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# CANADIAN MENTAL HEALTH ASSOCIATION - PEEL

**Brampton – March 19, 2007**

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## Diversity & Human Resources

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**By U. Shen Goh, LL.B., LL.M.**

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**INTRODUCTION**

- The Ontario Human Rights Commission (“OHRC”) is in charge of implementing the Ontario Human Rights Code (the “Code”)
- The OHRC and the Code state that it is public policy to recognize the inherent dignity and worth of every person, and to provide for equal rights and opportunities without discrimination
- To facilitate this public policy, the OHRC issues guidelines and a sample application form to help employers avoid breaching the Code – see [www.ohrc.on.ca](http://www.ohrc.on.ca)

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**PROHIBITED DISCRIMINATION – THE CODE**

- Section 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, age, record of offences, marital status, same-sex partnership status, family status or disability

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- Section 23(1) 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

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- Section 23(2) 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

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- Section 23(3) nothing in subsection (2) precludes the asking of questions at a personal employment interview concerning a prohibited ground of discrimination where discrimination of such ground is permitted under this Act

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**PROHIBITED DISCRIMINATION – EXAMPLES**

The following questions are prohibited during the advertising, application and interviewing stage, as it is presumed that the employer is asking them in order to filter out applicants. However, some of the following questions are permitted after the employer has made an offer of employment, as it will be clear then that the employer is asking them in order to accommodate the hired applicant

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- Race, Ancestry, Place of Origin, Colour, Ethnic Origin, Citizenship – questions re physical characteristics or requests for pictures
- Creed – questions re religious affiliations or holidays/customs observed
- Sex – questions re title of Mr., Mrs., Ms., Miss
- Sexual Orientation – questions re insurance beneficiary or the applicant's relationship with persons to be notified in case of emergency

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- Age (18 or more) – questions re date of birth or requests for driver's license
- Record of Offences (convicted for which a pardon not granted) – questions re whether applicant has ever been arrested
- Marital Status, Family Status – questions re spousal transfer or dependents
- Disability – questions re handicaps/limitations or requests for medical/physical examinations

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# PERMITTED DISCRIMINATION – THE CODE

The Code provides several exceptions to the rule against discrimination, and below are a few examples of those exceptions

- Section 14(1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I

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- Section 16(1) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law

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- Section 24(1)(a) The right under section 5 to equal treatment with respect to employment is not infringed where, a religious, philanthropic, education, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status, same-sex partnership status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is reasonable and *bona fide* qualification because of the nature of the employment

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- Section 24(1)(b) The right under section 5 to equal treatment with respect to employment is not infringed where, the discrimination in employment is for reasons of age, sex, record of offences, marital status or same-sex partnership status if the age, sex, record of offences, marital status or same-sex partnership status of the applicant is a reasonable and bona fide qualification because of the nature of the employment

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- Section 24(1)(c) The right under Section 5 to equal treatment with respect to employment is not infringed where, an individual person refuses to employ another for reasons of any prohibited ground of discrimination in section 5, where the primary duty of the employment is attending to the medical or person needs of the person or of an ill child or an aged, infirm or ill spouse, same-sex partner or relative of the person

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#### PERMITTED DISCRIMINATION - EXAMPLES

The following are examples of permitted discrimination. However, these exceptions are complex and need to be applied on a case-by-case basis. Therefore, seek legal advice before relying upon these examples

- Special Programs (section 14) – affirmative action programs, such as a job program for persons under 25 to combat youth employment
- Canadian Citizenship (section 16(2) and (3)) – federal immigration regulations on who can work in Canada

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- **Special Interest Organization (section 24(1)(a))** – a church when hiring a pastor, but not when hiring a janitor; a women’s shelter when hiring a counselor, but not when hiring an accountant
- **Special Employment (Section 24(1)(b))** – a bartender must be 19 years of age or older; a teacher must have a clear criminal background
- **Private Medical/Personal Attendants (Section 24(1)(c))** – an individual hiring only female care workers for his/her disabled mother

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#### DUTY TO ACCOMMODATE

- Where an employer’s policy/practice would normally be prohibited discrimination, it is not so if the employer can show that the discriminatory policy/practice is a *bona fide* occupational requirement
- A *bona fide* occupational requirement usually requires proving that the applicant/employee cannot be accommodated without undue hardship

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#### EMPLOYEE’S DUTY

Employees have a duty to disclose their disability and to co-operate with their employers in accommodating the disability. It is the responsibility of employees with disabilities to:

- Inform their employers of their need (ask for it in writing!)
- Co-operate in obtaining necessary information, including medical and other expert opinions
- Participate in discussions about solutions
- Work with the employer and union on an ongoing basis to manage the accommodation process

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#### EMPLOYER'S DUTY

Employers have a duty to accommodate up to the point of undue hardship. Employers are required to:

- Accept request for accommodation in good faith
- Request only information that is required to make the accommodation
- Obtain expert advice or opinion where necessary
- Take an active role in ensuring that possible solutions are examined

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- Maintain the confidentiality of person with disabilities
- Deal with accommodation requests in a timely way (do it in writing!)
- Bear the cost of any required medical information or documentation

Only three factors can be considered in assessing undue hardship:

- Cost
- Outside sources of funding
- Health and safety

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#### CONCLUSION

It is obvious that the concepts of human rights and discrimination, as well as accommodation and undue hardship, are complicated.

Employers can protect themselves by:

- Reducing likelihood of mistakes by pre-establishing advertising guidelines, application forms and interview questions
- Discouraging allegations of discrimination by pre-establishing accommodation policies and undue hardship criteria

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