

New Brunswick Human Rights Commission

Guideline on Political Belief or Activity Adopted on December 9, 2004

Please Note

This policy statement embodies the New Brunswick Human Rights Commission's interpretation of the provisions of the New Brunswick *Human Rights Code* relating to discrimination on the basis of political belief or activity. It is subject to decisions by Boards of Inquiry and the courts, and should be read in conjunction with those decisions and with the specific language of the *Code*. If there is any conflict between these guidelines and the *Code*, the *Code* prevails. Any questions regarding this policy should be directed to the Commission's staff; additionally, this policy is not a substitute for legal advice.

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1.0 INTRODUCTION

The *New Brunswick Human Rights Code* (also called the *Human Rights Act*) states that all persons are equal in dignity and human rights. According to sections 11 and 12 of the *Code*, the role of the Human Rights Commission is to enforce the *Code* and the principles underlying it. In order to fulfill this objective, the Commission produces guidelines that reflect its interpretation of the *Code*.

This guideline sets out the Commission's position on discrimination based on political belief or activity.

Under the *Code*, employers, owners and service providers are prohibited from discriminating on the basis of political belief or activity. This applies to any aspect of employment, as well as to housing, public services and membership in labour unions and professional associations.

2.0 INTERPRETATION PRINCIPLES

The Human Rights Commission will give this ground a broad and purposive interpretation consistent with obligations under international law, consistent also with the freedom of expression rights guaranteed under section 2 of the *Canadian Charter of Rights and Freedoms*, and in keeping with the approach taken by tribunals in other Canadian jurisdictions where this kind of discrimination is expressly prohibited.

Courts have recognized that human rights statutes have a quasi-constitutional nature and that they take precedence over every other statute in case of conflict.

However, the Commission must interpret the *Code* in light of the *Charter* and in particular in keeping with court decisions under sections 2 and 15 of the *Charter*. Courts have held that political belief is a ground analogous to those listed in section 15, that to hold a political belief is a fundamental human right that is recognized in the *Charter* and in international human rights law, and that it is a right that is connected to the rights in section 2 of the *Charter* (freedom of expression, thought, belief, assembly and association).¹

The Commission is also guided by international human rights case law and the treaty obligations agreed to by New Brunswick as a result of international human rights treaties that have been ratified by Canada. Article 26 of the *International Covenant on Civil and Political Rights*² which Canada ratified in 1976, recognizes that ratifying states must guarantee protection against discrimination based on political opinion. *The Universal Declaration of Human Rights*, adopted by the UN General Assembly in 1948, also states, in article 2, that everyone is entitled to all the rights and freedoms set forth in the *Declaration* without discrimination of any kind, including discrimination based on political or other opinion.

Please note that the New Brunswick *Human Rights Code* does not apply to federally regulated activities, such as:

- inter-provincial and international services (such as railways; highway transport; telephone, telegraph and cable systems; pipelines; canals; ferries, tunnels and bridges; shipping and shipping services);
- radio and television broadcasting, including cablevision;
- air transport, aircraft operations and aerodromes;
- banks;
- protection and preservation of fisheries as a natural resource;

¹ *Condon v. Prince Edward Island* (2002), 43 C.H.R.R. D/433 see also *Osborne v. Canada* (1991) 2 SCR 69

² Article 26— All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

- grain elevators; flour and seed mills, feed warehouses and grain-seed cleaning plants;
- uranium mining and processing.

3.0 DISCRIMINATION ON THE BASIS OF POLITICAL BELIEF OR ACTIVITY

Discrimination is differential treatment of, or failure to accommodate, an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons as set out the *Code*, rather than on the basis of personal merit.

"Political belief or activity" includes but is not limited to:

- affiliation with a political party³;
- adhering to a specific ideology⁴;
- being a member of an organized lobby or association engaging in public advocacy⁵;
- promoting the establishment of, or working for, a professional, business or trade association;
- participating in or being affiliated with a political protest or movement⁶;
- running for office⁷;
- working for a political candidate.

3.1.0 EMPLOYMENT

Section 3 of the *Code* prohibits discrimination in all aspects and types of employment.. For example, it applies to casual, part-time and term employment and to appointments to boards of directors and public offices. It also applies to:

- job ads, applications, interviews;
- selection and hiring;
- termination;
- terms and conditions of employment and
- membership in labour unions and professional associations.

³ *Condon, supra*, ;

⁴ *Jamieson v. Victoria Native Friendship Centre* (1994), 22 C.H.R.R. D/250 (B.C.C.H.R.)

⁵ *Comité de Citoyens Espaces Verts LaSalle Inc. v. Cité de LaSalle* (1981), 3 C.H.R.R. D/659 (C.P. Qué.)

⁶ *Jamieson, supra*; *Cité de LaSalle, supra*.

⁷ *Morin c. Manoirs, Comm. scolaire* (1994), 26 C.H.R.R. D/498 (Trib. Qué.)

3.1.1 PRE-EMPLOYMENT

The *Code* prohibits discrimination against an employee or potential employee based on political belief or activity. This can include:

- asking a potential employee about their political beliefs or activity in an application or during an interview;
- a job ad that requires job applicants to have, or excludes applicants on the basis of, specific political beliefs or affiliation; or
- asking an applicant's references about their political affiliation or activity.

3.1.2 DURING EMPLOYMENT

The *Code's* prohibition also applies to discriminatory conduct that can arise during the course of the employment relationship, including:

- refusing an employee promotion or advancement opportunities due to political belief or activity;
- disciplinary action or termination resulting from political belief or activity;
- harassment of an individual employee due to their political belief or activity; or
- abusing one's authority as an employer or union leader to coerce employees to endorse political beliefs or engage in political activities.

3.2 SERVICE SECTOR

Section 5 of the *Human Rights Code* prohibits discrimination based on one's political belief or activity in respect of accommodation, services or facilities available to the public. The courts have interpreted this provision broadly to apply to all services offered to the public, including:

- hospitality services and accommodations;
- private and public educational services;
- private and public health care services;
- insurance policies;
- nursing homes and residential care facilities and
- transportation and public transit services.

The Commission interprets the provision as applying also to the public tendering process for goods and services.

Service providers are required not to deny services or discriminate against clients or prospective clients in the provision of services based on their political beliefs or activities. This can include discrimination in the manner in which services are offered or denied, advertising, or harassment of clients based on their political beliefs or activities.

3.3 OTHER

The prohibition of discrimination based on political belief or activity also applies to all other sectors of activity regulated by the *Code*. This includes:

- the housing sector;
- publicity and
- professional, business or trade associations.

For example, under sections 4, 6 and 7 respectively, the Commission has jurisdiction to inquire into allegations of discrimination:

- concerning a refusal to rent based on the prospective tenant's political beliefs or activity;
- that a given publication discriminates against an individual based on his or her political beliefs; or
- that a professional, business or trade association is refusing membership, excluding or harassing a given member based on his or her political beliefs or activity.

4.0 DEFENCES

Employers, service providers and others subject to the *Code* must avoid policies that have a discriminatory effect related to political beliefs or activity. They must accommodate political beliefs and activity, provided they can do so without incurring undue hardship or sacrificing their objectives.

Generally, accommodation in this context requires an employer or service provider to refrain from taking action against or reprimanding an employee for holding certain views or engaging in political activity outside of work. They must also tolerate the free expression of political beliefs within their workplaces.

However the *Code* does not, generally, prevent employers or service providers from

- establishing and enforcing *bona fide* employment qualifications where the employer is itself engaged in lobbying and public advocacy⁸;
- managing performance and setting expectations with respect to workplace productivity;
- addressing work disruptions arising from protests or political activity or taking reasonable measures to prevent such⁹; or

⁸ *Vancouver Rape Relief Society v. Nixon* (2003), 48 C.H.R.R. D/123, 2003 BCSC 1936

- establishing or enforcing *bona fide* conflict of interest policies that determine whether certain employees may be restricted in the expression of their political beliefs or the exercise of their political activity¹⁰.

The Commission will investigate each complaint of political belief or activity discrimination on its merits and meritorious cases that cannot be settled will be referred on to a public Board of Inquiry.

While the standard defence allowed by the *Code*, that of a *bona fide* or good faith requirement, is a flexible one, it has been fairly well defined by the Supreme Court of Canada in recent decisions. In order to be *bona fide*, the organization's standards must pass the "Meiorin Test." This stringent three part test requires that the standard be:

1. Adopted for a purpose or goal that is rationally connected to the function being performed;
2. Adopted in good faith and in the belief that it was necessary to fulfill that purpose or goal;
3. In fact reasonably necessary to accomplish that purpose or goal, in the sense that the employer, owner or service provider cannot accommodate affected individuals without incurring undue hardship.

For more information, please consult the Human Rights Commission's *Guideline for BFOQ's and BFQ's and the Duty to Accommodate*.

Example

In a recent B.C. tribunal decision, a complainant argued that she was discriminated by the B.C. Electoral Reform Commission when they revoked their offer to hire her as a Communications Officer after it was determined that she had previously been a director of a political party that advocated for electoral reform based on proportional representation. The tribunal held that the complainant had been discriminated on the basis of her political beliefs and activity, but that the employer's actions were justified given the significant importance which had been placed in establishing the Commission in selecting non-partisan officials and directors in order to achieve a transparent and impartial electoral reform process¹¹.

⁹ *Max c. Blanchet* (1996), 27 C.H.R.R. D/428 (Trib.Qué.) ; *Quarrington v. Salt Spring Island Community Services Society* (2003), CHRR Doc. 03-221, 2003 BCHRT 59; concerning harassment of union members see also: *Rondeau c. Syndicat des employé(e)s du Centre de services sociaux du Montréal métropolitain* (N° 1) (1995), 25 C.H.R.R. D/495 (T.D.P.Q.)

¹⁰ *Trevena v. Citizens' Assembly on Electoral Reform* (2004) 49 C.H.R.R. D/47, 2004 BCHRT 24; see also *Osborne*, supra.

¹¹ *Trevena*, supra

8.0 FOR MORE INFORMATION

For further information about the *Code* or this policy, please contact the Commission at 1-888-471-2233 toll-free within New Brunswick, or at 506-453-2301. TTD users can reach the Commission at 506-453-2911. You can also visit the Commission's website at www.gnb.ca/hrc-cdp or e-mail hrc.cdp@gnb.ca.