*LW1210 - Labour and Employment Law*

With Paul Tilley

# UNIT 1 - Part 2 of 3 – CHAPTER 2 HUMAN RIGHTS ISSUES IN HIRING

Basic human rights are guaranteed in Canada. The Canadian Charter of Rights and Freedoms of 1982 is part of Canada’s Constitution and it protects every Canadian’s right to be treated equally under the law. The Charter guarantees broad equality rights and other fundamental rights such as the freedom of expression, freedom of assembly and freedom of religion. It applies to governments, but not necessarily to organizations, businesses or people.

The Canadian Human Rights Act of 1977 is designed to protect people in Canada from discrimination when they are employed by or receive services from the federal government, First Nations governments or private companies that are regulated by the federal government (eg: banks, trucking companies, broadcasters and telecommunications companies). Provincial and territorial human rights laws share many similarities with the Canadian Human Rights Act and apply many of the same principles. They protect people from discrimination in areas of provincial and territorial jurisdiction, such as restaurants, stores, schools, housing and most workplaces.

People can turn to the Act that applies to their jurisdiction to protect themselves against harassment or discrimination that is based on one or more of the grounds of discrimination specified in the Act. For example, if a workplace policy offers benefits to some married couples but not to others, this may be considered discrimination under the Human Rights Act.

In Newfoundland and Labrador a new Human Rights Act was passed in 2010. It enhanced protections that existed previously under the Human Rights Code

The 2010 Act included updates and changes to the pre-existing code in the following areas:

* It provided a clear definition of disability that is consistent with other jurisdictions in Canada
* Established disfigurement as prohibited ground of discrimination
* Prohibited discrimination in the making of a contract
* Removed the age restriction of 19 years for employees to file complaints
* Clarified that discrimination on the basis of pregnancy is prohibited
* Prohibited discrimination on the basis of criminal conviction by an employer when it is unrelated to the employment
* Broadened the definition of marital status
* Provided the Supreme Court of Newfoundland and Labrador, Trial Division with the ability to review the dismissal of complaint(s) by the Executive Director of the Human Rights Commission
* Provided a new appointment process for commissioners and adjudicators.
* People cannot contract out of human rights requirements
* The Code applies to all facets of employment (e.g. from recruitment to terminations)
* The Code places obligations on all parties (employer, employee, union)
* The Code provides civil remedies to employer defaults but not criminal penalties.

What are Human Rights? <http://youtu.be/kziCfRPWRKY>

What is Discrimination? <https://www.youtube.com/watch?v=gr8MMwoUqAs>

What is Duty to Accommodate: <https://www.youtube.com/watch?v=qfSY6EhCQMs>

What is Harassment: <https://www.youtube.com/watch?v=5Hgx_EfAr4U>

How are Human Rights Protected in Canada? <https://www.youtube.com/watch?v=5Hgx_EfAr4U>

How to file a Human Rights Complaint: <https://www.youtube.com/watch?v=LkafXGj4mDg>

The Human Rights Tribunal: <https://www.youtube.com/watch?v=GzGlG949kJQ>

Videos

# The Human Rights Act

**About** [**Federal Human Rights**](http://www.chrc-ccdp.ca/eng) **Legislation**

The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

**About** [**NL Human Rights Legislation**](http://www.justice.gov.nl.ca/hrc/index.html)

The Act applies to the provincial government, all of its departments and agencies, and to private businesses.

A human rights violation under the Act occurs when an individual is discriminated against because of one of the following prohibited grounds of discrimination:

* Race
* colour
* nationality
* ethnic origin
* social origin
* religious creed
* religion
* age
* disability
* disfigurement
* sex
* sexual orientation
* marital status
* family status
* source of income and
* Political opinion.

The Act prohibits discrimination in the following circumstances:

* Employers may not discriminate against employees/potential employees based on criminal convictions that are unrelated to the employment
* when providing goods, services, accommodation, or facilities which are customarily available to the public (for example, refusing to serve an individual at a restaurant because he or she has a physical disability)
* when granting occupancy of a commercial or self-contained dwelling unit (for example, refusing to rent an apartment to an individual because of his or her family status)
* in the area of employment (for example, refusing to hire an individual because of his or her sexual orientation)
* with respect to the attachment of wages (for example, firing someone because their wages were being garnished)
* in publications (for example, posting a job advertisement in the newspaper that asks specifically for male applicants only)
* with respect to contracts offered to the public

The Act also:

* protects equal pay for the same or similar work performed by males and females
* prohibits individuals who are in a position to grant or deny a benefit or advancement to another from engaging in unwelcome sexual solicitation with the person who is seeking or receiving the benefit
* protects individuals who have made complaints under the Act or who have assisted with the complaint process from retaliation
* provides the commission with the power to approve Special Programs that are designed to prevent, reduce or eliminate disadvantages to specific groups of people.
* Some exceptions to these rules are allowed when there is a limitation, specification, exclusion, denial, or preference based on a 'good faith' qualification, or for Special Programs. This means some actions that would normally violate the Act can sometimes be allowed if there is a 'good faith' reason for the violation (for example, males and females may be denied entry into public restrooms intended for the opposite sex)

# Discrimination one Job Candidate from Another

In light of the provision of the Human Rights Act, selecting a job candidate that meets the job qualifications has become more challenging. This is particularly true when we have multiple candidates who have similar qualifications, or if we have a candidate with some visible (or invisible) disability – How do we discriminate without contravening the law?

Clearly, the Human Rights Act spells out prohibited grounds of discrimination. The question then is, on what basis can we discriminate?

## Bona fide Occupational Requirements

Regardless of jurisdiction, each of the Human Rights Codes cover unintentional discrimination as well as intentional discrimination. Any rule that has a negative impact based on a prohibited ground is discriminatory unless the employer can show it is a Bona fide Occupational Qualification (BFOQ)

Obviously, in the context of the hiring decision, in order for a potential employer NOT to select an individual that meets all of the qualifications for a job, there has to be a legitimate reason.

That reason must be so real (Bona fide) that even after employer makes accommodation that issue will prevent that person’s ability to be effective in the job. To be considered as Bona fide, the workplace policy must meet the following tests:

* + The reason must be rationally connected to job
  + The reason must be based on the honest belief that it is necessary to satisfy a legitimate business purpose
  + The reason must be reasonably necessary to accomplish that purpose - and impossible to accommodate the individual or group without creating undue hardship.

# Recruitment/Selection - Key Functions

Candidate’s first impression of organization is at the recruitment/selection stage. It is important to ensure "best fit" for company and employee therefore, it is important to be aware of how you could discriminate against an applicant and practice discrimination in the process of recruiting and selecting a new employee.

Food for Thought: The selection process is probably responsible for more discrimination than any other area of employment practices.   
Do you agree? Why?

# Filling the Job Opening

* Is job description current?
* Does it accurately reflect needs of organization?
* What requirements are essential?
* If an essential duty touches on a prohibited ground, review it carefully
* Document every step of the process (paper trail)

# Employment Agencies

* Employer cannot use agency to hire people based on preferences related to discriminatory grounds
* Forbids placing or accepting discriminatory orders

# Advertising

* Forbids qualifications that directly or indirectly discourage people from applying based on a prohibited ground
* May specify BFOQ but consider it carefully if it touches on a prohibited ground (e.g. Canadian experience required)
* Where and how you advertise is important.

# Job Applications

Prohibits questions that directly or indirectly classify by a prohibited ground   
Job Application Forms (Can you compose questions that would be legal on an application form in these areas?)

* SIN (Social Insurance Number)?
* Do you have any health problems that could prevent you from performing the essential job requirements?
* Do you have a Drivers License?
* Height or Weight?
* Maiden name?
* Do you have any criminal convictions?
* Canadian work experience?
* Elementary school attended?
* What languages do you speak?
* Do you suffer from any drug or alcohol addictions requiring accommodation?
* Are you the spouse or child of any of our current employees?
* Specify organizations you are a member of.
* Are you 65 years of age or older?
* Are you available to work shift work as required in this position?
* Are you a Canadian citizen?
* Form of address preferred (Ms. or Mrs.?)
* Do you have any children?
* Are you free to travel or relocate in this position?

# The Job Interview

An employer should aim for a fair process that focuses on each candidate’s ability to perform the essential job duties. A best practice is to have a multi-person panel conduct formal interviews. Ideally, the interview panel should reflect the diversity available in the organization. They should develop set questions in advance, and ask all applicants the same questions. The questions should be based on the job’s essential duties and bona fide requirements. Before interviews start, create an answer guide showing the desired answers and a marking scheme. Then, each member of the interview panel can record and score each candidate’s answers against this guide.

Interviewer(s) must:

Understand the job to be filled and human rights requirements   
use a standard set of questions. Be sure to document interviews carefully.

**Disability**- special services organization and BFOQ ; employer must accommodate for interview or testing if applicant raises disability during interview, or disability is obvious, ask about accommodations required. Otherwise, job accommodation issues should be discussed after conditional offer made.

# Conditional Offers of Employment

* A conditional offer is where the position offered but not until certain conditions have been fulfilled, no employment relationship exists.  E.g. Requests for SIN; drivers license; medical examinations; confirmation of employee credentials or education transcript health information for pension, insurance purposes - should be left to conditional offer stage.

In Newfoundland and Labrador

[Guidelines Regarding Employment of Persons with Criminal Convictions](http://www.justice.gov.nl.ca/hrc/publications/criminal_conviction_and_employment.pdf)

# Pre-Employment Testing

* Medical testing must be left to a conditional offer and must be a BFOQ (genuinely job related)- still obligated to accommodate
* Must perform same test on every candidate (e.g. not just on older applicants)
* Must maintain confidentiality of test results (keep results out of HR files)