely restricting the manner in which that religious activity will be carried out, as the tribunal's interpretation would require them to confine their charitable work to members of their faith group, when they see their religious mandate as to serve all of the needy without discrimination.

On the second issue, however, the court agreed with the tribunal that Christian Horizons was unable to show that not being in a homosexual relationship was a BFOR for Heintz's position as a support worker. Although support workers engaged in some of the Christian practices, they were not engaged in actively promoting an evangelical Christian way of life. The court upheld the damage award but ruled that the lifestyle statement could be retained, as long as the prohibition on homosexual relationships was removed.

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The *Christian Horizons* decision underscores the need for employers that fall within the special service organization exemption to also direct their minds as to whether the discriminatory requirements are a BFOR for a particular position. Tribunals and courts will scrutinize such claims carefully; a BFOR has to be "tied directly and clearly to the execution and performance of the task or job in question" (para. 90).

## 2. Bona Fide Occupational Qualifications

Under section 24(1)(b), an employer may discriminate on the basis of age, sex, record of offences, or marital status if these are genuine requirements of the job. For example, a shelter for abused women may choose to hire only women as counsellors. Similarly, a recreational club may hire only male attendants to work in the men's locker room. However, in such instances, the employer must consider whether accommodation could be made under section 24(2) to enable a member of the group discriminated against to work in the position. For example, if working in the men's locker room is a minor part of the job, could the job be redefined to eliminate that element and thus accommodate a female candidate? The employer's general duty to accommodate is discussed more fully in Chapter 5.

## 3. Nepotism Policies

Under the nepotism policy exemption in section 24(1)(d), an employer may choose to hire or not hire, or to promote or not promote, her spouse, child, or parent or the spouse, child, or parent of an employee. A nepotism policy whereby an

employer gives preference for student employment to the children of its employees is permitted. Conversely, employers may discriminate against spouses, children, or parents of employees if they prefer not to have closely related employees working in the same area. Section 24(1)(d) therefore authorizes both nepotism and anti-nepotism policies.

Where this limited exception applies, the employer is not obligated to accommodate the person or group negatively affected by the job requirement.

## 4. Medical or Personal Attendants

The medical or personal attendant exemption in section 24(1)(c) applies to all 16 prohibited grounds of discrimination. A person may refuse to employ someone on the basis of any of the prohibited grounds where the primary duty of the job is attending to the medical or personal needs of the person or to those of an ill child or an aged, infirm, or ill spouse, same-sex partner, or relative of the person. This exemption covers home care and does not apply to conduct by or within an institution, such as a nursing home. For example, a person who wants to hire someone to look after his infirm grandfather in the grandfather's home can discriminate against an applicant on the basis of any of the grounds set out in the Code, including sexual orientation or ethnic origin. This exception presumably reflects the personal nature of the care and the fact that the applicant comes into the person's home. However, the same person may not stipulate in a hospital setting that the grandfather is to be cared for only by people of a certain sexual orientation or ethnic background. This exception also does not apply to persons hired as nannies of healthy children.

There is no duty to accommodate a person or group negatively affected by this exception.

## 5. Special (Affirmative Action) Programs

Like the medical or personal attendant exemption, the **special programs** exemption in section 14 of the Code applies to all 16 prohibited grounds. Under this exception, an employer may implement a special program to relieve or promote the status of disadvantaged groups or persons to help them achieve equal opportunity. This exemption allows an employer to prefer or promote people who typically suffer from employment discrimination on the basis of one or more of the prohibited grounds. These special programs are often referred to as **affirmative action** programs. For example, where the employer has a bona fide affirmative action program to hire youth from economically disadvantaged backgrounds, the employer may discriminate in favour of people who fall within this category. Upon application, the Ontario Human Rights Commission will review a program to decide whether it qualifies for the exemption. However, even if it is not "pre-approved," the tribunal could still find that a particular program that is being challenged is a special program protected by section 14.

The Code gives the Ontario Human Rights Commission the right to review the employer's special program to ensure that it is operated in good faith.

### **special program**

an employer program aimed at relieving hardship or promoting the employment status of disadvantaged groups

### **affirmative action**

a policy designed to increase the representation of groups that have suffered discrimination

## Recruitment, Selection, and Hiring

It has been said that the selection process is probably responsible for more discrimination than any other area of employment practice. At the hiring stage, assumptions, often subconscious, about certain groups of people and their abilities can come into play. Recruiters are required to make a decision quickly on the basis of information in a job application form and one or two interviews. Unspoken assumptions and first impressions lend themselves to subtle forms of discrimination.

The Code protects job applicants from discrimination by requiring that advertisements, application forms, interviews, and pre-employment testing programs comply with human rights law. At each step of the hiring process, an employer should *document all decisions made and include the reasons for each decision*. Clear and careful documentation, prepared at the time that a decision is made, provides an employer with a credible basis to defend against allegations that the decision was made on discriminatory grounds. *The Code is infringed even if a discriminatory ground is only one of several reasons for an employment decision*. For example, in *Derksen v Myert Corps Inc*, a tribunal found that an employee's dismissal violated the Code even though his absence for a religious leave was only one reason, along with poor job performance, for his dismissal.

The following is a discussion of the human rights issues raised at each step of the recruitment, selection, and hiring process.

### Essential Requirements of the Job

An employer should ensure that a job description is current and accurately reflects the employer's needs and expectations. Particular duties or structures that made sense when the job was last filled may have changed in the interim.

The employer should review the job carefully to determine which requirements are *essential* for the job. Under section 17 of the Code, only essential job duties or requirements can be considered in deciding whether someone is physically capable of performing the job.

Job duties or requirements that are both essential and relate to a prohibited ground of discrimination should be scrutinized carefully. For example, requiring a driver's licence for a job that entails only a minor amount of driving would unnecessarily bar a candidate who is unable to obtain a driver's licence because of physical disability, and therefore would infringe the Code. Similarly, if the job involves a lot of communication with the public, it is reasonable to require fluency in English, but it is unacceptable to discriminate against someone who speaks English with a non-Canadian accent. (Recall that although "language" is not a prohibited ground of discrimination under the Code, it is directly linked to other grounds, such as place of origin.)

Where an essential job requirement negatively affects a person or group on the basis of a prohibited ground of discrimination, an employer has a duty to accommodate the individual or group, unless this causes undue hardship. An employer who alleges undue hardship must prove it on a balance of probabilities. For example, an employer who maintains that a pregnant job applicant is not capable of performing



the job because it is too physically demanding must have significant information to back up such a view. This is difficult but not impossible, as *Mack v Marivtsan* demonstrates.

## CASE IN POINT

### Employer Refuses Pregnant Applicant Because of Job's Physical Demands

*Mack v Marivtsan* (1989), 10 CHRR D/5892 (Sask Bd of Inq)

#### Facts

The job applicant, who was seven months pregnant, applied for a job as a kitchen helper in a restaurant. The prospective employer refused to hire her because the position involved considerable heavy lifting and she was in the later stages of her pregnancy.

#### Decision

The Saskatchewan Board of Inquiry found that the employer did not infringe the Code. The applicant was not aware of the extent of the physical demands of the kitchen position because she had never worked in such a position before. The employer was able to show that the job was strenuous. Not being in the later stages of pregnancy was a BFOR.

#### Relevant Issue

Whether the prospective employer infringed the human rights legislation by discriminating on the basis of sex.

## Use of Employment Agencies

Section 23(4) provides as follows:

The right under section 5 to equal treatment with respect to employment is infringed where an employment agency discriminates against a person because of a prohibited ground of discrimination in receiving, classifying, disposing of or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or agent of an employer.

Sometimes employers use employment agencies to hire people temporarily. These workers are often referred to as “temps.” In some situations, the agency remains the employer.

The Code prohibits employment agencies from accepting or acting on requests to hire people on the basis of preferences related to prohibited grounds of discrimination. It also forbids employers from making hiring requests that contravene the legislation. For example, an employer cannot legally ask an employment agency to send only “young blondes” to fill a position. An employment agency that accepted this illegal directive would also be in contravention of the Code.

To ensure that it is not implicated in any discriminatory practices, an employer should include a term in its contract with the employment agency requiring the agency to comply with all human rights requirements. Similarly, the agency should make it clear that it will not accept or act on discriminatory directions.

## Advertising a Job

Many jobs are filled through advertisements. It is the intention of the Code that an employer consider many qualified candidates in the early part of the recruitment process so that suitable candidates are not eliminated inadvertently. This intention affects both where and how a position is advertised, as well as the contents of the advertisement.

### *Where and How Is a Job Advertised?*

Jobs are often advertised informally, using the “old boys’ network” or “word of mouth.” The human rights problem with such informality is that it tends to perpetuate the current composition of the workforce. For example, if most of the current employees come from a certain ethnic background, filling the position by internal posting or word of mouth may perpetuate the ethnic status quo.

It is not illegal to advertise by word of mouth or in an ethnically based community paper. However, if there is a subsequent complaint about discrimination, an employer’s hiring practices may affect a tribunal’s view of the case. Broadly based advertising using a variety of media is best because it provides access to the largest pool of applicants. Senior or highly skilled positions may need to be advertised over a larger geographic area than other jobs.

### *Contents of Advertisements*

Section 23(1) of the Code provides as follows:

The right under section 5 to equal treatment with respect to employment is infringed where an invitation to apply for employment or an advertisement in connection with employment is published or displayed that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.

The Code states that advertisements should not contain qualifications that directly or indirectly discourage people from applying for a job on the basis of a prohibited ground of discrimination. An advertisement should be geared to the qualifications and skills required for the position.

Advertisements should always use non-discriminatory language when describing a job. For example, gender-neutral words, such as sales clerk (rather than salesman) or server (rather than waitress), should be used. Reference to preferred applicants as “mature” and descriptions of an employer as having a “youthful” culture tend to exclude candidates on the basis of the prohibited ground of age.

Employers should also avoid qualifications that, while not obviously biased, touch on a prohibited ground. For example, if the advertisement states that Canadian experience is preferred, a qualified candidate whose work experience is largely outside Canada might be deterred from applying. Such a qualification could touch on the prohibited ground of place of origin. According to the OHRC’s 2013 *Policy on Removing the “Canadian Experience” Barrier*, a strict requirement for “Canadian experience” is *prima facie* discrimination and can only be used in very limited

circumstances. The onus is on employers to show that a requirement for prior work experience in Canada is a bona fide requirement. Previous work experience may be canvassed at the application and interview stage to the extent that it is relevant. Sometimes an essential job duty unavoidably touches on a prohibited ground. For example, because a school bus driver needs a special driver's licence, this requirement may be stated in the advertisement even though it bars applicants who are unable to obtain such a licence because of a disability. Similarly, an employer may indicate that fluency in a particular language is required as long as it can demonstrate that this requirement is a BFOR. But employers must make sure that they state the essential job requirements rather than refer to personal characteristics. For example, where strenuous physical work is necessary, the advertisement should state that "heavy lifting is required," rather than that "the applicant must be physically fit."

An advertisement can indicate that an employer is an equal opportunity employer or that candidates from diverse backgrounds are encouraged to apply.

## Job Applications

Section 23(2) of the Code provides as follows:

The right under section 5 to equal treatment with respect to employment is infringed where a form of application for employment is used or a written or oral inquiry is made of an applicant that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.

The Code prohibits questions and requests for information on the application form that directly or indirectly classify candidates by prohibited grounds. The wording of section 23(2) is similar to that of section 23(1) related to job advertisements. Once again, the intent is to avoid discouraging potential applicants from applying by creating the impression that they would not be acceptable. Appropriate questions are limited to establishing the applicant's name, address, education, and previous employment history. The purpose of the job application form is to gather information on job qualifications and skills and to avoid eliciting information that directly or indirectly excludes individuals on non-job-related grounds. See Figure 2.1.

Table 2.1 sets out most of the 16 prohibited grounds of discrimination and provides examples of questions that the Commission believes should be avoided because they directly or indirectly touch on those grounds. This list is not exhaustive. In some cases, acceptable alternative wording is suggested. The list of acceptable questions that are not directly job related is short.

### F Y I

#### **Sample Job Application Form from the Ontario Human Rights Commission**

The following is a sample application form prepared by the Ontario Human Rights Commission that suggests the information that an employer may ask on a job application.

**FIGURE 2.1** Job Application Form

Position being applied for _____			Date available to begin work _____
<b>PERSONAL DATA</b>			
Last name _____		Given name(s) _____	
Address _____	Street _____	Apt. no. _____	Home telephone number _____
City _____	Province _____	Postal code _____	Business telephone number _____
Are you legally eligible to work in Canada? <input type="checkbox"/> Yes <input type="checkbox"/> No Are you 18 years old or older? <input type="checkbox"/> Yes <input type="checkbox"/> No Are you willing to relocate in Ontario? <input type="checkbox"/> Yes <input type="checkbox"/> No Preferred location: _____			
<i>To determine your qualification for employment, please provide below and on the reverse, information related to your academic and other achievements including volunteer work, as well as employment history. Additional information may be attached on a separate sheet.</i>			
<b>EDUCATION</b>			
<input type="checkbox"/> SECONDARY SCHOOL		<input type="checkbox"/> BUSINESS OR TRADE SCHOOL	
Highest grade or level completed: _____		Name of program: _____	
		Length of program: _____	
Licence, certificate or diploma awarded? <input type="checkbox"/> Yes <input type="checkbox"/> No Type: _____			
<input type="checkbox"/> COMMUNITY COLLEGE		<input type="checkbox"/> UNIVERSITY	
Major subject: _____		Name of program: _____	
		Length of program: _____	
Degree, diploma, or certificate awarded? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Honours Type: _____			
Other courses, workshops, seminars: _____			
Licences, certificates, degrees: _____			
<b>WORK-RELATED SKILLS</b>			
Describe any of your work-related skills, experience, or training that relate to the position being applied for.			
_____			
_____			
_____			

**FIGURE 2.1** Job Application Form (Continued)**EMPLOYMENT**

Name of present/last employer: \_\_\_\_\_ Job title: \_\_\_\_\_

Period of employment (includes time spent away from work due to disability or maternity/parental leave but it is not necessary to refer to this): From: \_\_\_\_\_ To: \_\_\_\_\_

Type of business: \_\_\_\_\_

Reason for leaving (do not refer to issues related to maternity/parental leave, Workers' Compensation claims, handicap/disability, or human rights complaints):

\_\_\_\_\_

Functions/responsibilities: \_\_\_\_\_

\_\_\_\_\_

Name of previous employer: \_\_\_\_\_ Job title: \_\_\_\_\_

Period of employment (includes time spent away from work due to disability or maternity/parental leave but it is not necessary to refer to this): From: \_\_\_\_\_ To: \_\_\_\_\_

Type of business: \_\_\_\_\_

Reason for leaving (do not refer to issues related to maternity/parental leave, Workers' Compensation claims, handicap/disability, or human rights complaints):

\_\_\_\_\_

Functions/responsibilities: \_\_\_\_\_

\_\_\_\_\_

For employment references we may approach:

Your present/last employer?  Yes  No

Your former employer(s)?  Yes  No

List references if different than above on a separate sheet.

**PERSONAL INTERESTS AND ACTIVITIES (civic, athletic, etc.)**

\_\_\_\_\_

\_\_\_\_\_

Have you attached an additional sheet?  Yes  No

I hereby declare that the foregoing information is true and complete to my knowledge. I understand that a false statement may disqualify me from employment, or cause my dismissal.

Signature

Date

SOURCE: Ontario Human Rights Commission (2008). © Queen's Printer for Ontario, 2008. Open Data. Ontario.ca.

**TABLE 2.1** Job Application Form Questions

Prohibited grounds	Unacceptable questions	Acceptable questions
<b>Race</b> <b>Colour</b> <b>Citizenship</b> <b>Place of origin</b> <b>Ethnic origin</b> <b>Ancestry</b>	<ul style="list-style-type: none"> <li>• Are you a Canadian citizen?</li> <li>• What is your social insurance number? (This may indicate place of origin or citizenship status, and it should be requested after a conditional offer of employment is made.)</li> <li>• Where are you from originally?</li> <li>• What schools have you attended? (This may indicate place of origin.)</li> <li>• Are you a member of any clubs or other organizations? (This could indicate sex, race, or religion.)</li> <li>• What is your height and weight?</li> <li>• What is your Canadian work experience?</li> </ul>	<ul style="list-style-type: none"> <li>• Are you legally entitled to work in Canada?</li> <li>• What is the highest level of education that you have reached?</li> <li>• What professional credentials or diplomas have you received?</li> <li>• Are you fluent in English, French, or another language? (Acceptable only if this is a BFOR.)</li> </ul>
<b>Creed</b>	<ul style="list-style-type: none"> <li>• Are there any days of the week when you are unable to work? Are you willing to work Saturdays? (If these questions are asked, they may raise human rights issues, and the employer should be prepared to accommodate up to the point of undue hardship.)</li> <li>• What is your religion?</li> <li>• What religious holidays or customs do you observe?</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
<b>Sex</b>	<ul style="list-style-type: none"> <li>• What was your surname before marriage?</li> <li>• What form of address do you prefer (Mr., Mrs., Miss, or Ms.)?</li> <li>• What is your relationship with the person to be notified in case of emergency?</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
<b>Sexual orientation</b>	<ul style="list-style-type: none"> <li>• Are you participating in Pride Week?</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
<b>Marital status</b>	<ul style="list-style-type: none"> <li>• Are you married?</li> <li>• What was your surname before marriage?</li> <li>• What form of address do you prefer (Mr., Mrs., Miss, Ms.)?</li> <li>• Is your spouse willing to transfer?</li> <li>• What is your relationship with the person to be notified in case of emergency?</li> </ul>	<ul style="list-style-type: none"> <li>• Are you willing to travel or relocate? (Acceptable only if travel or relocation is a BFOR.)</li> </ul>
<b>Family status</b>	<ul style="list-style-type: none"> <li>• Are you married, divorced, single, or living in a common law relationship?</li> <li>• What is your birth name?</li> <li>• What form of address do you prefer (Mr., Mrs., Miss, Ms.)?</li> <li>• Do you have children?</li> <li>• How many children do you have?</li> <li>• Do you plan to start a family soon?</li> <li>• Are you pregnant?</li> <li>• Do you have appropriate childcare arrangements?</li> <li>• Is your spouse willing to transfer?</li> <li>• What is your relationship with the person to be notified in case of emergency?</li> </ul>	<ul style="list-style-type: none"> <li>• Are you willing to travel or relocate? (Acceptable only if travel or relocation is a BFOR.)</li> </ul>

**TABLE 2.1** Job Application Form Questions (Continued)

Prohibited grounds	Unacceptable questions	Acceptable questions
<i>Record of offences</i>	<ul style="list-style-type: none"> <li>• Have you ever been convicted of a crime?</li> <li>• Have you ever been arrested?</li> <li>• Have you ever spent time in jail?</li> </ul>	<ul style="list-style-type: none"> <li>• Have you ever been convicted of a criminal offence for which a pardon has not been granted?</li> </ul>
<i>Age</i>	<ul style="list-style-type: none"> <li>• What is your date of birth?</li> <li>• Attach a copy of your driver's licence.</li> <li>• Provide an educational transcript. (This could include dates or age of the applicant.)</li> </ul>	<ul style="list-style-type: none"> <li>• Are you 18 years of age or older?</li> </ul>
<i>Disability</i>	<ul style="list-style-type: none"> <li>• Do you have any disabilities?</li> <li>• Have you ever claimed or received Workplace Safety and Insurance benefits?</li> <li>• Do you have a history of substance abuse?</li> <li>• Are you physically or mentally capable of performing this job?</li> <li>• Do you require any accommodation to perform this job?</li> <li>• This job requires heavy lifting. Will you be able to do it?</li> <li>• Are you a member of Alcoholics Anonymous?</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>

SOURCE: Compiled in part from information contained in Ontario Human Rights Commission (1999, pp. 3–6).

## Job Interviews

Section 23(3) of the Code provides as follows:

Nothing in subsection (2) precludes the asking of questions at a personal employment interview concerning a prohibited ground of discrimination where discrimination on such ground is permitted under this Act.

At the job interview stage, the Code allows an employer considerably more latitude in questioning an applicant than at the previous stages in the hiring process. In a face-to-face meeting, a candidate has a better chance of countering any assumptions or stereotyping that could arise as a result of her response to an employer's inquiries. The employer may expand the scope of job-related questions to include questions that touch on prohibited grounds if they relate to a BFOR or if an exemption to the Code applies under sections 14, 16, or 24. For example, if the employer is a religious organization hiring an executive director, it may question an applicant's religious affiliation. However, under several of the exemptions, an employer is still obligated to accommodate an employee unless doing so would cause undue hardship (s. 24(2)).

The job interview process poses unique human rights challenges, and everyone who participates in the process should be knowledgeable about human rights requirements. For instance, when meeting a candidate, an interviewer may be tempted to chat informally to create a relaxed atmosphere and to get to know the candidate. During such a conversation, information may be elicited that touches on a prohibited ground. For example, the interviewer may ask whether the candidate prefers to be addressed as Mrs., Ms., or Miss during the interview. Even if this information is elicited without intent to discriminate, it may raise questions about whether the candidate's marital status played a part in the eventual hiring decision. A candidate

who is not hired could file a claim of discrimination on the basis of marital status, and an employer would need to expend time and effort in responding to it.

Similarly, it is common for job candidates to comment about family pictures displayed in an interviewer's office. The interviewer should refrain from eliciting information regarding the candidate's family, even though it would be normal to do so in conversation.

The interviewer should resist any urges to form subjective impressions or observations that relate to prohibited grounds. The interviewer should be conscious of human rights issues when placing notes on the interview file that are intended to help the interviewer remember a particular candidate. From a legal point of view, notes referring to an "older guy with a slight lisp" or a female candidate wearing a "tight rainbow sweater" will not be helpful.

There are several ways to limit the potential for human rights problems arising from the interview. These include the following:

1. *Accommodate disabilities.* If a job applicant is unable to attend an interview because of a disability, an employer must accommodate the candidate so that the applicant has an equal opportunity to be interviewed.
2. *Have a standard set of questions.* Standardizing an interview keeps it on track and avoids the perception that candidates were treated differently on the basis of a prohibited ground. For example, do not question only female candidates about their ability to travel or relocate.
3. *Use interview teams.* Teams allow interviewers to compare impressions and can reduce the impact of individual biases. If a candidate subsequently alleges discrimination, there are several people to recall what took place during the interview. There should be at least one interviewer knowledgeable about the position being offered.
4. *Beware of prohibited grounds.* An interviewer should not ask questions that relate to a prohibited ground unless the elicited information can legally form the basis of a hiring decision. If a response cannot be used in making a hiring decision, the employer takes a risk in asking it. The candidate may perceive that the information played a part in the decision not to hire and it may be difficult to prove otherwise.

For example, there is some debate about whether an interviewer should raise the issue of physical ability to perform the job at the interview stage. If the disability is obvious and relevant to the essential requirements of the job or if the candidate raises the issue, the employer should discuss the disability and possible accommodations. Otherwise, the candidate may get the impression that the employer has no serious interest in understanding how she can perform the job. However, if the disability is not obvious or is not raised by the candidate, it is probably safer for the employer not to introduce it. Once the employer is aware of the disability, an unsuccessful candidate could allege that that information played a part in denying her the job. The Ontario Human Rights Commission suggests that issues of accommodation should be discussed only after a conditional offer of employment is made unless the candidate requests accommodation at the interview stage or the disability is obvious (Ontario Human Rights Commission, 2008, p. 108).



Generally speaking, a job applicant is under no obligation to voluntarily disclose during an interview a medical condition that qualifies as a mental or physical disability under human rights legislation.

Similar considerations apply to discussions about the accommodation of religious practices. For example, if the position requires that the successful candidate work Friday nights and Saturdays, the employer would be wise not to discuss the candidate's availability for those shifts because this could elicit information concerning a prohibited ground, such as creed. Even if shift work is an important part of the job, an employer is obliged to accommodate an employee unless accommodation would create undue hardship. Therefore, there is little to be gained by raising the issue during the interview stage and risking a discrimination claim unless accommodation is virtually impossible because of the employer's size or hours of operation. If accommodation is virtually impossible, it could be raised at the interview because the employer can likely justify its discriminatory rule under the three-part *Meiorin* test.

Table 2.2 sets out the prohibited grounds of discrimination and indicates the circumstances when questions touching on those grounds are acceptable at the interview stage. Other than questions directly related to these circumstances, questions that are prohibited in the job application (see Table 2.1) are also prohibited during the job interview.

Employers must be careful not to screen out job applicants from the testing or job interview process for discriminatory reasons. In the 2013 case of *Reiss v CCH Canadian Limited*, a 60-year-old lawyer applied to be a commercial legal writer at CCH, a legal publishing firm. When he was not selected for an interview, he contacted the external human resources consultant who was helping the employer with its recruitment processes. The consultant explained that it looked like the employer was "moving toward candidates that are more junior in their experience and salary expectation." Seeing this as age-based discrimination, Reiss filed a complaint with the Ontario Human Rights Tribunal. The tribunal held that, although the evidence did not show that age was probably a factor in the employer's decision not to interview him, the human resources consultant's comments were "suggestive of a stereotyped assumption that an older person would necessarily want a higher salary and would therefore not be a good candidate." The tribunal ordered the employer to pay Mr. Reiss \$5,000 for injury to dignity, feelings, and self-respect as a result of the discriminatory assumptions made. Note that although the external consultant was not an employee of CCH, he was acting as its agent (he'd been given authority to act on its behalf) and therefore the employer was legally responsible for his actions (Rubin Thomlinson LLP, 2013).

A related point to note is that, whether it is at the time of receiving a job application or resumé, during the interview, or after the interview, an employer should be cautious about automatically screening out applicants on the basis that they are overqualified for the position (Miedema and Hall, 2012, p. 39). As shown in the following case of *Sangha v Mackenzie Valley Land and Water Board*, rejecting an applicant who is an immigrant because he is "overqualified" may be found to be discrimination on the basis of national or ethnic origin.

**TABLE 2.2** Job Interview Questions

Prohibited grounds	When questioning is acceptable
<b>Race</b> <b>Colour</b> <b>Ancestry</b> <b>Place of origin</b> <b>Ethnic origin</b>	<ul style="list-style-type: none"> <li>The employer is a special service organization that serves the needs of a particular community, and membership in that community is a BFOR (e.g., a social club for a particular ethnic group wants to hire an events coordinator from that ethnic group).</li> <li>Multilingualism is a BFOR (e.g., a legal aid clinic serving an ethnically diverse population wants to know what languages a candidate speaks).</li> </ul>
<b>Creed</b>	<ul style="list-style-type: none"> <li>The employer is a special service organization that serves the needs of a particular religious community, and membership in that community is a BFOR.</li> <li>The applicant raises the issue and the questions directly relate to the applicant's ability to perform the essential duties of the job and the nature of any necessary accommodation (e.g., the job requires a uniform, and the candidate wears a head covering for religious reasons).</li> </ul>
<b>Citizenship</b>	<ul style="list-style-type: none"> <li>Citizenship or permanent resident status is required by law (see s. 16 of the Code).</li> <li>Citizenship or permanent resident status is required to foster participation in cultural, educational, trade union, or athletic activities by citizens or permanent residents (see s. 16 of the Code).</li> <li>The job is a chief or senior executive position (see s. 16 of the Code).</li> </ul>
<b>Sex</b>	<ul style="list-style-type: none"> <li>The employer is a special service organization that serves the needs of a particular community and being a particular sex is a BFOR (e.g., a woman's shelter wants to hire a female therapist).</li> <li>Sex is a BFOR (e.g., a residential institution wants to hire male attendants to assist male residents with personal hygiene).</li> </ul>
<b>Sexual orientation</b>	<ul style="list-style-type: none"> <li>There is no specific exemption. However, if the job is, for example, a helpline counsellor for gay youth in crisis, the employer could still argue that being gay is a BFOR based on the three-part test in <i>Meiorin</i>.</li> </ul>
<b>Record of offences</b>	<ul style="list-style-type: none"> <li>An applicant's capacity to be bonded is a BFOR (e.g., a security service wants to hire a security guard).</li> <li>Driving is an essential job duty, and the questions relate to any convictions under the <i>Highway Traffic Act</i>.</li> </ul>
<b>Disability</b>	<ul style="list-style-type: none"> <li>The applicant raises the issue or the disability is obvious, and the questions directly relate to the applicant's ability to perform the essential duties of the job and the nature of any necessary accommodation (e.g., Braille readers or ramps).</li> <li>The employer is a special service organization that serves a particular community and membership in that community is a BFOR (e.g., an organization serving the needs of the hearing impaired wants to hire a community liaison officer who has a hearing impairment).</li> </ul>
<b>Age</b>	<ul style="list-style-type: none"> <li>The employer is a special service organization that serves the needs of a particular age group and being of that age group is a BFOR (e.g., a youth group wants to hire a social coordinator under a certain age).</li> <li>Age is a BFOR under section 24(1)(b) because of the nature of the employment.</li> </ul>
<b>Marital status</b>	<ul style="list-style-type: none"> <li>The employer is a special service organization that serves the needs of a particular community, and membership in that community is a BFOR (e.g., an organization that serves single women hires a single woman as its director).</li> <li>Marital status is a BFOR under section 24(1)(b) because of the nature of the employment.</li> <li>The employer has a nepotism policy that falls within section 24.</li> </ul>
<b>Family status</b>	<ul style="list-style-type: none"> <li>The employer has a nepotism policy that falls within section 24.</li> </ul>

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**CASE IN POINT**

## Is Overqualification a BFOR?

*Sangha v Mackenzie Valley Land and Water Board*, 2007 FC 856, rev'g 2006 CHRT 9

### Facts

Sangha had a PhD in environmental science and extensive work experience in this field. After he immigrated to Canada from India, however, he was unable to get a job in keeping with his employment background. Desperate to find a job in his field, he applied for one of four entry-level environmental positions advertised by the employer, Mackenzie Valley. Although Sangha was one of the best-qualified candidates, the employer's interview team decided he was unsuitable because he was overqualified for the position. The team felt he would be easily bored with the job and leave as soon as he found something better, and they already had a problem with high turnover. When Sangha found out that he did not get the job, given his credentials and how well he believed the interview had gone, he filed a complaint of discrimination based on race, national or ethnic origin, colour, and religion.

### Relevant Issue

Whether rejecting a job candidate who is an immigrant on the basis that he is overqualified is contrary to the Code.

### Decision

The Canadian Human Rights Tribunal found that Sangha had been discriminated against on the basis of national and ethnic origin. The tribunal noted that on the face of it,

the employer's hiring process was non-discriminatory and neutral. There were no questions that touched on personal characteristics, such as race, colour, national or ethnic origin, religion, or age, and the interview was conducted professionally. However, relying on expert testimony at the hearing, the tribunal found that the experience of applying for a job for which one is overqualified is disproportionately an immigrant experience. Visible minority immigrants are disproportionately excluded from the higher levels of the job market because of barriers to employment at this level. They therefore seek employment at lower echelons where their qualifications exceed the job requirements. The tribunal held: "Thus, a policy or practice against the hiring of overqualified candidates affects them differently from others to whom it may also apply." As such, it is *prima facie* discriminatory.

Sangha was awarded \$9,500 for pain and suffering. However, his request for compensation for three years' worth of lost earnings (\$55,000 per year) and for an order that Mackenzie Valley hire him when a position became available was denied. In the tribunal's view, Sangha had not established that his being hired was more than just a "mere possibility" had there not been discrimination. However, on appeal, the Federal Court found that Sangha had in fact shown that there was a "serious possibility" that he would have been hired but for the discriminatory overqualification standard. It therefore sent the decision back to the tribunal for reconsideration as to the appropriate remedy.

As noted in this decision, an employer should not screen out candidates who are "overqualified" simply because the employer assumes they will be dissatisfied and leave as soon as another position is found. It must make some inquiry into the candidate's motives for applying for the job in order to obtain a more accurate prediction of the candidate's behaviour if hired.

### ***Special Programs and Medical or Personal Attendants***

Under the exemption in section 14 of the Code, an employer with a bona fide special (affirmative action) program may question an applicant concerning his membership in the group that the program is aimed at.

Similarly, an employer may question a candidate regarding any of the prohibited grounds where the primary job is attending to the medical or personal needs of the

employer or of an ill child or an aged, infirm, or ill spouse or relative of the employer. This exemption is narrowly focused on the in-home care of the employer or a close relative under section 24(1)(c). See above under the headings “Medical or Personal Attendants” and “Special (Affirmative Action) Programs” for more information about these exemptions.

## Conditional Offers of Employment

The Ontario Human Rights Commission recommends that certain questions be left until after a conditional offer of employment is made. The Commission believes that this “avoid[s] a misapprehension of discrimination” because the employer obtains the information only after it has offered a job to a candidate.

The following are examples of information that the Commission suggests should be requested only after an employer makes a conditional offer:

- a copy of a driver’s licence, which contains information such as date of birth;
- a work authorization from immigration authorities, which contains information regarding date of arrival in Canada;
- a social insurance card, which may contain information regarding immigration status;
- a transcript or copy of professional credentials, which often indicate place of origin; and
- requests for medical examinations or health information necessary for pension, disability, life insurance, and benefit plans, all of which may indicate physical disabilities (Ontario Human Rights Commission, 2008, p. 109).

Another piece of information that an employer should not request until after making a conditional offer relates to Ontario’s *Consumer Reporting Act*. Under this Act, information, such as a credit report, can only be provided by a credit-reporting agency in response to an employer’s request if a candidate has been told about the request. Details about the request and penalties for failure to comply are set out in Chapter 3 under the heading “Background Checking: Negligent Hiring.” Similarly, any police record checks should be done after a conditional offer of employment is made.

## Pre-employment Medical or Fitness Examinations

The Commission takes the position that medical tests to determine a candidate’s ability to perform the essential duties of a job should take place only after a conditional offer of employment is made. The examination must be directly relevant to the job as well as objectively necessary and appropriate. For example, a back X-ray may be appropriate for a job that involves heavy lifting but not for a managerial job. The results cannot be used to disqualify a candidate unless they directly undermine his ability to perform the essential duties of the job. Even then, the employer is obliged to accommodate the employee unless this would create undue hardship.

If medical testing is required, all candidates must be tested; employers who test only certain candidates may be vulnerable to allegations of discrimination.

The results of medical tests must be maintained in confidential medical files, separate from human resources files, and accessible only to qualified medical personnel.

The Commission recommends that where medical testing is appropriate, candidates should be so notified at the time that an offer of employment is made. Arrangements must be made for the competent handling of test materials and for keeping them properly labelled and secure at all times. Test results should be reviewed with the employee by the physician.

## Pre-employment Drug and Alcohol Testing

Human rights legislation in Canada considers alcoholism and drug dependency, as well as perceived dependency, to be forms of disability and therefore prohibited grounds of discrimination. As a result, workplace alcohol and drug testing has been severely restricted in this country. However, such testing continues to be an important issue, especially in workplaces that are safety sensitive or that are affiliated with companies operating in the United States where such testing is far more common. The Commission takes the position that testing for drug and alcohol use is *prima facie* discrimination and therefore allowable only in limited circumstances. In its view, drug and alcohol testing is very difficult to justify at the recruitment or hiring stages. The Commission notes that pre-employment drug testing does not measure current impairment, and pre-employment alcohol testing, while measuring impairment at the time of testing, does not predict a candidate's ability to perform the essential job requirements. However, this area of the law is somewhat unsettled. For example, the case of *Weyerhaeuser Company Limited v Ontario (Human Rights Commission)* (known as the *Chornyj* case) suggests that pre-employment safety-certification drug testing by urinalysis may be acceptable for safety-sensitive jobs as long as accommodation is provided should the applicant test positive.

### CASE IN POINT

## Pre-employment Drug Test Not Prima Facie Discriminatory

*Weyerhaeuser Company Limited v Ontario (Human Rights Commission)*, 2007 CanLII 65623 (Ont Sup Ct J (Div Ct))

### Facts

Weyerhaeuser offered Chornyj a position as a stationary engineer at its Kenora, Ontario, plant. The position was considered "safety sensitive" and the offer was conditional on his passing a drug test. Chornyj took the drug test (urinalysis) and the result came back positive for marijuana.

After receiving the positive drug test result, Ms. Argue, from the employer's Human Resources (HR) department, spoke with Chornyj. She asked him whether he had ever used marijuana; he initially denied it but finally admitted that he had. Argue expressed serious concerns about Chornyj's honesty, and the next day the offer of employment

was withdrawn. Acknowledging that he was not an addict, Chornyj filed a human rights complaint based on perceived disability with the Ontario Human Rights Commission. The Commission referred the complaint to the Ontario Human Rights Tribunal. The employer brought a motion to the tribunal to have the complaint dismissed without a hearing on the basis of lack of jurisdiction. It argued that the *Human Rights Code* does not protect a right to lie and there was no evidence that Weyerhaeuser perceived Chornyj to be suffering from a disability. The tribunal dismissed the motion, and Weyerhaeuser applied to the court for an order preventing the tribunal from hearing the complaint (a very rare occurrence).

## Relevant Issue

Whether the employer's pre-employment drug testing is *prima facie* discriminatory on the ground of perceived disability.

## Decision

The court found that the employer's policy was not *prima facie* discriminatory because none of the evidence supported a conclusion that the employer perceived Chornyj as being disabled. All of the evidence from Weyerhaeuser's representatives indicated that they saw him as dishonest, not disabled. Moreover, the consequences of a positive drug test under the

employer's policy did not support an inference of perceived disability. Under that policy, a positive result for marijuana use did not automatically result in revocation of an offer of employment. The consequences included having a negative drug retest and signing an agreement that prohibited certain conduct for five years, such as using controlled substances (including marijuana) or refusing to submit to an alcohol or drug test. Even then, a positive drug test would not automatically result in dismissal; specific circumstances would be examined and the need for further accommodations evaluated. The court concluded that the Code was not engaged and the tribunal lacked jurisdiction to hear the matter.

The *Chornyj* decision states that the mere existence of a pre-employment drug-testing policy is not *prima facie* discriminatory on the ground of perceived disability. Rather, it is the effect of the particular policy in each particular case that must be examined. In addition to ensuring that a positive drug test does not automatically disqualify an applicant, an employer must be able to show that such testing assesses an applicant's ability to perform the essential duties of the job (e.g., meeting safety-related requirements) and is not merely a test of whether the candidate uses drugs or alcohol. Furthermore, as happened in *Chornyj*, the testing must be carried out only after a conditional offer of employment has been made.

Where such testing is legitimately necessary, the employer should make job applicants aware of the requirement when they make a job offer. On-the-job drug and alcohol testing is discussed in Chapter 5.

## Other Forms of Pre-employment Testing

In the Commission's view, tests that seek to assess personal interests, personality traits, and attitudes (psychometric tests) may raise human rights issues if they tend to screen out individuals on the basis of a prohibited ground (Ontario Human Rights Commission, 2008, p. 111). Tests that measure job-related skills, such as typing, mechanical, electrical, and computer skills, are acceptable.

Employers should administer any assessments at the same point in the selection process for all candidates; obtain the candidate's written permission before conducting the testing; investigate the reliability and validity of any tests administered; and ensure that the confidentiality of test results is protected (Hemeda and Sum, 2011, p. 23).

Employers must be prepared to accommodate a job candidate during any testing. In *Mazzei v Toronto District School Board* (TDSB) the Human Rights Tribunal found that the TDSB had contravened the Code by not accommodating a job applicant's learning disability. The applicant had requested he be provided with a calculator

and a separate room to write the pre-employment test but was refused. Once the applicant provided sufficient information about his disability, the employer had a duty to investigate the options for accommodation, and failure to do so was *prima facie* discrimination. The employer was ordered to pay \$7,500 for injury to his dignity, feelings, and self-respect. It was also ordered to distribute its guidelines on accommodation to all managers and staff with hiring power as well as a reminder that the duty to accommodate applies “at all stages of the hiring process.”

In contrast to other forms of pre-employment testing, pre-employment fitness tests have been frequently challenged under human rights legislation. *Meiorin*, for example, arose out of a fitness test that failed to take into account the different physiological capacities of males and females. *Canadian Union of Public Employees, Local 4400 v Toronto District School Board*, a more recent case, shows how sensitive employers must be to this issue.

## CASE IN POINT

### Discrimination on the Basis of Sex Found in Pre-employment Fitness Test

*Canadian Union of Public Employees, Local 4400 v Toronto District School Board* (2003), OLA no 514 (Howe)

#### Facts

The employer school board offered three women part-time cleaning jobs on the condition that they pass a physical demands assessment. They began work but were dismissed when they failed to complete the part of the assessment that required them to lift 50 pounds from bench to shoulder height. The employees filed grievances challenging the lifting requirement. They got their jobs back after they were given strength training that helped them meet the lifting requirements, but they pursued their grievance, claiming that the requirement was discriminatory.

#### Relevant Issue

Whether the lifting requirement contravened the *Human Rights Code* by discriminating on the basis of sex.

#### Decision

The arbitrator found that the lifting requirement indirectly resulted in the exclusion of a group identified by a prohibited ground (sex) because evidence showed that female candidates initially failed the strength test 16 times more often than male candidates. Because the job requirement had a *prima facie* discriminatory effect, the onus shifted to the employer to show that it was a BFOR. The employer failed the third part of the *Meiorin* test because it could not demonstrate that it could not accommodate the employees without incurring undue hardship. For example, the employer could have ordered supplies in smaller containers, reduced the height to which supplies are stacked, or arranged for the heavier lifting to be done by others.

Employers must keep human rights requirements in mind throughout the hiring process. Human rights issues that arise after the employee begins to work are discussed in Chapter 5.

## KEY TERMS

affirmative action, <a href="#">59</a>	conditional offer of employment, <a href="#">56</a>	remedial legislation, <a href="#">42</a>
balance of probabilities, <a href="#">51</a>	essential job duties, <a href="#">55</a>	special program, <a href="#">59</a>
bona fide occupational qualification (BFOQ) or requirement (BFOR), <a href="#">41</a>	nepotism policies, <a href="#">53</a>	special service organization, <a href="#">44</a>
	<i>prima facie</i> , <a href="#">51</a>	trade union, <a href="#">45</a>

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## RELATED WEBSITES

- <http://www.ohrc.on.ca> The Ontario Human Rights Commission’s website. This site contains Commission policies and public education resources.
- <http://www.hrto.ca> The Ontario Human Rights Tribunal’s website. This site contains application and response forms and materials to assist in working through the application/response process.
- <http://www.interfaith-calendar.org> A site that sets out sacred days for various faiths.

## REVIEW AND DISCUSSION QUESTIONS

1. Azar worked as a nurse for five years in various temporary positions for the same employer. She applied for a temporary position that was available from September 2009 to June 2010. Before the hiring decision was made, Azar advised the employer that she was pregnant and expected to commence her pregnancy leave in February 2010. Although she was the most qualified applicant for the job, the employer awarded the job to someone else because of her lack of availability to complete the short-term contract. Azar filed an application with the Ontario Human Rights Tribunal.
  - a. What is the alleged ground of discrimination?
  - b. In your opinion, did the employer contravene the Ontario *Human Rights Code*? Explain your answer.
2. Monique applied for a position as a cashier at a cafeteria. The employer's dress code requires employees to be "neatly groomed in appearance" and to avoid displaying body piercings or tattoos. The employer refused to hire Monique because she wears a nose ring. Monique filed an application with the Human Rights Tribunal.
  - a. What is the alleged ground of discrimination?
  - b. In your opinion, did the employer contravene the Code? Explain your answer.
3. Joe applied for a position in a daycare centre. The centre refused to interview him because it thinks that parents would be uncomfortable with having a man take care of their young children. Joe filed an application with the Ontario Human Rights Tribunal.
  - a. What is the alleged ground of discrimination?
  - b. In your opinion, did the employer contravene the Code? Explain your answer.
4. During his job interview, Zhou mentioned that he was recovering from an addiction to cocaine. The employer refused to proceed with the interview because the position being applied for was in a safety-sensitive area. Zhou filed an application with the Ontario Human Rights Tribunal.
  - a. What is the alleged ground of discrimination?
  - b. In your opinion, did the employer contravene the Code? Explain your answer.
5. The employer interviewed a number of candidates for a position in a nursing home that involves lifting patients and other physically demanding work. One of the candidates, Joan, had limited mobility in her arm, which was obvious at the interview. The employer did not address the issue, and the interview was brief. Joan was not hired and filed an application with the Ontario Human Rights Tribunal.
  - a. What is the alleged ground of discrimination?
  - b. In your opinion, did the employer contravene the Code? Explain your answer.
6. Arshit has a medical degree from a university outside Canada. He applied for a position as an orderly because his degree is not recognized in Canada. The employer refused to give him the job because she felt that he was overqualified and would leave as soon as he found a position more in keeping with his education. Arshit filed an application with the Ontario Human Rights Tribunal.
  - a. What is the alleged ground of discrimination?
  - b. In your opinion, did the employer contravene the Code? Explain your answer.
7. In 2005, Martha was charged with, and pleaded guilty to, shoplifting. She received a conditional discharge and according to the law in that province (Quebec), she automatically received a pardon after the passage of a certain period of time. Four years later, Martha applied to be a police officer in Montreal but, because of her past charge, her application was rejected on the ground that she did not meet the Montreal police service's strict hiring standards, which required that candidates must be of "good moral character." Martha filed a human rights application, alleging that her rights had been violated. The police responded that the misconduct itself, not the charge, brought her moral character into question. Assuming that this fact situation had taken place in Ontario:
  - a. What is the alleged ground of discrimination?
  - b. Discuss possible arguments that Martha could make to support her claim. Discuss possible arguments that the police could make to support their position.
  - c. In your opinion, would Martha succeed in her claim? Explain your answer.
8. The Ontario *Human Rights Code* was first enacted in 1962 to end discriminatory practices in five social areas. It has been argued, however, that this law has not been very effective. Critics have asserted that racist and sexist employers have found ways to circumvent the law. Discuss whether Ontario's human rights law

has achieved its objective of eliminating discrimination based on the 16 prohibited grounds. If not, how could it be made more effective?

9. Increasingly, employers are using social networking sites to find out more information about job candidates in the hiring process and basing their hiring decisions in part on this information. Is this a smart move or a human rights trap? What are some of the upsides and downsides of this approach?
10. Sarah, a salon owner, operates a trendy salon in London, Ontario. She advertises for a stylist. Nia calls in response to the ad and seeks an interview. At no time does Nia mention she covers her head for religious reasons. Nia attends the interview, which lasts only ten minutes. During the interview, Nia makes it clear that she will not remove her headscarf while at work and Sarah tells her that in that case, she cannot hire her. Sarah has a policy requiring all stylists to show their hair. She doesn't allow baseball caps or other hats to be worn by staff because, in her view, a stylist's hair is her "calling card" and that of the salon.
 

As a result of Sarah's reaction to her headscarf during the interview, and the ultimate decision not to offer her the job, Nia files a human rights application alleging discrimination. (She's been turned down by numerous salons and she's tired of it.) Sarah says she's a small salon and the costs of responding to this complaint will put her into financial ruin.

Assume that you are on the Human Rights Tribunal deciding this case. On the basis of Ontario's *Human Rights Code*, what would your decision be? Support your conclusions.
11. You are the newly hired HR manager at a medium-sized bottling plant. A supervisor tells you that one of his employees, George, has just told him that he is in the process of transitioning to a female and would like co-workers to refer to him by his new name: Gina. The supervisor thinks the other employees will simply find this a joke and make fun of George. How would you advise the supervisor?
12. Is it a violation of the Code for an employer to require proficiency in English?
13. McCormick was an equity partner at a prestigious law firm in British Columbia. As per the terms of the partnership agreement, he was due to retire during the year in which he turned 65. When he and the firm were unable to reach an agreement that would allow him to work beyond this age, he started a proceeding under

British Columbia's human rights legislation, alleging age-based discrimination. The law firm challenged the tribunal's jurisdiction on the basis that McCormick was a partner, not an employee, of the firm. The British Columbia Court of Appeal agreed: unlike a corporation, a partnership is not a separate legal entity. Therefore, McCormick, as a partner, could not be an employee of the partnership because he cannot employ himself.

If this fact situation occurred in Ontario, instead of British Columbia, would the result likely be different?

14. Can an employer have a "non-smokers only" hiring policy? Discuss.
15. You've just started your new job as an HR manager at a retail chain that sells teen clothing. A supervisor calls you with a question. She's been getting complaints from a couple of employees that other employees are speaking with each other during work hours in a language other than English (even though they speak English well). This seems rude because it makes them feel left out of the conversation. The supervisor is wondering whether she can insist that all employees speak English during working hours. Advise the supervisor.
16. Ontario's *Human Rights Code* currently lists 16 prohibited grounds of discrimination. Although weight discrimination is one of the most common forms of discrimination in the workplace, weight is not one of the 16 prohibited grounds. Should it be added?
17. Your employer tells you she would like to establish a mentorship program for employees under age 35 but wonders whether this would be illegal under the Ontario *Human Rights Code*. Advise her.
18. Mary was hired by Good Value Shop in 2004. She has suffered from, and been treated for, depression most of her life. Mary is seen as a difficult employee: her supervisor describes her as short-tempered, manipulative, and disruptive. One behaviour that is particularly resented by her manager is her habit, after receiving directions from a manager, of checking with other managers and co-workers in the store to see whether those directions are being consistently applied. In 2012, Mary goes off work on stress leave for depression. The supporting documentation sent to the disability insurance provider makes it clear that her depression relates to her work situation. It indicates that several friends and co-workers have quit because of stress, she has had four different managers in less than two years, and there is frequent bullying and

verbal abuse by managers. When she returns to work two months later, she continues with the behaviour that had most upset her supervisor: questioning instructions and checking with other managers to see whether those instructions are being consistently applied. Her supervisor repeatedly tells her not to do this, but she continues. As a result, her employment is terminated for insubordination four months after she returned from stress leave. In your opinion, has the employer infringed the *Human Rights Code*? Explain your answer.

19. Barbara was a registered massage therapist who had worked with the College of Massage Therapists of Ontario for several years as one of its examiners for candidates seeking certification. Hired under a series of one-year contracts, each year Barbara and the other examiners were required to attend a two-day training program; attendance was mandatory, as the scenarios upon which the candidates were assessed changed every year and the College wanted to ensure consistency in assessment. Unfortunately, the day before the training session, Barbara became ill with symptoms later diagnosed as strep throat, and she had to call in sick. When she did not make the first day of training, the College contacted her to say that her contract for that year was being cancelled due to her inability to attend the mandatory training. Upset with this decision, Barbara filed a human rights complaint. She pointed out that the College had allowed at least two people to examine despite missing the mandatory sessions: in one situation a replacement trainer had been needed quickly and in the other a strong candidate who had been unavailable for the training session was given individual training instead.
- What is the prohibited ground of discrimination that Barbara would likely allege?
  - Would Barbara's complaint likely be successful?
20. As she stepped into the office elevator on November 17, Erica was excited about her first day on the job as a legal assistant with the Toronto law firm, M & H. While in the elevator, she happened to see an old friend, and Erica mentioned that she had just found out she was pregnant but was nervous about telling her new employer. This conversation was overheard by one of M & H's partners. Later in that same week (November 19), Erica confided to one of the law firm's administrative assistants that she had just found out she was pregnant; the co-worker advised her to tell the support staff manager at her earliest convenience.

Erica waited until December 12 to tell the support staff manager and, when she did so, she said she had found out she was pregnant around December 3, when she had gone to the hospital due to feeling unwell. Responding to Erica's concern that the firm's senior partners would be upset by the news, her manager said not to worry and that at least five women had taken maternity leave in the past and all five were still employees of the firm.

Erica met with a senior partner shortly thereafter, repeating that she had learned of her pregnancy in early December when she had been ill. Initially, he congratulated her and followed up with a memo to the other partners, conveying the information he'd been given by her. However, during later conversations with others in the firm he found out that Erica had known about her pregnancy before she started work. Citing concerns about Erica's honesty, given her willingness to fabricate a story about when and how she found out about her pregnancy, the senior partner decided to fire her. Erica filed a complaint with Ontario's Human Rights Tribunal, alleging discrimination. She stated that the reason she had not told her employer about her pregnancy earlier was because she had suffered two previous miscarriages and therefore wanted to wait before she announced it.

- What is the prohibited ground of discrimination Erica would allege?
  - Is Erica's firing contrary to the Code? Explain your answer, with specific references to the Code.
21. Yvette started working as a delivery driver for Too Good Pizza in March 2012, and by early 2013 she was promoted to kitchen supervisor. She received a raise in June and a positive performance evaluation. However, shortly after that, Yvette found out that she was pregnant. Having miscarried three times before, she was reluctant to tell her employer about her pregnancy this early on but confided in a co-worker. To her surprise, when she came into work the next day, Yvette was called into the office by her manager who, she recalled, said, "There's a rumour that you're pregnant." He then announced, according to Yvette, "I guess we'll have to part ways." When she said, "You can't do that," he responded, "I think I can," and then told her to leave.
- Yvette filed a complaint with Ontario's Human Rights Tribunal. In his defence, the store manager denied knowing she was pregnant, stated he did not make the statements alleged, and insisted he'd let her go for poor work performance, culminating in a video

of her ignoring a customer while talking on her cell phone. He had not, however, kept the video or any other performance-related documentation.

- a. Was Yvette's firing contrary to the Code? Explain your answer, with specific references to the Code.
  - b. If it was contrary to the Code, what would be an appropriate remedy—or set of remedies? Why?
- 22.** Renee applied for a job with Prime Pave's paving company. When the owner contacted her about her application he was surprised to find out that she was female. He said that hiring a woman would not work, as he could not afford to incur additional hotel room costs—possibly as much as \$6,000, or almost 1 percent

of total expenses—when they were on the road (she would be the only woman in a crew of four). Renee became angry and decided to file a human rights complaint, alleging discrimination based on sex. As the owner admitted that his refusal to hire Renee was based on her being a woman, the tribunal found that a *prima facie* case of discrimination was proven. (That is, a protected characteristic [sex] was a factor in the adverse impact [not being hired].) The burden then shifted to the respondent to prove that his refusal was based on a BFOR. Does the employer's reason for refusing to hire Renee because of her gender constitute a BFOR defence?

