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**CARTERS WEBINAR SERIES  
– SPRING 2016  
May 18, 2016**

**HUMAN RIGHTS CHALLENGES IN  
THE WORKPLACE**

**By Barry W. Kwasniewski, B.B.A., L.L.B**

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## Human Rights Challenges in the Workplace

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**Barry Kwasniewski, B.B.A., LL.B.** – Mr. Kwasniewski joined Carters' Ottawa office in 2008, becoming a partner in 2014, to practice in the areas of employment law, charity related litigation, and risk management. After practicing for many years as a litigation lawyer in Ottawa, Barry's focus is now on providing advice to charities and not-for-profits with respect to their employment and legal risk management issues. Barry has developed an expertise in insurance law, and provides legal opinions and advice pertaining to insurance coverage matters to charities and not-for-profits.

## OVERVIEW

- Overview of Ontario Human Rights Code
- Canadian Charter of Rights and Freedoms, and Canadian Human Rights Act
- Human Rights System in Ontario
- Discrimination in Employment
- Duty to Accommodate
- Updates to the Ontario Human Rights Commission Policy on Creed
- Creed and Workplace Discrimination

## A. OVERVIEW OF ONTARIO HUMAN RIGHTS CODE

- Ontario Human Rights Code (“Code”) applies to most Ontario employers
  - This includes charities and not-for-profit organizations
- Human rights laws have a quasi-constitutional nature
- Human rights laws are remedial in nature
- Human rights legislation is intended to:
  - “give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law.” (CJ. Dickson)



## B. CANADIAN CHARTER OF RIGHTS AND FREEDOMS, AND CANADIAN HUMAN RIGHTS ACT

- Charter of 1982 is part of Canada's Constitution
- Applies to governments and protects Canadians from infringements of laws, policies or actions by governments, including authorities such as the police
- Canadian Human Rights Act, passed in 1977, protects Canadians from discrimination when they are employed by or receive services from the federal government, or private companies that are regulated by the federal government (e.g. Banks, telecommunications, interprovincial transport, etc.)
- First Ontario comprehensive human rights statute was enacted in 1962 Code, and other Canadian human rights laws, stem from 1948 Universal Declaration of Human Rights.
- International community came together to make sure that the horrors of WWII never happened again
- Provincial and federal human rights laws share many similarities, and are amended as generally accepted societal attitudes change over time

## C. HUMAN RIGHTS SYSTEM IN ONTARIO

- Ontario Human Rights Commission ("OHRC")
- OHRC has various functions, including developing public policy, conducting public inquiries, initiating or intervening in Ontario Human Rights Tribunal proceedings, public education
- Ontario Human Rights Tribunal (OHRT) - Hears and determines applications by complainants. Has wide remedial powers, not limited to the award of monetary damages
- Ontario Legal Rights Support Centre- Provides no charge legal advice and representation to complainants (but not respondents)
- OHRT does not award legal costs to successful party

## D. DISCRIMINATION IN EMPLOYMENT

### 1. Code Protections for Employees



- Majority of complaints to the tribunal are employment related
  - 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
  - 5(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

- Further prohibitions
  - 7(2) Every person who is an employee has a **right to freedom from harassment** in the workplace because of sex, sexual orientation, gender identity or gender expression by his or her employer or agent of the employer or by another employee
  - 7(3) Every person has a right to be free from,
    - (a) **a sexual solicitation or advance** made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
    - (b) **a reprisal or a threat of reprisal** for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person

## 2. Protections Applicable to Employee Hiring

- 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
- 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
- 23(3) 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

- 23(4) 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
- Employers may inadvertently breach the Code for hiring decisions based on bias or stereotypes which may lead to eliminating candidates on grounds protected by the Code



## 4. Protections for Certain Employers

- Certain employers are protected by limits to the applicability of s 5 equal treatment
- s24(1)(a) reads:
  - “The right under section 5 to equal treatment with respect to employment is not infringed where, a religious, philanthropic, educational, 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 or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and bona fide qualification because of the nature of the employment;”
- Certain special service organizations may be covered under s24(1)(a) if they employ or or give preference only to people with certain characteristics or qualifications if the organization serves mostly their particular interests



## 5. Who is Covered Under s 24(1)(a)?

1. Religious Organizations
  - That follow a particular system of faith and worship
2. Philanthropic Organizations
  - Which perform acts of benevolence
3. Educational Organizations
  - Schools, colleges, and other institutions offering instruction of a religious, moral, vocational, intellectual, or physical nature
4. Fraternal Organizations
  - formed for mutual aid or benefit on a not-for-profit basis
5. Social Organizations
  - Providing social or cultural benefits like a cultural club



## 6. Reasonable and Bona Fide Requirement

- SCC set out a three step test for justifying an otherwise discriminatory standard, factor, requirement, or rule
- An employer must establish that the rule, standard, requirement or factor was:
  1. Adopted for a purpose or goal that is rationally connected to performing the job
  2. Adopted in good faith, in the belief that it was necessary to fulfil legitimate work related purposes
  3. Reasonably necessary to accomplish the work related to the purpose by showing that it is impossible to accommodate individual employees serving the characteristics of the claimant without causing undue hardship on the employer

## 7. What an Employer Must Review

- An employer must;
  - Review the particular position that is only offered to individuals with certain characteristics or qualifications that may be seen as discriminatory
  - Review the essential duties of that position to ensure that it meets the reasonable bona fide requirements
  - Review whether hiring a person who does not have those characteristics or qualifications would truly impose undue hardship on the organization if that person were hired
  - Document the reasons underlying the required qualification or standard in both the job description and employment contract

- An employer should also make sure that the corporate documents and policies of the organization are clear, up to date, and reflect the core values and corporate objects
  - If your organization is ever challenged, your corporate documents and policies can assist you if they accurately reflect these values and objects
  - Consider your policies - respect in the workplace, accommodating special needs, dispute resolution, responding to employee complaints
  - Minimize the risk of litigation
  - Manage issues proactively and consistently
  - Foster good employee relations



## E. DUTY TO ACCOMMODATE

- The Code requires an effort, short of undue hardship, to accommodate the needs of persons who are protected by the Code
- It is considered unlawful to exclude someone from the workplace because their Code protected needs are different from the majority
- The principle of accommodation applies to all grounds of the Code, but most often relate to
  1. Disability
  2. Age
  3. Creed
  4. Sex
  5. Family status



The SCC says:

“Courts and tribunals should be sensitive to the various ways in which individual capabilities may be accommodated.... The skills, capabilities and potential contributions of the individual...must be respected as much as possible. Employers, courts and tribunals should be innovative ... when considering how this may best be done in particular circumstances.” - *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)*, 1999 3 SCR 3 [Meiorin]



## 1. Accommodating persons with disabilities: What is it?

- A very broad definition in s10(1): “disability” means,
  - (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
  - (b) a condition of mental impairment or a developmental disability,
  - (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
  - (d) a mental disorder, or
  - (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*; (“handicap”)

- Not every minor, trifling, and transitory illness is considered a disability under the Code
- For example a case of the flu does not give rise to Code protections of an employee (*Burgess v College of Massage Therapists of Ontario*)
- However the Ontario Human Rights Commission has noted that even “minor illnesses or infirmities can be disabilities, if a person can show that he or she was treated unfairly because of the perception of a disability.”
- Mental and psychological problems, such as PTSD, anxiety, and drug and alcohol addictions recognized as “disabilities”

## 2. Workplace Accommodation Requests

- Employers may not know how to respond to an accommodation request
- The accommodation process may be complex and ongoing
- However it is the employer that has the main responsibility to properly respond to an employee request for accommodation
- It is also the employer who bears the legal liability when no reasonable accommodation plan is offered in response to a request
- There is no set formula for workplace accommodation since each person’s needs are unique and must be considered afresh when a request is made



### 3. Accommodation: Duties of Employer and Employee

#### A. Duties of Employees\*:

- Request accommodation
- Explain why it is required
- Make his/her needs known to the best of his/her ability, preferably in writing
- Answer questions or provide information about relevant restrictions or limitations, including information from health care professionals, where appropriate and as needed

\*Source: *Human Rights at Work* (Ontario Human Rights Commission publication)

- Take part in discussion on possible accommodation solutions
- Co-operate with any experts whose assistance is required
- Meet agreed-upon performance and job standards
- Work with the employer on an on-going basis to manage the accommodation process
- Discuss his or her accommodation needs only with persons who need to know
  - This may include the supervisor, a union representative or human rights staff



## B. Duties of an Employer\*:

- Accept the employee's request for accommodation in good faith, unless there are legitimate reasons for acting otherwise
- Get expert opinions or advice where needed
- Take an active role in making sure that alternative approaches and possible accommodation solutions are investigated, and research various forms or possible accommodation and alternative solutions as part of the duty to accommodate
- Keep a record of the accommodation request and action taken

\*Source: *Human Rights at Work* (Ontario Human Rights Commission publication)

- Maintain confidentiality
- Limit requests for information to those reasonably related to the nature of the limitation or restriction, to be able to respond to the accommodation request
- Grant accommodation requests in a timely way, to the point of undue hardship, even when the request for accommodation does not use any specific formal language
- Pay cost of any required medical information or documentation. For example, employers should pay for doctors' notes and letters setting out accommodation needs
- Where accommodation would cause undue hardship, explain this clearly to the employee and be prepared to show why this is the case



- C. Reasonable accommodation may include one or more of the following
1. A leave of absence for treatment and/or recovery
  2. Temporary modification of performance standards or productivity targets
  3. Reassignment to open positions
  4. Retraining for alternative positions
  5. Temporary alternative work
  6. Permanent alternative work
  7. A return to work to the previous position

\* Important note: People who return to work after an absence related to a ground in the code generally have the right to return to their jobs (pre-disability jobs)

## 1. Undue Hardship

- There are three factors an employer must prove causes undue hardship upon them to provide the accommodation:
  1. Excessive financial cost which employers must show are:
    - a) Quantifiable
    - b) Shown to be related to the accommodation
    - c) So substantial that they would alter the essential nature of the enterprise, or so significant that it would substantially affect its viability
  2. Outside sources of funding to defray those costs,
    - a) Before denying the accommodation for cost reasons the employer will need to consider outside sources of funding to alleviate these costs

### 3. Health and safety issues

- a) Health and safety requirements may be set by law, regulation, or could be set by the company itself or together with other companies in the same or similar kind of business
- If a company wants to deny a request for accommodation on the basis of health and safety concerns, the employer must be able to show that it has properly evaluated the risks and has considered other accommodations to reduce that risk
- Tribunal will not accept evidence based on employer speculation
- Be very careful in taking any action (e.g. Termination) of employee who claims disability. Employer may face “reprisal” claim under s. 8 of the Code. Also subject to prosecution under s. 46.2(1) and fine of up to \$25,000



### F. UPDATES ON THE ONTARIO HUMAN RIGHTS COMMISSION POLICY ON CREED

- In December of 2015, the OHRC updated its policy on Creed titled *Policy on preventing discrimination based on creed* which replaced an earlier version. The Policy is 173 pages, and the full text is available at <http://www.ohrc.on.ca/en/policy-preventing-discrimination-based-creed>
- Under the Code creed is listed as a ground for protection against discrimination, however it is not defined, and has been the subject of interpretation by the courts, HRTO decisions, and the former policy.
- Due to the evolutionary nature of belief systems, the definition of Creed has continually expanded
- As a result, the OHRC asserts that interpretations of the Policy should be a purposive and liberal interpretation in order to ensure continued Code protections on the basis of creed



## 2. Creed Based Discrimination

### a) Exclusion

Discrimination based on creed may occur if a person is excluded from employment opportunities or even terminated from their employment on the basis of creed. An example of such discrimination will be discussed later in this presentation

### b) Harassment

Under the Code harassment based on creed is defined as “engaging in vexatious [i.e. annoying or distressing] comment or conduct that is known or ought to be known to be unwelcoming.”

Activities considered harassing under the Code include:

- 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

c) Imposing Creed Messages and Observances

The Policy also 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.” As a result, a freedom from discrimination under the Policy also includes a right to freedom from religious or creed-based pressure or coercion

d) Other Creed Based Grounds of Discrimination

Other prohibited creed based grounds of discrimination in the Policy include:

- profiling based on creed and associated race-related grounds,
- association with someone who practices or belongs to a creed community,
- constructive discrimination,
- systematic discrimination, and
- reprisal

## G. CREED AND WORKPLACE DISCRIMINATION

### *HT v ES Holdings o/a Country Herbs, 2015 HRTO 1067*

Facts:

- Two teens, aged 14 & 16, complained of discrimination alleging they were fired for observing a Mennonite religious holiday
- About three weeks before the religious holiday, the two teenage employees informed their employer that they would not be able to work for that day
- The employer was reminded again one week prior to the holiday



- A number of other employees were also Christian Mennonites who the employer allowed the day off, but required them to work as of midnight to make up the lost hours
- The teenagers did not work at midnight because of transportation and safety concerns that they and their parents had
- They were told by the employer that if they did not show up for work they should not bother coming to work anymore, effectively terminating their employment
- The teenagers commenced an application for unlawful discrimination and were successful

### Tribunal:

- The Tribunal held that Country Herbs had a policy that required their employees to work on a religious holiday and that if failed to engage in any form of serious discussion about how it might accommodate their request not to work that day
- The only accommodation offered was to start at midnight, which given the young age of the employees was unreasonable
- The company offered no evidence to the Tribunal of any undue hardship it would incur as a result of the accommodation request

### Decision:

- Country Herbs was ordered to pay the teens a total of **\$26,117** in compensation for lost wages, and injury to dignity, feelings, and self-respect
- The owners of Country Herbs were also ordered to take the Ontario Human Rights Commission's online human rights training course and provide the teenagers with written confirmation of its completion

## CONCLUSION

- Human rights in the workplace is constantly developing, and for employers, can be challenging in many respects
- Now matter how small or large the organization, human rights issues will arise
- Employers need to consider the “human rights perspective” in decisions affecting the entire employment relationship
- Educate yourselves on basic human rights in the workplace principles
- Know how to respond and deal with human rights issues should they arise

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### **The ABC's of GST/HST for Charities & NPOs**

Wednesday, June 8th - 1:00 - 2:00 pm ET

*By Linsey E.C. Rains, B.A., J.D.*

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