

ONTARIO HUMAN RIGHTS COMMISSION UPDATES POLICY ON CREED

*By Barry Kwasniewski**

A. INTRODUCTION

On December 10, 2015, the Ontario Human Rights Commission (the “OHRC”) announced the release of an update to its *Policy on preventing discrimination based on creed* (the “Policy”).¹ The updated Policy, which replaces the previous policy on creed from 1996, surveys current and historical trends and issues that have shaped discrimination based on creed and introduces an expanded definition of creed. This expanded definition of creed leaves open the possible inclusion of non-religious belief systems that substantially influences a person’s identity, world view, and way of life. The Policy also provides a range of specific situations in which accommodation may be required based on creed and how they may be accommodated.

This *Bulletin* discusses the Policy and how it may affect employers in their duty to accommodate employees on the basis of creed.

B. OHRC POLICIES AND GUIDELINES

Section 30 of the Ontario Human Rights Code (the “Code”) authorizes the OHRC to prepare, approve and publish policies to provide guidance with respect to the application of the Code.² The purpose of

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¹ Ontario, Ontario Human Rights Commission, *Policy on preventing discrimination based on creed*, online: <<http://www.ohrc.on.ca/en/policy-preventing-discrimination-based-creed>>

² Ontario, Ontario Human Rights Commission, *Policy on preventing discrimination based on creed: Appendix A: Purpose of OHRC policies* online: <<http://www.ohrc.on.ca/en/policy-preventing-discrimination-based-creed/appendix-purpose-ohrc-policies>>.

these policies is to provide guidance to individuals and organizations in various protected areas, such as housing; contracts; employment; goods, services and facilities; as well as membership in unions, trade or professional associations from discrimination.³ The policies advanced by the OHRC articulate its current interpretation of the *Code*. In addition, section 45.5 of the *Code* provides that the Ontario Human Rights Tribunal (the “HRTO”) may consider in the course of proceedings the policies made under section 30 by the OHRC. Subsection 45.5(2) places a further requirement upon the HRTO to consider a policy made by OHRC if it is requested by a party or intervenor to a proceeding.

C. DEFINITION OF CREED

While the *Code* lists creed as a ground for protection against unequal treatment or discrimination, it does not define creed, which has been accordingly interpreted by courts, HRTO decisions, and the former policy. However, under the Policy, the definition of creed has been expanded due to the evolutionary nature of belief systems. As a result, the Policy asserts that interpretations of the *Code* with respect to creed must be given a purposive and liberal interpretation in order to ensure continued *Code* protections on the basis of creed.⁴ According to the updated Policy a creed:

- is sincerely, freely and deeply held,
- is integrally linked to a person’s self-definition and spiritual fulfilment,
- is a particular, comprehensive and overarching system of belief that governs one’s conduct and practices,
- addresses ultimate questions of human existence, including ideas about life, purpose, death, and the existence or non-existence of a creator and/or a higher or different order of existence, and
- has some “nexus” or connection to an organization or community that professes a shared system of belief.⁵

In light of this definition, the Policy stipulates that in order to be recognized as a creed under the *Code*, a belief in a God, gods, or Supreme Being is not required. In addition, creed now includes spiritual beliefs and practices of Indigenous cultures.⁶ The Policy further emphasizes that, upon consideration of the factors already mentioned, newer religions may be included on a case by case basis.⁷

³ *Human Rights Code*, RSO 1990, c H 19. online: < <http://www.ohrc.on.ca/en/ontario-human-rights-code>>

⁴ Ontario, Ontario Human Rights Commission, *Policy on preventing discrimination based on creed: Creed*, online: < <http://www.ohrc.on.ca/en/policy-preventing-discrimination-based-creed/4-creed>>.

⁵ *Supra* note 4.

⁶ *Ibid.*

⁷ *Ibid.*

Though the Policy has expanded the definition to be more inclusive of newer religions, creeds, or Indigenous practices, there are certain practices that are excluded from the *Code*. Those practices which do not attract *Code* protection are ones that are hateful, or incite hatred or violence against individuals or groups, or are in contravention of criminal law.⁸ In addition, and subject to the exceptions set out in sections 14, 18 and 24 of the *Code*, certain practices or expressions of creed beliefs may be limited under the *Code* where they announce an intention to discriminate in one of the protected social areas.⁹

D. CODE PROTECTIONS FOR CREED

Within the employment context,¹⁰ sections 5 and 6 of the *Code* provide both equal treatment without discrimination and freedom from harassment. Those sections provide:

Employment

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because 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.

Harassment in employment

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

Vocational associations

6. Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

E. DISCRIMINATION BASED ON CREED

Discrimination against creed has a lengthy history in Canada and can take on many forms. Under the Policy, discrimination can happen either directly, indirectly, or subtly. Where negative attitudes and stereotypes are acted upon in a *Code* protected social environment, it is considered discriminatory and in

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ A discussion concerning the protections against creed-based discrimination in the areas of services, accommodations (i.e. housing), and contracts is beyond the scope of this article.

contravention of the *Code*. For example, in a recent case of the OHRT, it was held that an employer who terminated two teenagers for failing to show up for their shift because of a religious observance was considered discriminatory on the basis of creed.¹¹ The Ontario Human Rights Tribunal held that the employer failed to meet its duty to accommodate the teenagers after they made several attempts to inform the employer that they would be unable to attend work due to their religious obligations.¹²

The collective effect of the various forms of discrimination can be very detrimental to those who experience it. Discrimination based on creed is not always direct and is often difficult to detect, according to the Policy.¹³ As such, discrimination is not required to be intentional, and language or comments do not have to be present in interactions between parties in order for discrimination to occur.¹⁴

1. Harassment based on Creed

Under the *Code*, harassment based on creed is defined as “engaging in a course of vexatious [i.e. annoying or distressing] comment or conduct that is known or ought reasonably to be known to be unwelcoming” and is prohibited.¹⁵ Therefore, harassment can involve the following:

- derogatory language toward individuals or communities affiliated by creed,
- insults, comments that ridicule, humiliate or demean people because of their creed identity or how they express it,
- comments or conduct relating to a perception that a person is not conforming with, or poses a threat to, “Canadian way of life”,
- making negative comments about a person’s commitment to their faith or adherence to their beliefs,
- jokes related to a person’s creed, including those circulated in writing, by email or social media
- Spreading rumours about a person’s creed including on the Internet,
- intrusive comments, questions or insults about a person’s creed or other creed-related practices, dress and personal appearance, or
- threats, unwelcome touching, violence and physical assault.¹⁶

¹¹ *HT v ES Holdings Inc. o/a Country Herbs*, 2015 HTRO 1067, online:< <http://canlii.ca/t/gkpxs>> discussed in greater detail in [Charity & NFP Law Bulletin No. 371](#).

¹² *HT v ES Holdings Inc. o/a Country Herbs*, 2015 HTRO 1067, online:< <http://canlii.ca/t/gkpxs>>.

¹³ Ontario, Ontario Human Rights Commission, *Policy on preventing discrimination based on creed: Establishing discrimination based on creed*, online: <<http://www.ohrc.on.ca/en/policy-preventing-discrimination-based-creed/6-establishing-discrimination-based-creed>>.

¹⁴ *Ibid*.

¹⁵ *Murchie v. JB's Mongolian Grill*, 2006 HRTO 33 (CanLII), <http://canlii.ca/t/1r792> at para 161.

¹⁶ Ontario, Ontario Human Rights Commission, *Policy on preventing discrimination based on creed: Forms of creed discrimination*, online: <http://www.ohrc.on.ca/en/policy-preventing-discrimination-based-creed/7-forms-creed-discrimination#_edn130>.

2. The Right to be Free from Imposing Creed Messages and Observances

The Policy states that the right to be free from discrimination on the basis of creed includes freedom from religious or creed-based pressure or coercion. Consequently, the Policy states that “No person or organization can force or pressure another to accept or comply with creed beliefs or take part in creed practices against their choosing.”¹⁷

3. Intersecting Grounds for Creed Based Discrimination

The Policy also notes a number of intersecting grounds of discrimination that may be experienced by groups or individuals based on creed. For example, the Policy states that female members of a creed group often bear the brunt of the discriminatory behaviour, either because of visibility or actual or perceived vulnerability.¹⁸ Other intersectional areas include race and creed, and disability and creed where practitioners of their particular creed experience discrimination on ethnic, ancestral, colour or place of origin basis, or where workplace rules, standards, or duties affect an individual’s ability to fulfill a practice of their creed.

4. Other Creed Based Grounds

The Policy also notes other creed based grounds for discrimination, such as profiling based on creed and associated race-related grounds; association with someone who practices or belongs to a creed community; constructive discrimination; systemic discrimination; and reprisal. On all of these grounds, the *Code* provides individuals with protection against creed-based discrimination.

F. DUTY TO ACCOMMODATE

Under the *Code*, organizations have a duty to accommodate the needs of individuals to conduct their creed-based practices. The purpose of accommodation is to help everyone through equal opportunity, access, and benefits. What is important for employers to remember is that only one discriminatory factor needs to be present in order for a claim of discrimination to proceed. The reason for this is because of the difficulty of establishing discrimination “by way of direct evidence.”¹⁹ Furthermore, organizations have a duty to accommodate both obligatory and voluntary creed expressions and practices. According to the Supreme Court of Canada (the “SCC”), it is the “religious or spiritual essence of an action, not

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Smith v. Ontario (Human Rights Commission)*, 2005 CanLII 2811 (ON SCDC), <http://canlii.ca/t/1jr6h> at para 9.

any mandatory or perceived-as-mandatory nature of its observance, that attracts protection.”²⁰ Therefore, the Policy States that “organizations should accept in good faith that a person practices a creed, unless there is significant reason to believe otherwise.”²¹ In light of the SCC decision, courts and tribunals are generally hesitant to rule out beliefs as creeds where creed-based human rights claims have been claimed.

5. Procedural and Substantive Duties

Organizations are held to a duty to accommodate to the point of undue hardship, and the duty of an organization to accommodate creed-based groups or individuals has both a procedural and substantive element. As with any accommodation, an organization has a procedural duty to take steps to consider and assess the need and failure to properly consider an accommodation may be considered a procedural failure with the duty to accommodate. The substantive duty of an organization considers the reasonableness of the accommodation itself. If the accommodation is not provided, the substantive duty requires that the organization provide reasons that include the proof of undue hardship that would arise if the accommodation was made.

6. Exceptions for Special Interest Organizations and Special Employment

Under sections 14, 18, and 24 of the *Code* there are certain exceptions that qualifying organizations may claim for behaviour that would otherwise be considered discriminatory under the *Code*. These exceptions include protection for special programs that assist the historically disadvantaged; religious, charitable or other organizations that limit membership based on a particular religion or creed; and, special employment for religious, philanthropic, educational, or social organizations that serve the interests of people identified on particular *Code* grounds. However, under these exceptions the organization claiming the exemption must show that it meets all of the criteria of the relevant section.

G. CONCLUSION

The ORHC Policy on creed-based discrimination provides organizations and individuals in Ontario with useful guidance pertaining to their respective legal rights and responsibilities. Since the Policy directs organizations to accept in good faith that a person practices a creed (unless there is a significant reason

²⁰ *Syndicat Northcrest v. Amselem*, [2004] 2 SCR 551, 2004 SCC 47 (CanLII), <http://canlii.ca/t/1hddh> at para 47.

²¹ *Supra* note 5.

to believe otherwise), when accommodation requests arise, organizations should take those requests seriously. Therefore, charities and not-for-profits facing creed-based accommodation requests should seek legal counsel to ensure that they are satisfying either the necessary elements of their exemption, or their duty to accommodate.