

Policy on preventing discrimination based on

# Creed



Ontario  
Human Rights Commission  
Commission ontarienne des  
droits de la personne



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Ontario Human Rights Commission

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**Ontario  
Human Rights Commission**  
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## Summary

### Introduction

The rights to be treated equally based on creed, and to freely hold and practice creed beliefs of one's choosing, are fundamental human rights in Ontario, protected by the Ontario *Human Rights Code* (the *Code*) and the *Canadian Charter of Rights and Freedoms*. Also protected is the right to be free from religious or creed-based pressure.

The right to be free from discrimination based on creed reflects core Canadian constitutional values and commitments to a secular, multicultural and democratic society. People who follow a creed, and people who do not, have the right to live in a society that respects pluralism and human rights and the right to follow different creeds.

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“When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of whether they are right.” – Supreme Court of Canada in *Chamberlain v. Surrey School District No. 36* [2002].

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Under the *Code*, creed rights are protected in five areas (called social areas): housing, services, employment, contracts, unions and professional associations. This policy clarifies the nature and scope of rights and responsibilities based on creed in these five areas, and helps individuals and organizations to better identify, address and prevent discrimination based on creed, so that each person – whatever their creed – can take part in, contribute to and feel included in the community and province.

The Commission's *Policy on preventing discrimination based on creed* also recognizes that there are limits on rights based on creed, as there are on all grounds protected under Ontario's *Human Rights Code*. Limits can for example arise if creed rights interfere with the human rights of others.

### What is creed?

The *Code* does not define creed, but the courts and tribunals have often referred to religious beliefs and practices. Creed may also include non-religious belief systems that, like religion, substantially influence a person's identity, worldview and way of life. The following characteristics are relevant when considering if a belief system is a creed under the *Code*. A creed:

- Is sincerely, freely and deeply held
- Is integrally linked to a person's identity, self-definition and fulfilment



- Is a particular and comprehensive, 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
- Has some “nexus” or connection to an organization or community that professes a shared system of belief.

Given the breadth of belief systems that have been found to be a creed under the *Code* – from Raelianism to the “spiritual cultivation practices” of Falun Gong – organizations should generally accept in good faith that a person practices a creed, unless there is significant reason to believe otherwise, considering the above factors.

## Historical context

People experience discrimination based on creed in many different ways. All people may experience creed-based discrimination at some point in their lives, whether or not they personally have a creed. Historically in Ontario, belonging to what was seen as the “wrong creed” could seriously affect people’s standing, treatment and opportunities in society. This was especially the case for Indigenous peoples who were forced into residential schools, which operated in Ontario from 1880 to 1990.

Jewish people were barred from entry to the country, including at times of greatest need fleeing Nazi Germany in WWII, and were routinely denied access to jobs, facilities and services, because of virulent antisemitism. As well, much of the past religious conflict and discrimination in Ontario occurred between members of different Christian denominations, at a time when having no religious creed was socially unacceptable. Some of these legacies continue today.

## Discrimination today

Despite the many legal advances in protections for people against discrimination based on creed since the introduction of the *Code* and *Charter*, the OHRC’s research and consultation revealed that prejudice and discrimination based on creed remain a problem in today’s Ontario society. New and more severe forms of creed-based prejudice, antisemitism and Islamophobia have emerged in recent times, often shaped by international events and transmitted through media.

People’s experiences of discrimination based on creed often intersects with discrimination based on other *Code* grounds, such as race, ethnic origin, citizenship, ancestry, place of origin and sex.

Indigenous peoples in Ontario continue to face significant barriers practicing Ontario’s longest standing religious and spiritual traditions. This has sometimes been due to a lack of understanding of Indigenous Spirituality as a whole way of life, and a corresponding failure

to recognize and accommodate Indigenous Spirituality in its diverse forms and expressions. It has also been shaped by the ongoing impact of the colonial past on the present.

Atheists, agnostics and persons with no creed, as well as members of newer or lesser known creed communities also face various forms of stigma, prejudice and discrimination. New forms of prejudice against religious people in general have also emerged in recent times, as the numbers of people identifying with no religion continues to grow and increasingly shape public culture and morality.

### **Discrimination based on creed and corresponding protections**

To establish *prima facie* discrimination (discrimination on its face) under the *Code*, a person must show:

1. They have a characteristic protected from discrimination under the *Code*
2. They have experienced negative treatment or an adverse impact within a social area protected by the *Code*
3. The protected characteristic was a factor in the negative treatment or adverse impact.

Once a *prima facie* case of discrimination has been established, the burden shifts to the respondent to provide a credible, non-discriminatory explanation or to justify the conduct within the framework of the exemptions available under the *Code* (e.g. *bona fide* requirement defence). If it cannot be justified, discrimination will be found to have occurred.

Creed needs to only be a factor in someone's differential treatment for it to be discrimination under the *Code*.

The *Code* has primacy – or takes precedence – over all other provincial laws in Ontario. Where a law conflicts with the *Code*, the *Code* will prevail, unless the other law says otherwise.

Discrimination based on creed may take many forms. For example, it can happen when someone is:

- Negatively affected by an organizational requirement, rule or standard that prevents them from practicing their creed (without being accommodated)
- Pressured or compelled to do or believe something based on creed
- Harassed or subjected to a poisoned work environment because of negative comments or conduct relating to creed
- Racially profiled because of their creed
- Treated differentially and unfairly in a social area protected by the *Code*, due at least in part for reasons relating to creed.



The *Code* also prohibits discrimination because of creed in situations where:

- A person is targeted and treated unequally because of their perceived creed, absence of a creed, or association with an individual or group with a particular creed (or lack thereof)
- There is no intention to discriminate, but rules, requirements or standards negatively affect persons based on their creed
- People are negatively affected based on their creed due to the operation of a system as a whole (this includes rules and regulations and organizational culture and practices as a whole)
- Neither the person discriminated against nor the person discriminating follows a creed.

While discrimination based on creed can sometimes take very overt and direct forms (for example, involving harassment and even violence), less obvious and more indirect forms of discrimination are more common, often related to the failure to inclusively design or accommodate people based on creed in employment, services or housing.

### **The duty to accommodate creed beliefs and practices**

Section 11 of the *Code* prohibits discrimination that results from requirements, qualifications or factors that may appear neutral but have an adverse effect on people identified by *Code* grounds. This is known as “constructive” or “adverse effect” discrimination. Constructive or adverse effect discrimination violates the *Code* unless the requirement, qualification or factor is reasonable and *bona fide* in the circumstances, and cannot be accommodated short of undue hardship.

Employers, service providers, unions and housing providers have a legal duty to accommodate people’s beliefs and practices to the point of undue hardship where these are

- Adversely affected by a standard, rule or requirement of the organization
- Sincerely (honestly) held
- Connected to a creed.

For creed protections, a person’s creed belief needs only to be sincerely held. The focus is on the person’s sincerely held personal or subjective understanding of their creed. They do not need to show that their belief is an essential or obligatory element of their creed, or that it is recognized by others of the same creed (including religious officials).

Not every adverse impact on a person’s creed may be discrimination under the *Code*. Interference with creed practices or beliefs that are only marginally significant or peripherally connected to a person’s creed may not necessarily receive protection. For example, not being able to take part in volunteer activities at a church or take part in other social activities connected to a religion or creed, due to work-related obligations, have been found to not necessarily violate creed rights under the *Code*.

Determining whether or not a creed right has been engaged can sometimes require sensitive forms of inquiry into a person's creed belief or practice, where this is relevant to assessing accommodation needs. As a general rule, accommodation providers should:

- Take requests for accommodation in good faith (unless there is evidence the request is not genuine)
- Limit requests for information to those reasonably related to establish the existence of rights and duties, assess needs, limitations or restrictions, and make the accommodation
- Make sure that information related to accommodation is kept confidential and shared only with people who need the information to put the accommodation in place.

Asking about a person's sincerity of belief, where there is a legitimate reason to doubt this, should be as limited as possible. It need only establish that an asserted creed belief is "in good faith, neither fictitious nor capricious, and that it is not an artifice" (*Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at para. 52). Organizations may also sometimes need to evaluate objective evidence to decide whether a belief is in fact connected to a creed, or that a requirement, rule or practice actually negatively affects a person based on their creed.

Fulfilling the duty to accommodate requires that the most appropriate accommodation be determined and provided, short of undue hardship. The most appropriate accommodation is the one that most:

- Respects dignity (including autonomy, comfort, and confidentiality)
- Responds to a person's individualized needs
- Allows for integration and full participation.

Inclusive design (design with everyone in mind) that removes barriers up front is a preferred approach to removing barriers after they become apparent, or making "one-off" accommodations. The one-off approach assumes that existing structures are fine or only need slight modifications to make them acceptable. The Supreme Court of Canada has affirmed organizations' obligations to be aware of differences between individuals and groups, including based on creed, and wherever possible to build in concepts of equality into standards, rules or requirements.

The duty to accommodate is about more than providing the most appropriate accommodation in the circumstances (the substantive component). It is also about engaging in a meaningful, good-faith process to assess needs and find appropriate solutions (the procedural component). Failing to carry out either component appropriately may be discriminatory.

Everyone involved in the accommodation process has a duty to cooperate to the best of their ability. While the accommodation provider is ultimately responsible for putting in place solutions and leading the process, persons seeking accommodation must cooperate in the process. In some cases, an organization may have fulfilled its duty to accommodate because the person may not have taken part in the process.



### Specific cases and issues

This policy provides individuals and organizations with specific guidance about rights and responsibilities for accommodating:

- Indigenous spiritual practices
- Creed-based holidays, leaves and ritual observances
- Dress codes and appearance rules and standards
- Displaying religious or creed-based symbols
- Photos and biometrics
- Food restrictions
- Exemptions from activities that adversely affect a person's creed
- Creed issues in recruitment and hiring.

### Limits and defences

Human rights protections for creed do not extend to practices and observances that are hateful or incite hatred or violence against other individuals or groups, or contravene criminal law. The duty to accommodate creed beliefs and practices may also be limited where it:

- Causes undue hardship for an organization, considering factors of cost and of health and safety
- Interferes with the rights of others under the *Code* or *Charter*
- Announces an intention to discriminate in a social area as prohibited under section 13 of the *Code*.

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The OHRC's *Policy on competing rights* provides organizations with a framework for making sure that rights are appropriately balanced when they conflict with one another. The framework follows several key principles including that no right is absolute (all rights may be limited where they interfere with the rights of others), and there is no hierarchy of rights.

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The duty to accommodate people's creed beliefs and practices should not be limited or denied because of such factors as the impact on employee morale, third-party preferences, business inconvenience, or collective agreements or contractual terms. The duty to accommodate also is not negated simply because a person or organization thinks a belief or practice is unreasonable or objectionable, or because an organization operates in the secular public sphere. The Supreme Court of Canada has said that a secular state respects and accommodates religious differences, instead of trying to extinguish them.

Sometimes, an organizational requirement that negatively affects a person based on their creed belief or practice may be a *bona fide* (legitimate) requirement in the circumstances. For example, a high-risk environment subject to poisonous gases may have a legitimate requirement for people to wear safety masks, even if this requires persons to be clean-shaven for the mask to properly seal, which may adversely affect

persons whose creed requires them to grow facial hair. However, organizations are still required to explore alternative options to accommodate people to the point of undue hardship.

The *Code* also provides organizations with certain defences that allow behaviour that would otherwise be discriminatory. For example, such exemptions in the *Code* apply to special programs, special interest organizations (including religious organizations), special employment, solemnization of marriage by religious officials, and separate school rights. An example might be restricting employment in a Sunday school to a teacher of the same faith. Many of these exceptions recognize and protect the associational rights of creed-based groups in certain circumstances to enact or abide by creed-based standards and requirements. Organizations will still need to show that they meet the requirements of the exception.

### **Preventing and responding to discrimination based on creed**

The ultimate responsibility for maintaining an environment free from discrimination and harassment rests with employers, housing providers, service providers and other responsible parties covered by the *Code*. They must make sure they maintain accessible, inclusive, discrimination and harassment-free environments that respect human rights.

Organizations should develop broader strategies to prevent and address discrimination based on creed. A complete strategy should include:

- A barrier prevention, review and removal plan
- Anti-harassment and anti-discrimination policies
- An education and training program that, among other things, increases cultural competence in dealing with creed diversity
- An internal complaints procedure
- An accommodation policy and procedure.

All of society benefits when people of diverse creed backgrounds are encouraged and empowered to take part at all levels. All Ontarians also benefit from a society that respects diversity and pluralism, and affords equal rights, opportunity and dignity to all.

## Part 1: Setting the context

### 1. Introduction

In 1996, the Ontario Human Rights Commission (OHRC) published its first formal *Policy on creed*, a ground that has been part of the Ontario *Human Rights Code* (the *Code*) since its beginning over 50 years ago. There have been many important legal and social developments since then.

Questions about the appropriate nature and limits of rights relating to religion and creed have increasingly assumed centre stage in public life, as Ontario society has grown increasingly more religiously diverse.<sup>1</sup>

This policy aims to help Ontarians better understand and respond to diversity based on creed in ways that are inclusive and protect human rights (see section 2 below for more about this policy and its aims). It provides a timely reminder of our need to respect human rights in a time of great discussion of the role of creed and religion in our society.

Since 2011, the Ontario Human Rights Commission (OHRC) has conducted extensive research and consultation to update its understanding of creed human rights under the *Code*.<sup>2</sup> The OHRC's *Human rights and creed research and consultation report* presents many of these findings.<sup>3</sup>

The OHRC's research and consultation shows that prejudice and discrimination based on creed remain a reality in Ontario, and are on the rise in some cases.

Many experts say that how a society treats religious and creed minorities indicates its tolerance towards difference and diversity in general.<sup>4</sup> Freedom and equality rights based on religion and creed are core elements of a free and democratic society.<sup>5</sup>

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“[R]espect for and tolerance of the rights and practices of religious minorities is one of the hallmarks of an enlightened democracy.” – Supreme Court of Canada<sup>6</sup>

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[H]arassment or discrimination against someone because of religion is a severe affront to that person's dignity, and a denial of the equal respect that is essential to a liberal democratic society. – Human Rights Tribunal of Ontario (then known as the Ontario Board of Inquiry)<sup>7</sup>

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The human right to be free from discrimination based on creed is not only a right of the religious or those who actively follow a creed, but also a right all people depend on in a society that allows for and respects pluralism, human rights, and the right to hold and manifest different beliefs.<sup>8</sup> It is a core part of what enables a diverse plural society such as ours to work.<sup>9</sup>

It is thus particularly important from a human rights perspective that everyone upholds and understands the right to be treated equally based on creed – as a human right under the *Code*, and as a fundamental constitutional right under the *Charter* that reflects core Canadian constitutional values and secular commitments.

At the same time, this policy recognizes that no right is absolute and every right, including rights based on creed, may be subject to reasonable limits, in balance with other competing rights.<sup>10</sup>

## 2. About this policy

This policy is a complete revision and update of the OHRC's original *Policy on creed and the accommodation of religious observances* first published in 1996. It sets out the OHRC's position on creed and accommodating observances related to a person's creed.

The policy offers Ontario citizens and organizations ways to address and prevent discrimination and conflict based on creed in an informed, proactive and principled way. In keeping with the Preamble to the *Code*, this policy is also designed to:

- Promote recognition of the inherent dignity and worth of people of diverse creed faiths, whatever their creed
- Provide equal rights and opportunities without discrimination and harassment because of creed
- Create a climate of understanding and mutual respect, so that people of diverse creed faith feel they belong in the community and can fully contribute to it.

The policy can help people who face discrimination based on creed to understand and assert their rights. The policy can also help employers, unions and other vocational associations, and housing and service providers to understand and meet their legal responsibilities under the *Code* to prevent and address discrimination based on creed.

Organizations can also use the policy to develop their own training materials and anti-discrimination and harassment policies.

The analysis and many of the examples in this policy are based on research, tribunal and court cases involving creed, as well as the OHRC's consultations.

See Appendix A for more about the purpose of OHRC policies.

### 3. Background

#### 3.1 Historical context

There has always been creed diversity in Ontario.<sup>11</sup> Ontario laws have long recognized ideals of religious freedom,<sup>12</sup> even if interpreting and applying these in the past in selective and discriminatory ways that did not protect, or seek to protect, religious equality.<sup>13</sup>

Historians note that for much of Ontario's and Canada's history "to be a (proper) Canadian one had to be a (proper) Christian."<sup>14</sup> People belonging to minority creed communities faced significant, and in some cases severe, persecution and discrimination.

Among the most egregious historical examples of legally permitted discrimination based on creed and race were the sustained Canadian government efforts to assimilate Indigenous<sup>15</sup> peoples over the 19<sup>th</sup> and 20<sup>th</sup> centuries, particularly following the introduction of the *Indian Act* in 1876.<sup>16</sup>

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"Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system."

– Jose R. Martinez Cobo<sup>17</sup>

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Suppressing and outlawing Indigenous spiritual practices and traditions was an integral part of a broader colonial project to "Christianize and civilize" Indigenous peoples. The effects of policies like the forced residential schooling of over 150,000 First Nation, Inuit and Métis children across the country, including in many places in Ontario,<sup>18</sup> are still being felt today.<sup>19</sup>

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"The happiest future for the Indian race is absorption into the general population, and this is the object and policy of our government..."

"I want to get rid of the Indian problem. I do not think as a matter of fact, that the country ought to continuously protect a class of people who are able to stand alone...Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this Bill."

– Duncan Campbell Scott, Deputy superintendent of the Department of Indian Affairs (1913-1932).<sup>20</sup>

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Differences between Christian denominations (mainly Protestants and Catholics) was another main source of tension and discrimination among people in Ontario in the past. Christian minorities in Ontario such as Mennonites, Jehovah's Witnesses, Seventh Day Adventists, Hutterites, Eastern Orthodox and Evangelicals often faced more intense creed-based prejudice and discrimination because others saw these beliefs as heretical. This was sometimes made worse because of intersecting ethnic and race-based prejudice and discrimination.<sup>21</sup>

Jewish Canadians have long been subjected to legalized forms of antisemitic discrimination.<sup>22</sup> "None is too many" was the response of a high-level Canadian government official when asked how many Jewish people should be accepted as immigrants, at the time of the Nazi persecution of Jewish people.<sup>23</sup> Signs posted along Toronto beaches stated "No Dogs or Jews Allowed." Many hotels and resorts had policies prohibiting Jewish people as guests.<sup>24</sup> There were restrictions on where Jewish people could live or buy property. In 1951, a Jewish man challenged a restrictive covenant preventing property from being sold to anyone of "the Jewish, Hebrew, Semitic, Negro or coloured race or blood." The Supreme Court of Canada declared the covenant void because, among other reasons, it was unclear.<sup>25</sup>

Religious prejudice, racism and xenophobia in Ontario also involved persecution and discrimination against Sikhs, Hindus, Muslims, Buddhists and other non-conforming creed groups, including atheists and agnostics. A glimpse into this history of creed-based discrimination is provided in the *Human rights and creed research and consultation report*.

Religion has been an inspiring force for good in the lives of many Ontarians, contributing significantly to building the Canadian social and institutional fabric.<sup>26</sup> At times it has also been used to limit and violate people's human rights.<sup>27</sup>

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The use of religious claims to justify curtailing and violating people's rights, including the rights of women, LGBTQ and other minority and racialized communities, has long been recognized and addressed in international human rights fora.<sup>28</sup> For example, in Canada, so-called "sodomy laws" criminalizing "homosexual acts" and carrying sentences up to death were on the law books until 1969.<sup>29</sup> Such laws and the attitudes surrounding them were significantly shaped by appeals to particular understandings of Christianity.<sup>30</sup>

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Since the 1960s, Ontario public policy and law has increasingly embraced values of diversity, equality and non-discrimination. A new commitment to the ideal of state neutrality in religious matters has emerged alongside these values, and this has steadily eroded Christian historical privileges in public and state institutional life. However, new (and in some cases old) forms of discrimination and prejudice based on creed continue to persist, and in some cases are growing.

### 3.2 Faithism, prejudice and stereotyping based on creed

“Faithism” often underlies negative treatment and discrimination directed towards people based on creed. Faithism includes any ideology that ascribes to people values, beliefs and behaviours, and constructs people as fundamentally different and unequal – deserving or undeserving of respect and dignity – based on their religion or belief.<sup>31</sup>

Faithism creates and reproduces a consistent, distorted, negative and stereotypical view of individuals and groups based on their creed, faith, beliefs or associated characteristics, and ignores or suppresses contrary evidence (including of intra-group diversity, shared humanity and redeeming positive qualities).

Examples of faithism are:

- Presuming that all people of religious faith are backward or closed-minded, or do not respect human diversity
- Labelling or treating all people of the Islamic faith as terrorists, or potential terrorists.

Faithism differs from simple prejudice in that it operates at several levels, including individual, institutional, cultural and societal. As an ideology, it is usually organized and systemic, and often justifies a dominant group exercising power over a minority group. It can include both individual and institutional practices that dehumanize and undermine the dignity of persons of a particular faith or belief.

“Faithism,” in its more individual form, includes prejudicial<sup>32</sup> attitudes and perspectives, based on stereotypes, that devalue and denigrate people who follow beliefs and ways of life that differ from what may be considered “normal” or “acceptable.”

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Critically engaging with or negatively evaluating a person’s belief is not “faithist” in and of itself. It is only so when this begins to take on an ideological form that distorts and draws on and reproduces stereotypes about groups based on their creed, faith, beliefs, or associated characteristics. This is often linked to practices of domination and dehumanization.

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Stereotyping happens when generalizations are made about individuals based on assumptions about qualities and characteristics of the group they belong to.

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“Stereotyping, like prejudice, is a disadvantaging attitude, but one that attributes characteristics to members of a group regardless of their actual capacities.”  
– Supreme Court of Canada<sup>33</sup>

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It is often based on misconceptions, incomplete information and/or false generalizations. Stereotyping can also often be the result of subtle unconscious beliefs, biases and prejudices.<sup>34</sup> Stereotypes can be damaging in many ways. For example, acting on them results in unequal treatment. Also, the people being stereotyped may internalize them and believe or accept them.

Faithism and creed discrimination are often linked to stereotypes based on creed. During the OHRC consultation, people of religious faith spoke about the growth of anti-religious prejudice in Ontario society directed against people of religious faith in general.<sup>35</sup> At times, this prejudice was based on stereotypes about "religious people" or followers of a particular creed. Examples of these stereotypes were that people are backward, close-minded, irrational, opposed to or incapable of critical, independent thought, superstitious, unintelligent, unenlightened, tribal, uncivilized, submissive, conformist, anti-egalitarian, sexist, homophobic, and/or potentially violent and subversive of public order.<sup>36</sup> Anti-religious stereotyping and prejudice have also drawn on race-related stereotypes and various forms of racism, xenophobia, antisemitism and Islamophobia (as discussed in section 3.3).

During the consultation, people without religious faith, or affiliated with lesser known creed communities, also spoke of being stigmatized at times based on stereotypes, such as being immoral, deviant, untrustworthy, bizarre and/or malevolent.

**Example:** People who identified as Raelians were refused use of a local pub to host a "mini-lecture" event. When the pub manager learned that the group's members had distributed over 500 flyers to promote the event, he became concerned that the event would disrupt business on a Saturday night, and cancelled their reservation, making derogatory comments about Raelians in the process. The Human Rights Tribunal of Ontario (HRTO) found that the pub manager's statement that the pub did not want to be associated with their "cult" was inappropriate and discriminatory.<sup>37</sup>

Where negative attitudes and stereotypes based on creed are acted on in a *Code* social area, resulting in discrimination, they will contravene the *Code*. Creed stereotyping can also lead to creed harassment when acted upon or communicated in a social area governed by the *Code*, such as in employment, housing, services, contracts, unions or associations.

Faithism can also take on less obvious and more systemic forms which can be "hidden" to the people who don't experience it. Systemic faithism refers to the ways cultural and societal norms, structures and institutions may directly or indirectly, consciously or unwittingly, promote, sustain or entrench differential advantage or disadvantage for individuals and groups based on their religion or belief.<sup>38</sup> Systemic faithism may appear neutral on its surface, but have an "adverse effect" or exclusionary impact on people belonging to particular communities of belief.

**Example:** The standard work week and statutory holiday calendar in Ontario is organized around the Christian Sabbath and high holy days (Christmas and Easter). While this structure is understandable given Canada's history and demographics, it may adversely affect non-Christians, some of whom may therefore need to seek out special accommodations to observe their own faith holy days.

In some cases, systemic faithism can result from the ways past religious privileges and ways of doing things from the “Christian Canada” era (1841 – 1960) continue to inadvertently shape contemporary institutional norms, practices and arrangements.<sup>39</sup> It may also result from the adoption of viewpoints and institutional practices that seek to shut out any and all expressions of religion from public life.

**Example:** An employer prohibits its staff from referring to “Christmas” or any other religious holiday in its internal communications and staff meetings because it believes that workplaces should be “secular.”<sup>40</sup>

Not all forms of faithism contravene the law. An example might be where people hold general cultural or religious prejudices and biases but do not act on these in a *Code*-governed social area. There may also be legal exemptions and defences that protect or justify a particular institutional arrangement that is unequal on its face.

Sometimes, institutional arrangements that reflect the historical dominance of one faith group may be more or less benign and non-discriminatory, depending on the circumstances.<sup>41</sup> For example, many Ontario hospitals have a Christian religious origin or affiliation, which reflects the key role and contribution of Christian religious organizations historically in providing social and healthcare services to Ontarians.

Systemic faithism may be discriminatory under the *Code*; for example, where it results in “systemic discrimination” or “adverse effect” discrimination (see sections 7.8 and 7.9).

The OHRC's research and consultation findings showed that the more a community's creed belief or practice was perceived to differ from mainstream ways of life and understanding (including appropriate ways to be religious), the more likely it was to be frowned on, stigmatized and rejected, and considered unworthy of inclusion and accommodation in society.<sup>42</sup>

### **3.3 Racism, xenophobia, antisemitism and Islamophobia**

The interconnection between religion, race and ethnicity for many creed communities has exposed many religious minorities in Ontario to intersecting forms of prejudice, racism<sup>43</sup>, xenophobia and discrimination and harassment based on race, creed, ethnic origin, place of origin and ancestry.

As Ontario's original occupants, Indigenous peoples have long faced intersectional forms of discrimination and prejudice targeting them not only as distinct "Peoples" but also as members of so-called "inferior races" and as practitioners of spiritual traditions deemed "alien" and "uncivilized" by European settlers. Indigenous peoples continue to face many challenges accessing and receiving appropriate creed accommodations, for a variety of reasons, sometimes inadvertently due to a lack of cultural competence and understanding, and/or at other times because of more overt or hidden anti-Aboriginal racism.

**Example:** High school students of Indigenous descent in a town with a large Indigenous population experience more frequent and severe forms of school discipline and punishment up to expulsion. Administrators forgo the usual progressive discipline measures. Instead, they respond harshly and immediately to misconduct, based in part on stereotypes about Indigenous culture and spirituality as not responding well to "reason," and other racist myths that only punitive forms of punishment are effective.

Sometimes, religious differences may themselves become "racialized"<sup>44</sup> in ways that not only reflect but also shape how "races" are constructed.

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"Race is not an objective biological fact but rather social and political constructions which establish and perpetuate hierarchies of power."

– Historian Lucy Salyer<sup>45</sup>

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Religious differences are "racialized" when they are (overtly or covertly) linked to or associated with racial differences.<sup>46</sup>

**Example:** A recent body of social scientific literature identifies and examines the emergence, in post-9/11 racist discourse and practice, of a new "brown race" associated with the "the Muslim terrorist." While the racialization of Islam as a religion is not new,<sup>47</sup> what is new is how this category is marked not only by skin colour but also significantly by various religious signifiers (e.g. beard, female head covering, etc.) associated with persons with ancestry in lands implicated in the current "War on Terror" stretching from South, Central and Southeast Asia to the Middle and Near East, North and East Africa.<sup>48</sup>

Religious differences may also be racialized when they are:

- Naturalized: treated as fixed and unchanging (i.e. unaffected by history or society), usually in ways making religious groupings permanently "foreign" or "other"
- Ascribed to people based on outward signs or appearances (e.g. perceived markers of religion, ethnicity, race, place of origin, ancestry, colour, citizenship, national origin, language or culture, including dress or comportment)



- Homogenized: viewed as uniformly shared by all members of a faith tradition without internal differences in understanding, interpretation or behaviour
- Presumed to be the sole or primary determinant of a person's thinking and behaviour.

**Example:** A psychologist speaks about the "Jewish personality" and explains contemporary social behaviour based on presumed and attributed psychological characteristics allegedly shared by all Jewish people.

Like older forms of racism based on biology, newer cultural and religious forms of racism ascribe views and behaviours to people based on their perceived group affiliation.<sup>49</sup> This effectively obscures and overlooks internal differences within religious groups, as well as the multiple and varied motivations, identities, practices and understandings of religious adherents.

Antisemitism is a prime example of how religion can be racialized, evolving from religious bigotry (anti-Judaism) to racist bigotry and hatred (antisemitism).<sup>50</sup> Like all forms of racism, antisemitism continues to evolve in multiple and new directions today in ways that no longer necessarily rely on overt references to blood, race, ethnicity or nation.<sup>51</sup> This policy uses the term "antisemitism" (versus "Anti-Semitism") precisely because it can encompass such newer forms of hostility towards Jews or Judaeophobia that may not depend on notions of Jewish people as a "Semitic race," as the older term (Anti-Semitism) implies.<sup>52</sup>

The Canadian Race Relations Foundation (2013) defines antisemitism to include:

[I]atent or overt hostility or hatred directed towards, or discrimination against individual Jews or the Jewish people for reasons connected to their religion, ethnicity, and their cultural, historical, intellectual and religious heritage.<sup>53</sup>

Antisemitism can take many forms, ranging from individual acts of discrimination, physical violence, vandalism and hatred, to more organized and systematic efforts to destroy entire communities and genocide.<sup>54</sup> This longstanding form of creed-based prejudice and discrimination continues in Ontario today.<sup>55</sup>

**Example:** An employer makes stereotypical antisemitic remarks about a Jewish employee during a staff meeting. He suggests that the man was hired because the employer knew he would be good at "counting money," and "saving pennies and dimes" for the company.

A significant contemporary form of racism and religious intolerance in Ontario is "Islamophobia."<sup>56</sup> Islamophobia includes racism, stereotypes, prejudice, fear or acts of hostility directed towards individual Muslims or followers of Islam in general.<sup>57</sup> In addition to individual acts of intolerance and racial profiling (see section 7.5), Islamophobia can lead to viewing and treating Muslims as a greater security threat on an institutional, systemic and societal level.<sup>58</sup> One-sided, sweeping, negative portrayals of Muslim people or Islam in general play a key role in normalizing and reproducing contemporary forms of Islamophobia.<sup>59</sup> These may result in Muslims being treated

unequally, evaluated negatively, and being excluded from positions, rights and opportunities in society and its institutions.

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The (1997) British Runnymede Trust Report, *Islamophobia: A Challenge for Us All*, is most widely credited with giving the term prominence and profile in public policy and discussion. The report defines Islamophobia as “the dread, hatred and hostility towards Islam and Muslims perpetuated by a series of closed views that imply and attribute negative and derogatory stereotypes and beliefs to Muslims.”

These “closed views” include:

- Seeing Islam “as a monolithic bloc, static and unresponsive to change”
- Seeing Islam “as separate and ‘other’ without “values in common with other cultures,” being neither affected by them nor having any influence on them
- Seeing Islam as “inferior to the West,” ... “as barbaric, irrational, primitive and sexist”
- Seeing Islam “as violent, aggressive, threatening, supportive of terrorism and engaged in a ‘clash of civilisations’”
- Seeing Islam “as a political ideology...used for political or military advantage”
- “Reject[ing] out of hand” criticisms made of the West by Islam
- Using “hostility towards Islam...to justify discriminatory practices towards Muslims and exclusion of Muslims from mainstream society”
- Seeing anti-Muslim hostility “as natural or normal.”

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Anti-Muslim discrimination is a leading form of contemporary creed-based discrimination in Ontario.<sup>60</sup> Stereotypes of Muslims as a threat to Canadian security and Canadian values and ways of life have been particularly pronounced, as have various forms of racial profiling.<sup>61</sup> Because of this animosity, visible minority community members are sometimes broadly targeted based on outward appearances, and, in some cases, “perceived” associations with Islam (e.g. Arabs and South Asians).

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One of the first hate crimes following 9/11 involved the fire-bombing of a Hindu temple in Hamilton, which the perpetrator mistook for a mosque. There are also numerous other instances involving members of the Sikh faith or non-Muslim individuals of Arab or South or West Asian background, who have been victimized as perceived “Muslims” owing to their outward appearance, language and visibility.<sup>62</sup>

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With both Islamophobia and antisemitism, a common tactic is to assign collective guilt and blame to all members of the religion when individuals or sub-groups (including state or non-state actors) commit objectionable or heinous acts.

Members of the Sikh, Hindu and Buddhist faiths often face prejudice and discrimination based on a combination of racism, faithism and xenophobia.

**Example:** A human rights tribunal found that a turban-wearing Sikh man was discriminated against when he was denied entry to a bar because, according to the doorman, the bar “had an image to maintain” and could not have “too many brown people in.”<sup>63</sup>

Generally, the more "visible" and "different" ethnic minorities and their faith practices are perceived to be, the more likely they are to come under public scrutiny and censure.

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### **Defining xenophobia**

Xenophobia describes “attitudes, prejudices and behavior that reject, exclude and often vilify persons, based on the perception that they are outsiders or foreigners to the community, society or national identity.”<sup>64</sup>

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During the OHRC consultations, people often found it hard to clearly identify how creed factored into their discriminatory treatment, other than contributing in a more general way to their perceived ethnic and racial "otherness" and non-belonging. The OHRC's *Human rights and creed research and consultation report* explores further how xenophobic and racist sentiments, in some cases linked to "multicultural backlash," may shape current forms of discrimination and prejudice based on creed.

## Part 2: Policy framework

### 4. Creed

Creed is a prohibited ground of discrimination under the Ontario *Human Rights Code*. The fact that Ontario adopted the term creed (or "la croyance" in French) in its human rights legislation, and not another term (such as religion, religious belief or religious creed as used in other Canadian human rights statutes), is significant when interpreting its meaning. It suggests that creed may have a meaning that is distinct from these other closely related terms.<sup>65</sup>

The *Code* does not define creed. Understandings of creed and what are considered creed-based beliefs and practices evolve over time, as do forms of discrimination based on creed.

Creed means different things to different people. During its consultation, the OHRC heard about some of the limitations of this term. For some people, including some Indigenous people and others belonging to minority cultural and spiritual traditions, "religion" or "creed" were not terms they would use to describe their beliefs, despite being protected under this *Code* ground.<sup>66</sup>

Over time, human rights protections under the *Code* ground of creed have been extended to an increasingly broad range of people's beliefs and practices, including those that are not connected to any organized formal religion, sacredly held scriptures, official doctrines or institutional authorities.

This policy interprets the protections of the *Code* in a broad and purposive way (in other words, in a way that reflects the spirit and intent of the *Code*). This approach is consistent with the principle that the *Code's* quasi-constitutional status requires that it be given a liberal interpretation that best ensures its anti-discrimination goals are reached.

#### 4.1 What is creed?

Under the *Code*, creed includes, but is not necessarily limited to, "religious creed" or "religion."<sup>67</sup> Given the evolving nature of belief systems over time and the need to apply a liberal and purposive interpretation to *Code* protections for creed, this policy does not provide a universal, "once and for all" definition of creed.<sup>68</sup> However, the following characteristics are relevant when considering if a belief system is a creed under the *Code*. A creed:

- Is sincerely, freely and deeply held<sup>69</sup>
- Is integrally linked to a person's self-definition and spiritual fulfilment<sup>70</sup>
- Is a particular, comprehensive and overarching system of belief that governs one's conduct and practices<sup>71</sup>
- 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<sup>72</sup>

- Has some “nexus” or connection to an organization or community that professes a shared system of belief.<sup>73</sup>

If uncertainty still exists after considering the above criteria, the overall purpose of the *Code* and statutory human rights law more generally should be considered.<sup>74</sup>

Religion is typical of the kinds of beliefs and practices that are protected under the *Code* ground of creed.<sup>75</sup> The Supreme Court of Canada has said that while it is not possible to define religion precisely, religion can be distinguished from convictions and practices that are “secular, socially based or conscientiously held.”<sup>76</sup> In *Amselem*,<sup>77</sup> the Supreme Court defined religion broadly to typically include: “a particular and comprehensive system of faith and worship;” “the belief in a divine, superhuman or controlling power;” and “freely and deeply held personal convictions or beliefs” that are “connected to an individual’s spiritual faith and integrally linked to one’s self-definition and spiritual fulfilment.” Practicing such beliefs allows the individual “to foster a connection with the divine or with the subject or object of that spiritual faith.”<sup>78</sup>

To be recognized as a religion or creed under the *Code*, a belief in a God or gods or a single supreme being or deity is not required. Religion or creed includes the spiritual beliefs and practices of Indigenous cultures. Also, newer religions or creeds may be included (as assessed on a case-by-case basis considering the above factors).<sup>79</sup>

**Example:** A labour arbitrator found that an employer should have accommodated an employee who followed the Rocky Mountain Mystery School belief system by allowing time off to attend a pilgrimage to the Rocky Mountains. In finding that the employee should have been accommodated, the arbitrator implicitly accepted that the ground of creed was engaged.<sup>80</sup>

Organizations should accept in good faith that a person practices a creed, unless there is significant reason to believe otherwise. Courts and tribunals have generally been hesitant to rule out beliefs as creeds at the outset of proceedings where a human right based on creed has been claimed.

At the same time, not every belief, opinion, expression, practice or matter of conscience is a creed under the Ontario *Code*. Unlike some other jurisdictions, Ontario’s *Code* does not include a ground for political belief or conviction. To date, no tribunal or court has found a political opinion or belief to be a creed under Ontario’s *Code*. However, some decisions have left open the possibility that a comprehensive political or philosophical belief system may be equivalent to a creed under the *Code*.<sup>81</sup> Persons with political beliefs that substantially intersect with creed beliefs may also receive protection under the *Code*, where creed is an element of their discriminatory treatment.<sup>82</sup>

**Example:** The Ontario Divisional Court, confirmed by the Court of Appeal for Ontario, found a person’s views on the Israel-Palestine conflict were not a creed under the *Code*, but rather a political opinion on a single issue. The Court acknowledged that there was a diversity of dictionary definitions of creed, and



some included secular belief systems. The Court further stated that although the term creed is capable of including a comprehensive set of principles, its ordinary meaning requires an element of religious belief. However, the Court went on to explicitly not rule out the possibility that a “political perspective, such as communism, made up of a recognizable cohesive belief system or structure,” could amount to a creed, though this question did not need to be decided in this case.<sup>83</sup>

Where there is sufficient reason to believe otherwise, objective inquiry may sometimes be required to establish the existence of a creed.<sup>84</sup> This is usually only in rare cases. In such cases, the above criteria should be considered. It may not be enough for a person to sincerely believe that they have a creed to establish that they in fact have one for purposes of *Code* protection.<sup>85</sup>

When determining if a creed exists, it is generally not relevant to evaluate the “quality” of the belief system, whether it is “reasonable” or would withstand scientific scrutiny.<sup>86</sup>

**Example:** A Chinese Seniors’ Association was found to have engaged in discrimination based on creed when it revoked a woman’s membership because she practiced Falun Gong. The HRT0 rejected the Association’s argument that Falun Gong is akin to a “cult” and should not therefore be protected as a creed under the *Code*. The HRT0 stated: “It is not for the Tribunal to determine whether or not a belief system is reasonable, whether it would withstand scientific scrutiny, or whether it espouses beliefs that are consistent with *Charter* values.”<sup>87</sup>

The Courts and HRT0 have also cautioned against using “Western” or “mainstream” standards and understandings of what a religion or creed looks like when assessing if a belief system is a religion or a creed under the *Code* or *Charter*.<sup>88</sup>

**Example:** Falun Gong was found to fall within the notion of “creed” under the *Code* as a system of beliefs, observances and worship, despite its practitioners describing it as a “spiritual cultivation practice” as opposed to a “religion.” The HRT0 based its decision in part on expert evidence explaining that the notion of “religion” is significantly different in China than in the West and that in western terms Falun Gong would be understood as a creed.<sup>89</sup>

## 4.2 Excluded practices

Human rights protections for creed do not extend to practices and observances that are hateful<sup>90</sup> or incite hatred or violence against other individuals or groups, or contravene criminal law.

**Example:** A school allows students to set up extra-curricular clubs based on shared interests, subject to an approval process. The school receives a request from several students to form a club based on extremist Christian, white supremacist creed beliefs. The school refuses the request saying that it does

not have an obligation to allow members of such a creed to form a school club, and that such a club would poison the educational environment for others.

**Example:** A religious group believes in corporal punishment for religious reasons. Family members in the religious community cannot claim Code protection for actions that expose their children to extreme forms of neglect and physical assault that violate criminal law.

The right to practice or express creed beliefs may also be limited when it interferes with other rights under the *Code* or *Charter*, or announces an intention to discriminate in a social area as prohibited under section 13 of the Code.<sup>91</sup>

## 5. Legal framework

### 5.1 Ontario *Human Rights Code*

Under Part 1 of the *Code*, people are protected from discrimination and harassment based on creed in five “social areas”:

- In **goods, services and facilities** (section 1). “Services” is a broad category and can include privately or publicly owned or operated services such as schools, restaurants, policing, health care, shopping malls, insurance, *etc.* Harassment based on creed is a form of discrimination, and is therefore also prohibited in services (see section 8.2 below for more on harassment).<sup>92</sup>
- In **housing** (section 2). This includes access to and treatment in private rental housing, co-operative housing, social housing and supportive or assisted housing.
- In **contracting** with others. This includes entering into or ending a contract, setting prices or contract terms and discrimination during the life of a contract (section 3).
- In **employment** (section 5). Employment includes full time work, part-time work, volunteer work, student internships, special employment programs, probationary employment,<sup>93</sup> and temporary or contract work.
- When joining or belonging to a **union, professional association or other vocational association**. This applies to membership in trade unions and self-governing professions, including the terms and conditions of membership, treatment of members, *etc.*(section 6).

A fundamental aspect of the *Code* is that it has primacy over all other provincial laws in Ontario, unless the law specifically says that it operates notwithstanding the *Code*. This means where a law conflicts with the *Code*, the *Code* will prevail, unless the other law says otherwise.<sup>94</sup>

Under the *Code*, the right to equal treatment on the ground of creed includes the right to be treated equally, whatever one's creed, with no person being privileged or disadvantaged or prevented from taking part in a *Code* social area based on their creed (or lack of creed). The right to equal treatment can sometimes require individuals and organizations to take positive steps to accommodate people's creed observances.

The ground of creed, like religion, has some distinct characteristics. First, creed typically has a strong associational dimension; that is, it may require or be expressed through group-based activities and institutions.<sup>95</sup> Second, a creed may take many and varied forms, owing to its subjective basis and rooting in “sincerely held belief.” Many people think that because a person’s religious or creed beliefs can change, they should give way to other so-called more important needs or rights. Although people may think it is very easy for people to change their creed beliefs, the Supreme Court has said that religion is “changeable only at unacceptable cost to personal identity” and is no less deserving of protection than any other right.<sup>96</sup>

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“[R]eligious belief or commitment [i]s deeply rooted...as an element of the individual’s identity, rather than simply a choice or judgment she or he has made.” – Richard Moon, as cited by the Supreme Court of Canada<sup>97</sup>

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While the Supreme Court was speaking about religion, the same may be said of creed.

Finally, depending on the circumstances, the right to equal treatment based on creed may be informed not only by the Section 15 equality provisions of the *Charter* (like other *Code* grounds) but also by a “fundamental freedom” under the Constitution (freedom of conscience and religion under s. 2(a) of the *Charter*).

Despite some of the unique aspects of religious and creed rights, the Supreme Court of Canada has confirmed that there is no hierarchy of rights, and creed deserves the same consideration, protection and respect as other human rights (see the OHRC’s [Policy on competing human rights](#)).<sup>98</sup>

Section 9 of the *Code* prohibits both direct and indirect discrimination. Section 11 states that discrimination includes constructive or adverse effect discrimination, where a requirement, policy, standard, qualification, rule or factor appears neutral but excludes or disadvantages a group protected under the *Code*.<sup>99</sup>

People who have a creed, or are discriminated against because of their creed or lack thereof, are also covered by the *Code* under section 8 if they experience reprisal or are threatened with reprisal for trying to exercise their human rights.<sup>100</sup>

People are also protected from discrimination based on their association with someone with a creed, or lack thereof (section 12). This could apply to friends, family<sup>101</sup> or others – for example, someone advocating on behalf of a person with a religious or creed background.

The *Code* includes specific defences and exceptions that allow behaviour that would otherwise be discriminatory. These include but are not limited to defences for special

programs (s. 14), special interest organizations (s. 18), solemnization of marriage by religious officials (s. 18.1), separate school rights (s. 19), restriction of facilities by sex (s. 20), and special employment (s. 24). For more on these defences, see section 8. An organization that wishes to rely on these defences and exceptions must show it meets all of the requirements of the relevant section.

## 5.2 *Charter of Rights and Freedoms*

The *Canadian Charter of Rights and Freedoms* guarantees people's civil, political and equality rights in the policies, programs, practices and legislation of all levels of government.<sup>102</sup> Unlike the *Code*, which applies to both the public sector and private entities, the *Charter* applies only to government and also includes government policies, programs and laws. Governments must not infringe *Charter* rights unless violations can be justified under section 1, which considers whether the *Charter* violation is justifiable in the circumstances.

In certain circumstances, the *Charter* may assist in interpreting the scope of human rights protections based on creed.

**Section 15** of the *Charter* guarantees the right to equal protection under the law and equal benefit of the law, without discrimination based on religion, among other grounds. This equality rights guarantee is similar to the purpose of the *Code*.<sup>103</sup>

**Section 2(a)** of the *Charter* protects "freedom of conscience and religion" as a fundamental freedom in Canada. The Supreme Court of Canada defined "freedom of religion" under the *Charter* in *R. v. Big M Drug Mart*:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

...

Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that...no one is to be forced to act in a way contrary to his beliefs or his conscience.<sup>104</sup>

The Supreme Court of Canada has affirmed the essential purpose of freedom of religion and its fundamental importance in a free democratic society in many decisions.<sup>105</sup>

Section 2(a) of the *Charter* also protects freedom of conscience, which shares similar underlying purposes.<sup>106</sup>

The *Code* and *Charter* share common objectives, and they are often interpreted in light of one another. However, there are some important differences between the purposes of these statutes, and ongoing debate about how they should relate to each other.<sup>107</sup>

For example, the protection of freedom of religion under s. 2(a) of the *Charter* is primarily concerned with preserving individual *liberty*. The *Code* is primarily concerned with preserving and promoting *equality* and *non-discrimination* between individuals, as members of *Code* defined groups.<sup>108</sup> Analysis under the *Code* must go beyond asking if persons are ultimately *free* to practice their faith – it must also ask if they may *equally* access, benefit from, and are equally treated in, employment, housing, contracts and services. For this reason, it would be inappropriate or incomplete to reduce equality rights based on creed under the *Code* to liberty rights under the *Charter*.

### 5.3 International human rights law

International human rights laws and instruments set standards and obligations for domestic human rights law and policy. Canadian courts can and have explicitly cited them to guide legal decision-making, particularly when there is ambiguity about interpreting a domestic human rights statute.<sup>109</sup>

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“The *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.”  
– Supreme Court of Canada<sup>110</sup>

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Article 18 of the *Universal Declaration of Human Rights (UNDHR)* states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Articles 2 and 7 of the *UNDHR* also extend equal protections to all persons under law, without distinction of any kind, including based on religion.<sup>111</sup>

Article 18 of the *International Covenant on Civil and Political Rights (ICCPR)*, 1966 states further:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.



4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.<sup>112</sup>

Article 2.2 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 1966 states:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) sets forth minimal standards and provides an internationally recognized framework for measuring the human rights of Indigenous peoples around the world. It also has provisions for protecting the rights of Indigenous peoples to practice their religious and spiritual beliefs.<sup>113</sup> For example, Article 12(1) states:

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.<sup>114</sup>

Canada has ratified the UNDHR, ICCPR, ICESCR and UNDRIP, and is also a signatory to the *Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief*, 1981, which calls for national legislation (and by implication provincial legislation) to extend these same rights.<sup>115</sup>

## 6. Establishing discrimination based on creed

To establish *prima facie* discrimination (discrimination on its face) under the *Code*, a claimant must show:

1. They have a characteristic protected from discrimination under the *Code*
2. They have experienced negative treatment or an adverse impact within a social area protected by the *Code*
3. The protected characteristic was a factor in the negative treatment or adverse impact.<sup>116</sup>

The claimant must show on a “balance of probabilities” (more likely than not) that discrimination took place. Once a *prima facie* case of discrimination has been established, the burden shifts to the respondent to provide a credible, non-discriminatory explanation or to justify the conduct within the framework of the exemptions available under the *Code* (e.g. *bona fide* requirement defence). If it cannot be justified, discrimination will be found to have occurred.

Discrimination is not always direct and is often hard to detect. The analysis should be flexible and look at all relevant factors in the situation, including circumstantial evidence and the full context and impact on the affected person or group.<sup>117</sup> The contextual factors and relevant considerations may vary slightly based on the type of discrimination claimed (direct, adverse effect, systemic, profiling, *etc.*), or the ground alleged. For creed, additional factors may include social and historical contexts of inequality, and past and present forms of marginalization, stereotyping and disadvantage based on creed, including on a group basis (as discussed in section 3.2).<sup>118</sup> However, the legal test and threshold for discrimination do not change.

Discrimination does not have to be intentional. The focus is on the effect of a creed-based distinction, preference or exclusion on a person or group.<sup>119</sup> Intent is irrelevant for establishing that discrimination occurred.<sup>120</sup> Language or comments related to creed do not have to be present in the interactions between the parties to show discrimination. However, where such comments have been made, they can be further evidence that a person's creed was a factor in their treatment.

As well, human rights case law has established that a *Code* ground need only be one factor, of possibly several, in the decision or treatment for there to be a finding of discrimination.<sup>121</sup>

**Example:** An employer dismissed an employee who declined to work on Sundays due to his observance of the Christian Sabbath. The employer argued that the employee's refusal to work Sundays was only one of several reasons why the employee was dismissed. For instance, the employee had several incidents of discipline or poor performance, and had been confrontational with the manager. The employer was found to have breached the *Code*, since creed need only be a factor in a person's adverse treatment. It does not need to be the only or main factor.<sup>122</sup>

Discrimination based on creed may occur because someone is:

- Negatively affected by an organizational requirement, rule or standard that prevents them from practicing their creed (without being accommodated)
- Pressured or compelled to do or believe something based on creed
- Treated differentially and unfairly in a social area protected by the *Code*, at least in part for reasons relating to creed.

Creed must be a factor in a person's treatment for it to be discrimination based on creed. The *Code* prohibition on discrimination because of "creed" extends to situations where:

- The person who is the target of such behaviour is atheist or agnostic<sup>123</sup>
- Neither the person discriminated against nor the person discriminating follows a creed
- A person is targeted and treated unequally because of their "perceived creed," or because of their association with an individual or group with a particular creed (or lack thereof).

**Example:** Co-workers in a workplace direct derogatory comments about Muslims as “terrorists” towards an employee of Middle-Eastern background who is perceived to be Muslim. Neither the employee who is the target, nor the co-workers making the comments, identify with any creed. The employee complains about his treatment to the employer. The employer does not take any remedial action because neither the complainant nor the co-workers identify as having a creed under the *Code*. This creates a discriminatory poisoned work environment and could be the basis for a human rights complaint because of perceived creed.

In some cases, such as when someone is seeking accommodation based on creed, it will be necessary for a rights claimant to follow a creed to receive rights protection.

### 6.1 Discrimination in religious services and functions

The HRTO has made clear that it is not the appropriate forum for challenging a religion’s belief system, teachings, or core forms of worship.<sup>124</sup> Accordingly, “purely religious services” (e.g. forms of worship or tenets of religious belief) have been found not to be covered under the *Code*.

**Example:** A gay man alleged that a priest he had asked for help in dealing with his parents’ views toward “homosexuality” had expressed views to him about “homosexuality” that violate the *Code*. The HRTO dismissed his claim as not being within its jurisdiction. In concluding that a member of the clergy performing purely religious functions is not covered by the social area of “services” under the *Code*, the HRTO considered the competing rights of the priest and noted that in the circumstances, the scope of “services” should be interpreted in a way that protects the *Charter* rights of the priest. The HRTO further found that in making statements about “homosexuality” in accordance with his faith, the priest was exercising rights at the core of freedom of religion – including teaching and disseminating religious beliefs – which were purely connected with his religious role.<sup>125</sup>

However, services offered by religious organizations that are not “purely religious” – and have no clear connection with religion – are subject to the *Code*.

**Example:** A religious organization opens a restaurant for the general public. However, it discriminates against members of a different creed by not allowing them to dine at the restaurant.

Conduct within religious services or facilities that is not connected with religious belief may also be challengeable under the *Code*, unless covered by another *Code* defence (see section 8 for other *Code* defences and exemptions for religious organizations, including those relating to membership, employment, programs and services).

**Example:** A place of worship fails to provide a ramp at its entrance to enable people with disabilities to attend its core worship services. This is unrelated to any religious teaching or requirement. This could be discriminatory under the *Code*.

## 7. Forms of creed discrimination

It is not always possible to slot people's experiences of creed discrimination into clear categories. Ways people face discrimination often blur together and overlap to a large degree. However, for this policy, it is helpful to describe the different ways creed discrimination can take place. The following sections cover some of the main ways.

### 7.1. Direct, indirect and subtle discrimination

Discrimination may happen in a direct way when individuals or organizations overtly exclude people belonging to a creed group from employment or services, or withhold benefits that are available to others, or impose extra burdens that are not placed on others, without a legitimate *Code* defence.

Many creed discrimination complaints allege that a respondent has relied on stereotypes, whether covertly and unconsciously, or because of overt prejudice and antipathy towards another person or group because of their creed affiliation. This is a form of direct discrimination.

**Example:** A Children's Aid Society and youth service provider decided to terminate a woman's contract to provide a foster home for children. The HRTO found this to be discriminatory, based in part on their "stereotypical view of the applicant's Christian faith," which was assumed to undermine her capacity to foster children who are gay.<sup>126</sup>

Discrimination may also happen indirectly. For example, it may be carried out through another person or organization.

**Example:** A landlord hires a property management company and tells it to ensure Indigenous peoples who appear to follow traditional Indigenous Spirituality do not rent units. This is based on the landlord's dislike of the smell of burning traditional Indigenous herbs and medicines used in traditional Indigenous creed-related observances, and purported concerns over fire safety. Both the landlord who sets out the discriminatory conditions and the property manager or person who carries out this discrimination can be named together in a human rights claim and held jointly responsible.

More hidden and subtle forms of discrimination can also happen. Most people don't make discriminatory remarks openly or voice their stereotypical views to explain their behaviour. Subtle discrimination might only be detected when looking at all of the circumstances to see if a pattern of behaviour exists. Individual acts themselves may be ambiguous or explained away. But when viewed as part of a larger picture, they may

lead to a conclusion that discrimination because of creed was a factor in a person's treatment. For example, a departure from usual practice that can't be explained may support a claim of discrimination.<sup>127</sup> Criteria applied to some people but not others may also be evidence of discrimination, if it can be shown that people and groups protected by the *Code* were singled out for negative treatment.

The cumulative effect of direct, subtle and indirect discrimination can be profoundly damaging to people who experience it.

Organizations and individuals have a legal obligation under the *Code* to not discriminate against people based on creed, to take steps to prevent discrimination, and to respond to it when it happens. These obligations apply in situations where discrimination is direct and the result of a person's internal stereotypes or prejudices. They also apply when discrimination is indirect and may exist within and across institutions because of laws, policies and unconscious practices.

## 7.2. Harassment

During its consultations, the OHRC heard that overt harassment against people identified by creed, particularly people who are visibly identifiable as members of minority faith communities, is still very much a reality in Ontario.<sup>128</sup>

The *Code* prohibits harassment based on various grounds including creed, ethnic origin, place of origin, race, colour, ancestry, citizenship, sex, sexual orientation and gender identity and expression. Individuals and communities affiliated by creed can experience harassment on one or more grounds.

In addition to the *Code*'s explicit protection against harassment in housing and employment, harassment is also prohibited in services and other social areas.<sup>129</sup>

The *Code* defines harassment 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 unwelcome."<sup>130</sup> The reference to comment or conduct "that is known or ought reasonably to be known to be unwelcome" establishes both a subjective and an objective test for harassment.

The subjective part is the harasser's own knowledge of how his or her behaviour is being received. The objective component considers, from the point of view of a "reasonable" person, how such behaviour would generally be received. Determining the point of view of a "reasonable" person must take into account the perspective of the person who is harassed. In other words, the HRTO can conclude based on the evidence before it that an individual knew, or should have known, that his or her actions were unwelcome.<sup>131</sup>

Some types of comments or behaviour should be understood to be unwelcome based on the response of the person subjected to the behaviour, even when the person does not explicitly object. An example could be a person walking away in disgust after a co-worker has made derogatory comments about people of a particular religion.<sup>132</sup> A victim does not have to explicitly or directly object to harassment.<sup>133</sup> They may be vulnerable and not speak out because of a threat or fear or because the harasser has some power or authority over them (e.g. a manager or a landlord).

Some conduct or comments relating to creed may not, on their face, be offensive. However, they may still be "unwelcome" from the perspective of a particular person. If similar behaviour is repeated despite indications from the person that it is unwelcome, there may be a violation of the *Code*.

Harassment because of creed is often based on stereotypes that ascribe particular beliefs, thoughts, behaviours and motivations to people based solely, or in part, on their (actual or perceived) creed.

**Example:** After 9/11, a Muslim employee of Iranian descent was subjected to name-calling in his workplace, and associated with Osama Bin Laden and Saddam Hussein. He faced discrimination and harassment by being exposed to what were deemed to be racial slurs.<sup>134</sup>

The experience of creed harassment can differ for men and women, and different ethnic and racial creed communities. People often experience distinctive forms of stereotyping based on the combination of creed, ethnicity, race and gender.

Creed-based harassment can involve:

- 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<sup>135</sup>
- Intrusive comments, questions or insults about a person's creed or other creed-related practices, dress and personal appearance
- Threats, unwelcome touching, violence and physical assault.

Harassment is often used to try to get people to conform to dominant group norms, or to punish them for not doing so. It is also used as a bullying tactic to ridicule, ostracize and exercise power over people and to make them feel unwelcome in their environment because of their creed.

Harassment based on creed can happen between members of the same or different creeds. It can also affect people who have no creed (see section 7.4 on Imposing creed messages and compelling creed observances).

Organizations have an obligation to maintain an environment free of harassment targeting people because of their creed, whether or not anyone objects. In employment, the *Occupational Health and Safety Act*<sup>136</sup> requires employers to establish policies on harassment and violence in the workplace and to review these once a year.

Organizations also have a responsibility to contact the appropriate authorities in situations where harassment may escalate to hate crime<sup>137</sup> or may contravene the *Criminal Code* in any other way.

### 7.3 Poisoned environment

While harassment generally involves more than one incident of comment or conduct, in some cases even a single statement or incident, if sufficiently serious or substantial, can create a poisoned environment.<sup>138</sup>

A poisoned environment is a form of discrimination. In employment, tribunals have held that the atmosphere of a workplace is a condition of employment as much as hours of work or rate of pay. A “term or condition of employment” includes the emotional and psychological circumstances of the workplace.<sup>139</sup> While the notion of a poisoned environment has predominantly arisen in employment, it can apply equally where it results in unequal terms and conditions in housing, services, contracts and membership in a vocational association.

**Example:** A professor has a strong dislike of religion. She often makes disparaging remarks about religion and religious people in the classroom. These include stereotypical comments about students who actively practice a religion, whom she portrays as being incapable of critical, independent thought.

A poisoned environment may happen due to a serious single incident, and/or when unwelcome comment or conduct is ongoing or widespread throughout an organization. This can lead to a hostile or oppressive atmosphere for one or more people from a *Code*-protected group. While ongoing exposure to harassment can be a factor, a poisoned environment is also based on the nature of the comments or conduct and the impact on an individual or group rather than on the number of times the behaviour happens.<sup>140</sup>

Behaviour need not be directed at any one person to create a poisoned environment. A person can experience it even if not a member of the targeted group.

**Example:** A Tibetan Canadian woman of Buddhist faith works in a union office where racial slurs, religious bigotry and stereotypical language are common. Although none of these remarks are directed specifically to her or her creed group, she may have a basis to allege that she has been subjected to a racially and religiously poisoned environment.<sup>141</sup>

Examples of situations that may violate the *Code* by creating a poisoned environment include:

- A supervisor or landlord saying to an employee or tenant “I don’t know why you people (referring to persons of the Muslim, Hindu or Sikh faiths) don’t go back to where you came from because you don’t belong here.”<sup>142</sup>
- Comments, signs, caricatures, or cartoons displayed in a service environment such as a store or restaurant, in a work or tenancy situation which show persons of a particular creed in a demeaning way.
- Graffiti targeting creed groups that is not removed promptly by an employer, a landlord or a service provider.
- Creed-related remarks, jokes or innuendo about an employee, client, customer or tenant. In addition, creed-related remarks, jokes or innuendo made about other persons or groups may create the sense that similar views are held about the employee, client, customer or tenant.

When a poisoned environment exists, some people face negative terms and conditions of employment, tenancy, education or other services that other people do not experience (for example, having to endure attacks on their dignity and self-respect). This is inequality.

Organizations have a duty to maintain an environment free from discrimination, to be aware that a poisoned environment exists, and to take immediate steps to respond and eliminate it.<sup>143</sup> This is the case even if no one objects, and even if there is widespread participation in the behaviour.<sup>144</sup> Inappropriate comments or conduct poison the environment for people targeted because of their creed – and they are disruptive and can affect everyone’s environment.

A poisoned environment can be caused by the comments or actions of any person, regardless of their position of authority or status. It could involve a co-worker, supervisor, co-tenant, housing provider, member of a board of directors, fellow student, teacher, contractor, client, *etc.* Whoever is involved, the person in charge has a duty to address it.

Sometimes, comments or conduct outside of the workplace or service setting may have discriminatory effects and consequences inside it.

**Example:** A New Brunswick school board was found to discriminate because it failed to appropriately address the conduct of a teacher who had become notorious in his community for his off-duty antisemitic writings, statements and comments. Although the teacher’s comments and conduct occurred off-duty, and there was no direct evidence establishing an impact upon the school district, the Supreme Court found that his continued employment in a teaching position impaired the educational environment by creating a “poisoned” environment.<sup>145</sup>

Failing to address discrimination and harassment may in itself cause a poisoned environment.<sup>146</sup>



**Example:** On September 12, 2001, a police detective left a voicemail message for another detective suggesting that he had information that a civilian police employee (a man who identifies as a non-White person of Afghan descent) was involved in the events of 9/11.<sup>147</sup> The message was referred to the Internal Affairs division for investigation and, through the investigation, came to the civilian employee's attention. The incident became widely known in the division as the targeted employee became the object of gossip and suspicion about whether he was involved in 9/11. The employee became very upset as he believed that his employer did not appropriately investigate and respond to the message. He filed a human rights complaint. The HRTO found that although the detective's message was meant to be a "joke," it still amounted to harassment and a poisoned environment based on ethnic origin, place of origin and perceived creed (Muslim). The HRTO also concluded that although the employer appropriately investigated and disciplined the detective who left the message, it did not do enough to address the gossip and suspicion about the civilian employee that flowed from the event. This was found to have poisoned his work environment.<sup>148</sup>

Managers who know or should know a poisoned atmosphere exists but allow it to continue are essentially condoning discrimination even if they are not directly involved.<sup>149</sup>

#### 7.4 Imposing creed messages and compelling creed observances

The right to be free from discrimination based on creed under the *Code* includes the right to be free from unwelcome religious or creed-based pressure or coercion in employment, services, housing, contracts and professional or vocational associations.<sup>150</sup> 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.<sup>151</sup> Exerting religious pressure may also be a form of harassment or create a poisoned environment (see 8.2 and 8.3 above). The *Charter*<sup>152</sup> requires government organizations to be neutral towards religion (i.e. neither favouring nor hindering any particular religion or system of belief over another).<sup>153</sup>

Employers may not place unwelcome "religious pressure" on employees, or make taking part in religious matters a term or condition of employment.<sup>154</sup>

**Example:** An employer engaged an employee in many discussions about religion, held prayers at business meetings and hosted weekly Bible study groups. The HRTO found the employer discriminated by imposing a religious atmosphere, where the employee felt he had to take part as part of his employment.<sup>155</sup>

The *Code* prohibits imposing creed-based messages on others, in any of the covered social areas, no matter how convinced a person may be that he or she has a duty to proselytize and share that message.<sup>156</sup>

However, court decisions also suggest that some discussion of religious matters in the workplace is acceptable. People are not prohibited from expressing their genuinely held religious beliefs in the workplace, within the confines of the *Code*, provided this does not escalate to unwelcome religious pressure.<sup>157</sup>

**Example:** A supervisor who initiated discussions about religion with an employee, gave the employee a Bible and talked about the comfort of religion in difficult circumstances, was found not to have placed unwelcome religious pressure in the circumstances.<sup>158</sup>

Selectively privileging one creed or religious tradition over another in employment or services has also been found to be a form of religious imposition that violates the equality rights of others.<sup>159</sup>

**Example:** A public elementary school inclusively designs classroom materials and in-school and extra-curricular activities over the school year to ensure that they are welcoming and reflect the multicultural and multi-faith background of the school community served. This helps to make sure that the school provides an equitable learning environment for all students, neither privileging nor hindering members of any creed or people with no creed.

Requiring the recitation of the Lord's Prayer in schools and at public meetings has been found to be a form of religious pressure or compulsion that violates the religious freedoms of others.<sup>160</sup> While courts and tribunals have differed in the past on whether using more inclusive, non-sectarian, non-denominational prayers, including those that refer to God, may be discriminatory in some service settings,<sup>161</sup> the Supreme Court of Canada has ruled that even a non-denominational prayer may violate rights to the extent that it favours persons of religious faith over atheists and persons of non-religious faith.<sup>162</sup>

**Example:** A man who identified as an atheist and who regularly attended local municipal council meetings challenged the city's practice of opening meetings with a prayer. The prayer, which took place in the council chambers where there was a Sacred Heart statue fitted with a red electric votive light and a crucifix on the wall, referred to God and was preceded and followed by councillors making the sign of the cross and saying "in the name of the Father, the Son and the Holy Spirit." The Quebec Human Rights Tribunal found that the prayer was religious in nature and that it made the man feel isolated, uncomfortable and excluded. The Tribunal's decision was challenged and ultimately ended up before the Supreme Court of Canada. The Supreme Court of Canada found that the Tribunal's conclusion that the prayer was religious in nature (and strongly associated with Catholicism) and resulted in an exclusion based on religion was a reasonable one, saying that "[t]he prayer recited by the municipal council [was] in breach of the state's duty of neutrality [and] resulted in a distinction, exclusion and preference based on religion – that is, based on [the applicant's] atheism – which, in combination with the circumstances in which the prayer was recited, turned the meetings into a preferential space for people with theistic beliefs."<sup>163</sup>

The Court further concluded that "[e]ven if a religious practice engaged in by the state is 'inclusive', it may nevertheless exclude non-believers".<sup>164</sup>

However, depending on the context, the Supreme Court ruling in *Saguenay* (see above example) may not preclude the use of opening statements or invocations at municipal or public meetings that are equally inclusive of people's diverse religious *and* non-religious beliefs.

Having regulations in place to allow individuals to not take part in activities of religious or creed significance does not necessarily insulate an organization from a potential finding of discrimination, and in some cases may even worsen people's exclusion and discrimination.<sup>165</sup>

**Example:** A school board regulation required area public schools to open or close each day with religious exercises consisting of reading of the Scriptures or repeating the Lord's Prayer or other suitable prayers. Even though the regulation allowed for students to be exempted and was wide enough to allow for non-Christian prayers, a court found the regulation was unconstitutional, in part by exerting indirect pressure on students to conform to the majority's religious practices.<sup>166</sup>

The state's duty of religious neutrality does not mean that individuals associated with government cannot exercise their religious rights in their personal capacity.

There is no general right to be free from all exposure to religion or creed in services, housing, the workplace, or vocational associations.<sup>167</sup> There is also no general right not to be exposed to views and beliefs that contradict or differ from one's own. For instance, the Supreme Court has held that in schooling, mere exposure to a diversity of views – and the "cognitive dissonance" that this can create for young persons who are taught something at home that differs from what they may be exposed to in school – is a necessary fact of life in Canada's multicultural society, that all citizens should be prepared for.<sup>168</sup>

Distinguishing between discriminatory and non-discriminatory forms of religious or creed expression in employment, housing or services will often depend on the circumstances of each situation, and require consideration of the wider organizational, social and historical context.<sup>169</sup>

In education, religious subjects may be engaged inside and outside the classroom, provided these are approached neutrally, and there is no indoctrination.<sup>170</sup>

**Example:** The Ontario Court of Appeal struck down religious instruction in public schools in Ontario in a case known as *Elgin County*.<sup>171</sup> To help draw a "line between indoctrination and education," the Court set out the following guidelines for appropriate, non-indoctrinating religious education in (non-Catholic) public schools:

1. The school may sponsor the study of religion, but may not sponsor the practice of religion.
2. The school may expose students to all religious views, but may not impose any particular view.
3. The school's approach to religion is one of instruction, not one of indoctrination.
4. The function of the school is to educate about all religions, not to convert to any one religion.
5. The school's approach is academic, not devotional.
6. The school should study what all people believe, but should not teach a student what to believe.
7. The school should strive for student awareness of all religions, but should not press for student acceptance of any one religion.
8. The school should seek to inform the student about various beliefs, but should not seek to conform him or her to any one belief.<sup>172</sup>

While confessional-based schools may be permitted to teach from a religious or creed-based perspective, the Supreme Court of Canada has also affirmed that the state may require certain subjects be taught from a neutral perspective, where this advances legitimate state interests and core values including respect for diversity and equality.<sup>173</sup>

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“The state...has a legitimate interest in ensuring that students in *all* schools are capable, as adults, of conducting themselves with openness and respect as they confront cultural and religious differences. A pluralist, multicultural democracy depends on the capacity of its citizens ‘to engage in thoughtful and inclusive forms of deliberation amidst, and enriched by different religious worldviews and practices.’”

– Supreme Court of Canada<sup>174</sup>

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Having inclusive policies on creed in place does not guarantee that religious or creed-based pressure will not be found to exist. Actual practices on the ground are of equal importance when considering if the right to equal treatment has been preserved.<sup>175</sup>

## 7.5 Profiling based on creed and associated race-related grounds

“Profiling” is a significant human rights issue and form of discrimination that negatively affects people because of their creed and/or race.<sup>176</sup>

Religion or creed-based profiling may be defined as any action taken for safety, security or public protection that relies on stereotypes about a person’s religion or creed – or other ground perceived to be connected with a religion or creed (e.g. race or ethnic origin) – rather than on reasonable suspicion, to single out a person for greater scrutiny or different treatment.

Profiling is based on preconceived ideas about a person’s *Code*-protected characteristic. Profiling based on creed often intersects with or can be a form of racial profiling. An example is when people are subject to heightened security, scrutiny and surveillance because of their outward appearance or perceived belonging to a certain creed faith, based on stereotypes about people of that creed, or because of their associations with particular ethnic and racial groups.

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Profiling based on creed affects Arabs and Muslims particularly. In a 2003 survey, 48% of Canadians reported that they approved of profiling of Arabs and Muslims, despite the fact that their civil liberties would be called into question.<sup>177</sup> As well, in a 2002 survey by the National Council of Canadian Muslims (formerly Council of American-Islamic Relations Canada), a majority (60%) of Canadian Muslims said they experienced bias or discrimination since the 9/11 terrorist attacks.<sup>178</sup>

Anti-Muslim bigotry and prejudice sometimes involve treating all Muslims as collectively guilty (until proven innocent) and responsible for the acts of individuals or groups sharing a religious or ethnic background.<sup>179</sup> Sometimes, non-Muslim people who share ethnic or racial markers associated with the Islamic faith may also encounter religious or racial profiling, due to a perceived co-relation between religion, creed and other race-related grounds such as colour, ethnic origin, place of origin, language and citizenship.

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Religion or creed-based profiling is different from criminal profiling. Criminal profiling relies on actual behaviour or on information about suspected criminal activity by someone who meets the description of a specific person or persons.

While most often arising in policing and security services, profiling based on creed can happen in many different situations. Examples are:

- When receiving or accessing services, such as education, shops, government, community and social services
- In employment, including in recruitment, hiring, retention, promotion and the day-to-day workplace

- When travelling or using public transportation
- When trying to get or live in housing.

Several creed-related profiling cases have arisen in employment. These have involved the discriminatory conduct of co-workers based on intersecting creed and race-related grounds, and management's failure to respond appropriately.<sup>180</sup>

**Example:** A Muslim Canadian citizen was subjected to a humiliating RCMP investigation after a co-worker reported him as someone she suspected was involved in the 9/11 attacks.<sup>181</sup> A tribunal found that had he not been an Arab Muslim who had immigrated from Saudi Arabia, the co-worker would not have acted the way she did. The tribunal further found that while the employer was not responsible for the report to the RCMP, which was made outside the workplace, the employer was still responsible for discriminatory racial profiling in the workplace because it allowed the suspicions about the employee to continue and did not take any action to address the impact on him. Instead, the employer left the wrongfully suspected employee to fend for himself in a poisoned work environment.

Profiling based on creed can arise in the other contexts, such as when assessing health and safety risks associated with accommodation.

**Example:** In one case, a school board prohibited a Sikh student from wearing a kirpan<sup>182</sup> because the board claimed, among other things, that the kirpan is a "symbol of violence" and that it sends the message that using force is the way to assert rights and resolve conflict. The Supreme Court of Canada found that the board's claim was contradicted by the evidence of the symbolic nature of the kirpan, was disrespectful to believers in the Sikh religion, and did not take into account Canadian values based on multiculturalism. Ultimately, the Supreme Court concluded that the risk of the student using the kirpan for violent purposes was low and prohibiting it violated the student's religious rights.<sup>183</sup>

There will rarely be direct evidence of profiling – it often may have to be proven by inference drawn from circumstantial evidence.<sup>184</sup> The following factors are drawn from the case law on racial profiling. These factors may be relevant when considering whether profiling based on creed was a reason for the alleged adverse treatment:

- Whether the respondent is aware of, or has a perception of, the person's creed
- Statements being made that show the existence of stereotyping or prejudice against someone with a creed (e.g. negative comments)
- No explanation, or a contradictory or changing explanation, for why someone was subjected to greater scrutiny or different treatment, or the explanation does not accord with common sense<sup>185</sup>
- Deviations from the normal practice that are hard to explain<sup>186</sup>
- An unprofessional manner is used or the person is subjected to discourteous treatment (for example, through harsh questioning)<sup>187</sup>
- The person fits a certain profile<sup>188</sup>
- Unfounded suspicion or action in the face of a possibly innocent explanation<sup>189</sup>

- Misinterpreting innocent or ambiguous conduct as incriminating behaviour (e.g. not making eye contact)
- Overreacting to perceived challenging behaviour where people of a certain creed are perceived as threatening, even where there is no real risk<sup>190</sup>
- Events would have unfolded quite differently if the complainant were not known or perceived to be of a particular creed<sup>191</sup>
- Whether the respondent cast its investigative net so widely that a person's creed was a factor leading to his or her investigation.<sup>192</sup>

People who believe they are being profiled can be expected to find the experience upsetting, and might well react in an angry and verbally aggressive way. A person's negative reaction in these circumstances requires reasonable tolerance and tact and cannot form the basis for further differential treatment.<sup>193</sup>

## 7.6 Intersectional forms of discrimination

Discrimination may be unique or distinct when it occurs based on two or more *Code* grounds. This discrimination can be said to be "intersectional." The concept of intersectional discrimination recognizes that people's lives involve multiple overlapping identities, and that marginalization and exclusion based on *Code* grounds may exist because of how these identities intersect.<sup>194</sup>

Discrimination based on creed can overlap with various other forms of discrimination, including discrimination based on race and race related grounds and gender.

It is the OHRC's position that where multiple grounds intersect to produce a unique experience of discrimination or harassment, this must be acknowledged to fully address the impact of the discrimination or harassment.

### 7.6.1 Race-related grounds and creed

Discrimination based on creed most often intersects with discrimination based on race and race-related *Code* grounds including ethnicity, colour, ancestry, place of origin and citizenship.<sup>195</sup>

**Example:** The HRTO ordered a restaurant to pay \$100,000 in damages for discrimination, including harassment, reprisal and a poisoned environment involving a combination of creed, colour, ancestry, place of origin and ethnic origin. Three employees, who were Muslim and from Bangladesh, were mocked because they spoke Bengali. They were told to only speak English in the kitchen, threatened with being replaced with "white" staff, refused accommodation to celebrate the holiday of Eid, and pressured to taste-test pork dishes including during the holy month of Ramadan, against their religion.<sup>196</sup>

Another example is when a person is prevented from observing a practice that has religious or spiritual as well as cultural or ancestral significance and meaning (for more discussion and examples see Section 11 on Indigenous spiritual practices).

### 7.6.2 Sex and creed

Creed-based discrimination often intersects with the ground of sex. Female religious practitioners have often faced the brunt of discrimination and prejudice based on creed in Ontario. In some cases, this is due in part to their greater visibility, or actual or perceived vulnerability.<sup>197</sup>

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Much of the public debate around religious accommodation in public life has centered on what Muslim women should and should not wear. OHRC research and consultation findings suggest that Muslim women who wear the headscarf (hijab) or face veil (niqab) have been particularly susceptible to creed-based discrimination, prejudice and harassment, owing in part to their greater visibility.

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Female religious adherents can also sometimes face a double burden and disadvantage, experiencing both sex-based discrimination and marginalization from within the community as well as sex and race-based prejudice and discrimination from without.<sup>198</sup>

Women may face unique forms of discrimination and harassment based on a combination of sex, creed and other (e.g. race-based) stereotypes.

**Example:** A woman of African descent who practices a traditional African religion and wears traditional African attire to work is harassed by her colleagues. They belittle her cultural identity and spiritual beliefs and practices, and jokingly refer to her “voodoo” powers and perceived “unpredictability” and “volatility,” drawing on gender and race-based stereotypes.

**Example:** A Hindu woman wears a traditional Indian style of dress to a job interview for a management position in a retail store. An interview panel quickly dismisses her and tells her to leave her “costume” at home next time she applies for a job.

### 7.6.3 Creed and disability

Creed may also intersect with disability. Some creed observances are physically or mentally demanding in ways that can affect a person's ability to physically or mentally function, particularly where a pre-existing disability may exist.



Where a creed practice affects a person's pre-existing disability, there may be a duty to accommodate to the point of undue hardship, based on the intersecting grounds of creed and disability.

**Example:** An Orthodox Christian who has diabetes is not able to do some of the more physically demanding tasks of her work as an office cleaner during days that she is fasting. The employer has a duty to accommodate her based on disability and creed up to the point of undue hardship.

Even where a person has no pre-existing disability, where a workplace rule, standard or duty affects their ability to fulfill a sincerely held creed practice (e.g. fasting), there is still a duty to accommodate.<sup>199</sup>

#### 7.6.4 Differences within creed groups

A growing number of creed disputes and discrimination claims are arising between members of the same faith.<sup>200</sup> At times, these conflicts have been shaped by social differences and power dynamics operating within communities, whether based on socio-economic status, creed, gender, ethnic or race-related grounds, and/or sexual orientation or other *Code* grounds. Sometimes, these have also been shaped by conflicts elsewhere in the world.

**Example:** An employer was held liable for not adequately addressing discriminatory comments by a worker of Bosnian Serb ethnic origin towards a co-worker, who identified as a Bosnian Muslim. A tribunal found that the Serb co-worker made threats to kill Muslims in Sarajevo and to harm the employee and his family. He also used the term “Zacklan” which was particularly offensive to the targeted employee because of its violent meaning (decapitation) and its historical and current significance to a person of Bosnian ancestry. The tribunal concluded that the comments were made to the co-worker because of his Bosnian heritage, ancestry, place of origin and religion, and that the employer’s response to the serious threats was inadequate.<sup>201</sup>

Conflicts, discrimination and harassment may also be based on disputes within communities about how a particular creed should be understood and lived out.

**Example:** A supervisor suggested that a fellow Christian employee wasn't doing her job properly, in part because she was not acting like a “true Christian.” This led to negative consequences for her job and was found to be discriminatory.<sup>202</sup>

**Example:** A Jewish man alleged creed discrimination against a Jewish organization for failing to certify him as a kosher caterer because he was not “orthodox or shomer Shabbat.” The respondent, the Kashruth Council, was a corporation that certifies products and establishments that comply, in its view, with the laws of kashrut (Jewish dietary laws). The HRTD dismissed his application, ruling that the applicant did not show that the respondent’s refusal

was in anyway related to creed. The Council's policy did not require that a caterer be orthodox or shomer Shabbat. Indeed, the applicant was previously certified although he was not orthodox. There was no evidence the decision was related to the applicant's creed.<sup>203</sup>

Organizations should be aware of and respect the significant diversity of beliefs and practices within creed groups when inclusively designing for or accommodating people's creed beliefs. An individual approach should be taken that recognizes the unique identity of each person, without relying on preconceived notions, assumptions or stereotypes about people based on creed, or other *Code* grounds.<sup>204</sup>

## 7.7 Association

Some people face discrimination because of their association with someone who belongs to a creed community.<sup>205</sup>

**Example:** The Christian wife of a Jewish man is subjected to antisemitic comments and harassment in the workplace from co-workers, once they learn of her relationship.

Discrimination by association is prohibited under the *Code*.<sup>206</sup> This could apply to friends, family<sup>207</sup> or others (e.g. someone advocating on behalf of people affiliated by creed).

## 7.8 Constructive (adverse effect) discrimination

"Constructive" discrimination, also known as "adverse effect" discrimination, arises when a neutral requirement, qualification or factor has an adverse impact on members of a group of persons who are identified by a *Code* ground. Section 11(1) of the *Code* explicitly addresses this form of discrimination.<sup>208</sup>

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An adverse impact may arise from neutral requirements or identical treatment.<sup>209</sup>

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This is one of the most common forms of discrimination experienced by people with a religion or creed.

The emphasis of the analysis is on the adverse "effects" of the requirement, qualification or factor, and not on the intention or motives behind it, which may be neutral and non-discriminatory on their face.

**Example:** An employer has a rule that male employees must be clean-shaven and keep short hair. Using this rule, the employer refuses to hire a man who identifies as a Rastafarian who does not shave or cut his hair for religious

reasons. The rule is not “intended” to exclude Rastafarians from the job, but it has this effect. Unless an employer can show that a change or exception to the rule would be too costly or create a significant health and safety risk which can’t be mitigated by other means, the employer would need to change the rule.

Typically, in the context of creed, constructive discrimination issues arise in the areas of:

- Scheduling, vacation and break policies
- Dress codes
- Health and safety rules or standards
- Photo and biometric identification (see section 10.4 below for more discussion)
- Food practices and restrictions.

Constructive or adverse effect discrimination violates the *Code* unless:

- The requirement, qualification or factor is reasonable and *bona fide* in the circumstances,<sup>210</sup> and the person or group cannot be accommodated short of undue hardship, or
- An exception is provided by law that to discriminate because of such a ground is not an infringement of a right.<sup>211</sup>

For more on the requirements for the duty to accommodate, see section 9.5 below.

## 7.9 Systemic discrimination

Creed discrimination can result from individual behaviour as well as because of the unintended and often unconscious effects of a discriminatory *system*. This is known as systemic discrimination. Systemic discrimination can sometimes result from, and is often shaped by, systemic forms of faithism (see section 3.2 for more on faithism).

Systemic discrimination based on creed can be described as patterns of behaviour, policies and practices that are part of the administrative structure or informal “culture” of an organization, institution or sector, which, on purpose or inadvertently, create or perpetuate disadvantage for persons based on their creed.<sup>212</sup>

While systemic discrimination can overlap with and be in part reproduced through individual acts of discrimination, the focus of the systemic discrimination analysis is on the outcome and effects of institutional policies, practices and procedures.

The OHRC has set out three considerations to identify and address systemic discrimination:

1. Numerical data
2. Policies, practices and decision-making processes
3. Organizational culture.

For more on how to assess these elements of systemic discrimination analysis, see the OHRC's *Policy and guidelines on racism and racial discrimination*.

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Organizational culture refers to informal norms and values that influence organizational activity and the experience of individuals both inside and outside the organization. An organization may have dominant and competing subcultures.<sup>213</sup>

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Organizational culture and more informal practices and subjective assessments are particularly prone to inadvertently disadvantaging creed minorities within organizations.

**Example:** An investment firm has a tradition of celebrating its successes over drinks at a bar. The company regularly organizes “get-togethers” at a local drinking establishment on Thursday evenings to unwind and share latest market trends. These occasions also offer an important informal networking and mentoring opportunity for more junior staff members. Persons of religious faith who do not drink alcohol for creed-related reasons are effectively excluded from benefiting from these informal networking and information-trading opportunities in ways that can significantly limit their career prospects with the firm. The failure to provide other additional, more inclusive opportunities for career networking and mentoring for staff, including for people who do not consume alcohol or cannot meet in places where alcohol is served for religious reasons, could be discriminatory.

Organizations have a responsibility to make sure that they are not knowingly or unconsciously engaging in systemic discrimination. This takes vigilance and a willingness to monitor and review numerical data, policies, practices and decision-making processes and organizational culture. From a human rights perspective, it is not acceptable for an organization to choose to remain unaware of systemic discrimination or to fail to act when it learns of a problem. For more on measures to combat systemic discrimination, see the OHRC's *Policy on racism and racial discrimination*.

## 7.10 Reprisal

Section 8 of the *Code* protects people from reprisal or threats of reprisal. A reprisal (“payback”) is an action, or threat, that is intended<sup>214</sup> as retaliation for claiming or enforcing a right under the *Code*.

Creed group members may try to enforce their *Code* rights by filing a grievance against an employer (in a unionized workplace), making an internal discrimination complaint to a service provider, housing provider, or to their employer, or making an application at the HRTO. However, there is no strict requirement that someone who alleges reprisal must have already made an official complaint or application under the *Code*. Also, to claim reprisal, a person does not have to prove that discrimination took place.<sup>215</sup>

Someone will have experienced reprisal based on a *Code* ground if:

- An action was taken against, or a threat was made to, the claimant
- The alleged action or threat was related to the claimant having claimed or tried to enforce a *Code* right, and
- The respondent intended to retaliate for the claim or the attempt to enforce the right.<sup>216</sup>

**Example:** A Toronto restaurant was found to have violated section 8 of the *Code* by carrying out acts of reprisal in response to complaints of discrimination by three former kitchen staff members. The three ex-staff members – one a head chef, another a sous chef, and another a cook – faced various acts of reprisal after submitting two complaint letters to their employer detailing a host of grievances, including allegations of discrimination based on creed and race-related grounds.<sup>217</sup> The HRTO found that the restaurant manager’s treatment of the applicants worsened after the letters of complaint were submitted: the employer took steps to hire replacement staff (all of whom were white); the head chef was asked to train a new inferior (sous chef) at his usual station, and to work the salad bar (a lower position in the kitchen hierarchy). Ultimately, the HRTO found that the employer “made the workplace intolerable for each of the applicants” and that the manager “precipitated a confrontation” that resulted in the termination of the head chef’s employment, and soon thereafter the other kitchen staff members, amounting to constructive dismissal and reprisal.<sup>218</sup>

The threat of reprisal sometimes contributes to a person’s decision not to assert their rights or complain. For example, during consultations,<sup>219</sup> the OHRC learned that some employees, particularly those who feel economically insecure or vulnerable, do not reveal their creed identity or needs. And they do not request or complain about their lack of creed accommodation, for fear of being marginalized or stigmatized by co-workers or the employer, and/or of being fired or demoted.

To combat discrimination, it is essential for organizations to create an inclusive and welcoming climate where negative practices, attitudes and stereotypes can be challenged and discouraged.<sup>220</sup>

## 8. Defences and exceptions

The *Code* includes specific defences and exceptions that allow behaviour that would otherwise be discriminatory. Some of these recognize the associational rights of creed-based groups to give preference in certain circumstances to persons who share the same creed beliefs and practices.<sup>221</sup>

In many cases, these defences reflect lawmakers’ efforts to reconcile a conflict between different rights, and/or individual and collective rights.<sup>222</sup> The Supreme Court of Canada has noted that these types of provisions should be treated not only as rights-limiting provisions,

which require a narrow interpretation, but also as rights-conferring provisions, which require a liberal and purposive interpretation (in a way that reflects the spirit and intent of the *Code*).<sup>223</sup>

An organization that wishes to rely on these defences and exceptions, must show it meets all of the requirements of the relevant section.

## 8.1 Special programs

Section 14 of the *Code* protects “special programs” that are designed to address the historical disadvantage experienced by people identified by a *Code* ground. As a result, it is not discriminatory to implement programs designed to help people identified by creed, as long as an organization can show that the program is:

- Designed to relieve hardship or economic disadvantage
- Designed to help the disadvantaged group achieve or try to achieve equal opportunity, or
- Likely to help eliminate discrimination.

For more information about special programs, see the OHRC’s *Your guide to special programs and the Human Rights Code*.<sup>224</sup>

## 8.2 Special interest organizations

Under section 18 of the *Code*,<sup>225</sup> religious organizations and other organizations such as charities, schools, social clubs, sororities or fraternities that want to limit membership and involvement to people with a particular religion or creed can do this as long as they primarily serve the interests of people from this group.

**Example:** Students at a university set up a club that provides social, networking and education opportunities for students of a certain religious background. They restrict their membership to people of this group under section 18 of the *Code*.

Section 18 of the *Code* establishes three requirements that will allow an organization to provide a service or facility that would otherwise be regarded as discriminatory under the *Code*:

1. Is the entity a religious, philanthropic, educational, fraternal or social institution or organization?
2. Is the institution or organization primarily engaged in serving the interests of persons identified by their creed?
3. Is membership or participation in the institution or organization restricted to people identified by that creed?<sup>226</sup>

Section 18 of the *Code* does not require that an organization or institution provide its services solely to members of a group identified by creed to qualify for the exemption.<sup>227</sup> The section states that providing such services must be its “primary” purpose.

Therefore, this provision may allow religious institutions to grant preferences in their admission policies or membership based on religion. The interpretation of this section in the case law balances the public's right to be treated equally without discrimination against a private organization's right to limit its membership to an identified group.<sup>228</sup> Courts and tribunals have also recognized how this type of provision gives effect to religious rights under the *Code* and *Charter*, in their associational and communal dimension.

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“The diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected.”  
– Supreme Court of Canada<sup>229</sup>

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“Religious freedom under the *Charter* must...account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions[.]”  
– Supreme Court of Canada<sup>230</sup>

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Allocating public funds to private religious or creed-based organizations – such as healthcare, housing or service providers that have a religious history, mission or mandate and qualify as a special interest organization under the *Code* – may be permissible under the *Code*, provided that such funding is not allocated in a discriminatory way (for example by only providing funding to one religious group).

### 8.3 Special employment

Section 24(1)(a) states that a religious, philanthropic, educational, fraternal or social institution or organization that mostly serves the interests of people identified by certain *Code* grounds including creed can give hiring preference to people from that group or impose a creed-based qualification, as long as the qualification is reasonable and legitimate (*bona fide*), given the nature of the job.

**Example:** A religious organization hires people of the same faith to instruct children attending after-school and weekend religious educational programming. A core job requirement is that employees be members of the same creed-based community and have a proficient command of the community's articles of faith.

To qualify for this exemption under the *Code*, the religious/creed-based special employer must show that:

1. It is a religious, philanthropic, educational, fraternal or social institution or organization
2. It is primarily engaged in serving the interests of persons identified by their creed, and employs only, or gives preference in employment to, persons similarly identified; and
3. The religious or creed-based qualification is a reasonable and *bona fide* qualification because of the nature of the employment.<sup>231</sup>

Legal decision-makers have shown the importance of keeping in mind the dual (rights limiting and conferring) purposes and balancing function of section 24 when interpreting this provision.<sup>232</sup>

***Step 1: The organization is a religious, philanthropic, educational, fraternal or social institution***

To qualify for the special employment exemption under section 24, an organization must be able to show that it is within the class of organizations (religious, philanthropic, educational, fraternal or social) the section applies to.

Before determining if an organization qualifies for the section 24 defence, it may be necessary to first clarify and determine what constitutes the organization for purposes of analysis, particularly in cases where an organization has multiple branches, programs and/or site locations. This may be determined on a case-by-case basis, depending on the facts, context, and corporate and organizational structure.<sup>233</sup>

Just because an organization sees itself as religious does not mean that it will necessarily be found to be a religious organization.<sup>234</sup> Assessing whether an organization is religious may require an objective examination of the organization's history, purpose, founding principles and by-laws.<sup>235</sup>

Receiving public funds or providing social services to the public does not preclude an organization from qualifying as a religious organization under this *Code* defence.<sup>236</sup>

***Step 2a: The organization is primarily engaged in serving the interests of persons similarly identified by their religion or creed***

If Step 1 is met, the religious organization must then show it is primarily engaged in serving the interests of persons similarly identified by religion or creed.

Determining whose interests are primarily served by the activity of the organization is not based on who actually uses the service or program, or how an objective outsider or service user may view the organization's activity. Rather, the test for this step hinges on evaluating how the organization sees the activity it performs, and the activity's relation to the organization's underlying purpose.<sup>237</sup>



If a religious or creed-based organization serves the general public and does not limit admission to its programs or services to persons based on creed, it may still be found to be primarily serving the interests of persons identified by their religion or creed.<sup>238</sup>

**Example:** The Ontario Divisional Court found that a supportive housing service offered by an Evangelical Christian organization to persons with developmental disabilities regardless of faith did primarily serve the interests of persons identified by their creed (namely the religious interests of the organization and its members). This was because the organization viewed providing service to all needy people without discrimination as part of its religious mandate.<sup>239</sup>

***Step 2b: The organization gives preference in employment to persons similarly identified***

This part of step 2 requires looking at the nature of the employment requirements and creed-based qualifications set out by the employer.

An organization that does not preferentially hire persons similarly identified by their religion or creed, or has no history or consistent pattern of setting out religious qualifications for a particular job category, may face challenges meeting this second part of the test.

Sometimes, only some employee positions in an organization may require religious qualifications as a *bona fide* occupational requirement, as discussed further below (e.g. leadership or “directing mind” positions in a religious or creed-based organization, or positions involving direct teaching and propagation of the creed faith).

**Example:** The Salvation Army is an Evangelical Christian organization and branch of the Salvation Army Church. Its mission is to preach the gospel of Jesus Christ, supply basic human needs, provide personal counselling and undertake the spiritual and moral regeneration and physical rehabilitations of all persons in need who come within the sphere of influence regardless of race, colour, creed, sex, age or sexual orientation. The Salvation Army is engaged in various social service activities, including operating hospitals and caring for individuals with developmental disabilities. Its value statement requires all employees to support Christian values of respect, honesty, integrity, fairness, mercy and compassion. Adherence to lifestyle and morality standards, however, is considered to be a qualification for only some positions, such as youth pastor, but other positions, such as registered nurse, do not have this requirement.<sup>240</sup>

**Step 3: The religious or creed-based qualification is a reasonable and bona fide qualification because of the nature of the employment**

The final element of the s. 24(1)(a) test under the *Code* requires that the religious or creed-based qualification be “reasonable and *bona fide*” because of the nature of the job.

Courts and tribunals have established a two-part test for determining whether an occupational qualification or requirement is *bona fide* under section 24(1)(a) of the *Code*.<sup>241</sup>

The onus is on the employer to establish that the religious or creed-based qualification, requirement, or standard is:

1. Imposed honestly, in good faith, and in the sincerely held belief that such limitation is necessary to adequately perform the work involved, and not for ulterior reasons that contravene the purpose of the *Code*.
2. Objectively related to the performance of the employment concerned, in that it is reasonably necessary to assure the effective performance of the job and to accomplish its purpose or goal.

The first part of this test is subjective. It requires assessing the religious employer’s own view of the nature of the employment and religious qualifications. It requires evidence that the organization sincerely believes that the religious or creed-based qualification is necessary to adequately perform the job tasks.

The second part of the test is objective, and narrowly interpreted, because it restricts rights.<sup>242</sup> It requires considering whether the individual job function, including in relation to the broader goals, activity and services provided by the organization, requires imposing discriminatory job qualifications.<sup>243</sup> A close examination of the nature of the employees’ actual duties, functions and activities is critical.<sup>244</sup>

**Example:** A denominational school may prefer to employ teachers of the same denomination or faith. This hiring policy would be permitted if the teacher’s faith is related to the professional functions that teachers perform in denominational schools. However, this same defence may not be available when hiring maintenance staff, unless the school could show that belonging to a particular faith is objectively and reasonably necessary to effectively perform the essential duties of the maintenance job.<sup>245</sup>

The validity of a religious/creed-based standard or qualification cannot and will not simply be inferred from the general religious ethos of an organization and its mission as a whole. Instead, it must be tied directly and clearly to performing the job in question.<sup>246</sup>

Procedurally, organizations may be required to show that they have engaged in a meaningful process to carefully consider whether the religious qualification is necessary, in light of the organization’s objectives, the nature of the services provided, and the specific

job tasks required.<sup>247</sup> When assessing if a religious qualification or standard is reasonably needed, it might be relevant to look at the practices of other religious organizations in similar situations.<sup>248</sup>

Organizations that apply religious qualifications and standards for employees inconsistently (without a valid reason or explanation) may fail to satisfy the objective part of this test.<sup>249</sup>

Even where an organization qualifies for the section 24 exemption, it is still subject to other aspects of the *Code* and is responsible for maintaining an otherwise discrimination-free workplace.<sup>250</sup> The section 24 exemption does not give a free pass for organizations to discriminate in any way, beyond its *bona fide* creed-based employee job requirements and qualifications.

Employees found to violate a creed-based requirement must still be dealt with in a respectful way that preserves their dignity and respect.<sup>251</sup>

#### 8.4 Solemnization of marriage by religious officials

Section 18.1<sup>252</sup> of the *Code* allows religious officials<sup>253</sup> to refuse to preside over (or assist in the solemnization of) a marriage in a “sacred place”<sup>254</sup> or refuse to allow a “sacred place” to be used for a marriage event, if this goes against their religious beliefs or “the doctrines, rites, usages or customs of the religious body to which the person belongs.”

To date, there have been no decisions under the Ontario *Code* dealing with this provision. However, there has been a decision under similar legislation in British Columbia.

**Example:** A lesbian couple filed a human rights complaint against a Catholic men’s organization after it refused to allow them to hold their wedding reception in a hall that was owned by the Catholic Church and operated by the Knights of Columbus. The Knights argued that they had a reasonable and *bona fide* justification for cancelling the contract with the couple, and that they were also entitled to the protection of the statutory defence in s. 41 of the British Columbia *Human Rights Code*. The BC Tribunal found that the Knights’ refusal was “reasonable and bona fide” because allowing the hall to be used for same-sex marriages would have required the Knights to “indirectly condone” an act that is contrary to their core religious beliefs.<sup>255</sup>

#### 8.5 Separate school rights preserved

**Section 19** of the *Code* preserves the rights and privileges of separate schools under the Canadian Constitution and *Education Act*.<sup>256</sup> These Acts preserve denominational school rights enjoyed at confederation. They effectively mean that public, government-funded Roman Catholic separate schools, and Roman Catholic-based educational and moral instruction in these schools, cannot be held to violate the *Code*.

**Example:** A group of parents whose children attended private religious schools challenged the Ontario government's funding for Roman Catholic Schools but not other religious schools. In *Adler v. Ontario*<sup>257</sup> the Supreme Court of Canada rejected the claim that this preferential funding infringed their religious rights and equality rights under sections 2(a) and 15 of the *Charter*. The Court confirmed that because of section 93 of the *Constitution Act, 1867*, Ontario is permitted to fund Roman Catholic separate schools. This special status is the product of a historical compromise crucial to Confederation.<sup>258</sup>

The right to freedom of religion under s. 2(a) of the *Charter* has also been found to protect the right of confessional schools – including Roman Catholic schools – to teach from a confessional religious perspective.<sup>259</sup>

**Example:** The Supreme Court of Canada found that a Quebec government requirement that a private Catholic school teach *all* aspects of a government mandated “Ethics, Religion, Culture” (ERC) program of study from a neutral, non-confessional perspective, including the teaching of Catholicism, limited freedom of religion more than was necessary. Recognizing the collective aspects of religious freedom – “in this case, the collective manifestation and transmission of Catholic beliefs through a private denominational school” – the Court unanimously held that: “To tell a Catholic school how to explain its faith undermines the liberty of the members of its community who have chosen to give effect to the collective dimension of their religious beliefs by participating in a denominational school.”<sup>260</sup> At the same time, the Court affirmed that other aspects of the ERC program dealing with ethics and other religions should be taught from a neutral perspective, in keeping with the program's objectives of preparing students for living in a plural, democratic society which was described as being constitutional and “of immense public importance”.<sup>261</sup> The Court affirmed an earlier ruling (*S.L.*) in this respect: “in a multicultural society, it is not a breach of anyone's freedom of religion to be required to learn (or teach) about the doctrines and ethics of other world religions in a neutral and respectful way.”<sup>262</sup>

Denominational school rights under section 93 of the *Charter*, preserved in section 19 of the *Code*, have been found to include the right to prefer Catholic teachers for employment.<sup>263</sup>

**Example:** In *Caldwell v. Stuart*,<sup>264</sup> the Supreme Court of Canada concluded that a Catholic school could terminate the employment of a Catholic teacher who married a divorced man in a civil ceremony contrary to the Church's rules. The Court accepted that the school had the “right” to preserve the religious basis of the school by employing teachers who accept and practice the teachings of the Church. Therefore, it found the requirement of religious conformity by Catholic teachers to be a legitimate and *bona fide* job qualification. As well, the school could rely on section 22 of the British Columbia *Human Rights Code*, which was similar to s. 18 of the Ontario *Code*, to grant preference to Catholic teachers who accept the practice and teachings of the Church.

However, religion-based employment preferences and qualifications in Catholic schools or school boards may be subject to the test laid out in section 24 of the *Code* (see section 9.3 above). This requires, among other things, that the religious qualification be reasonable and *bona fide*, given the nature of the employment.

While section 19 of the *Code* enables Roman Catholic separate school boards to preserve the religious basis of their schools, it does not prevent claims of discrimination in policies and conduct within Catholic schools from being heard under the *Code* or *Charter*.

**Example:** A gay Catholic high school student successfully applied to an Ontario court for an injunction restraining the board from preventing him from attending the high school prom with his boyfriend.<sup>265</sup> In applying the test for an injunction, the Court acknowledged the protections for Catholic schools in s. 93 of the *Constitution Act*. However, the Court also stated that this does not mean that separate schools are exempt from the *Charter*. Instead, the Court said that the courts must strike a balance on a case-by-case basis between conduct essential to the proper functioning of a Catholic school and conduct that contravenes *Charter* rights such as equality under s. 15. In this case, the injunction was granted and Mr. Hall was allowed to attend the prom with his same-sex partner.<sup>266</sup> The case was ultimately discontinued and never went to a full trial of the *Charter* and other constitutional issues involved.

## 9. The duty to accommodate

Under the *Code*, employers, unions, housing providers and service providers have a legal duty to accommodate people's sincerely held creed beliefs and practices to the point of undue hardship, where these have been adversely affected by a requirement, rule or standard.<sup>267</sup>

The goal of accommodation is to help everyone have equal opportunities, access and benefits. Creed accommodations enable people affiliated by a creed to fully and equally take part and contribute in areas like the workplace, services or in housing, unions or professional associations, when they would otherwise face barriers because of their creed. They help to make sure that people do not have to choose between observing their religion or creed, and being gainfully employed, or equally accessing or benefitting from housing, employment and services.<sup>268</sup>

The duty to accommodate stems, in part, from a recognition that the "normal ways of doing things" in organizations and society are often not "neutral" but rather may inadvertently disadvantage, privilege or better meet the needs of some groups relative to others. Instead of giving special privileges or advantages, accommodations help to "level the playing field" by ensuring that all Ontarians are equally included and accommodated.

“[T]he Ontario *Human Rights Code* is meant to foster a society which will allow diversity to flourish. It is designed to protect and accommodate the needs and interests of those who differ from the dominant majority group. Although the *Code* does not require that any individual or group accommodate others to the point [where it creates] undue hardship, severe suffering, or disproportionate privation, it does conceive of inconvenience, and some degree of disruption and expense. Insofar as we want to make space within our communities for the comfortable coexistence of those who differ by religion, sex, sexual orientation, race, disability, and family grouping, there will be commensurate costs to be borne by all of us.”<sup>269</sup>

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Most accommodations are not difficult or expensive, and do not cause a major burden for the people responsible. Inclusive design up front can often eliminate the need for accommodation, by building diversity and equality considerations into the normal way of doing things (see 10.2.4 for more information).

Where a person has been negatively affected by a requirement, factor or rule based on creed, failure to accommodate may lead to a finding of a breach of the *Code*.

**Example:** An employer advised an employee that it would not allow any days off for religious holy days and then terminated his employment for an unauthorized absence on such a day. This was found to have violated the British Columbia *Human Rights Code*.<sup>270</sup> There was no evidence that the employer made any effort to accommodate the employee.

## 9.1 Inclusive design

"Inclusive design" or "universal design" means design with everyone in mind.<sup>271</sup> It means being aware of differences that characterize people from *Code* protected groups when making design choices to avoid creating barriers.

Achieving integration and full participation requires up-front barrier-free inclusive design, as well as removing existing barriers. Inclusive or “universal” design is a preferred approach to removing barriers after they become apparent, or making “one-off” accommodations, which assumes that existing structures are fine or only need slight modifications to make them acceptable. The Supreme Court of Canada has said that standards should be designed to reflect all members of society, to the extent that this is reasonably possible.<sup>272</sup>

**Example:** A mental health facility creates a multi-faith prayer/reflection room for persons of diverse faiths to observe their creed beliefs and practices. The room is designed in a way that facilitates and enables the accommodation of diverse creed observances.

Organizations have an obligation to be aware of differences between individuals and groups and to build in conceptions of equality to standards, rules or requirements.<sup>273</sup> This means designing inclusively for the needs of people of diverse creed faith when developing or changing policies, programs, procedures, standards, requirements or facilities. Along with the expectation to prevent barriers at the design stage through inclusive design, organizations should be aware of systemic barriers in systems and structures that already exist. They should actively identify and seek to remove these existing barriers through inclusive design reviews. New barriers should never be created when designing new structures or revising old ones.

This proactive approach is more effective because it emphasizes accessibility and inclusivity from the start. It also minimizes the need for people to ask for individual accommodations as a result.

**Example:** A university with a large and religiously diverse student body makes it a policy to avoid scheduling exams on major religious holidays. This saves the university administration significant time and resources that would otherwise have been required to reschedule and monitor alternate exam times and dates for individual students.

Organizations will find that inclusive design, barrier removal and individual accommodations often benefit larger numbers of people.

## 9.2 Procedural and substantive duty to accommodate

The duty to accommodate has a procedural component (the process) and a substantive component (the accommodation provided). Both are very important.<sup>274</sup>

The procedural duty involves the considerations, assessments and steps taken to respond to an accommodation need. A failure to give any thought or consideration to an accommodation issue or request, including what steps if any could be taken, may represent a failure to satisfy the “procedural” duty to accommodate.<sup>275</sup>

**Example:** An employer rejected an applicant during the recruitment process as soon as it learned that he would need a creed-related accommodation. The HRTO found that it “immediately rebuffed” the request and that this was discriminatory. It confirmed that the employer had a procedural duty to take adequate steps to assess and explore accommodation options.<sup>276</sup>

The substantive duty is about the appropriateness or reasonableness of the chosen accommodation as well as the reasons for not providing an accommodation, including proof of undue hardship.<sup>277</sup>

## 9.3 Principles

The duty to accommodate is made up of several overlapping and mutually reinforcing principles including respect for dignity, individualization, integration and full participation, inclusive design, and appropriate accommodation.

### 9.3.1 Respect for dignity

Human dignity involves many factors, including respect for people's identities, integrity and sense of self-worth. It is harmed when people are marginalized, stigmatized, ignored or devalued. Empowerment, privacy, confidentiality, comfort, autonomy, individuality and self-esteem are all important factors.

Dignity includes considering how accommodation is provided and the person's own participation in the process. It means not overly questioning a person's creed beliefs and choices beyond what is minimally required to determine an appropriate accommodation. It also means respecting and valuing the perspectives of people with a creed, even where one's own views differ sharply, and not reducing everything about a person to their creed identity or belief system.

Organizations responsible for providing creed accommodation should carefully consider the different ways people may need accommodation in their workplace, housing environment or when accessing a service to respect people's dignity.

**Example:** A trucking company requires a Sikh driver, who cannot wear a hardhat in the truck unloading area due to his turban, to remain in the truck cab upon arrival at the point of delivery. As fumes from the truck present health and safety risks, he is required to turn off the engine upon arrival at the destination, while others unload the truck. As a result, he is exposed to high temperatures while waiting in the cab in the summer and cold temperatures in the winter. The company has a duty to explore accommodations that better respect dignity.

### 9.3.2 Individualization

There is no set formula for creed accommodation. Each person's needs are unique and must be considered afresh when an accommodation request is made. What might work for one person may not work for others.

Accommodations may also need to be revisited over time to make sure they continue to meet a person's needs appropriately.

**Example:** A hospital offers a Muslim man "kosher" food to fulfill his religious dietary needs, because this had met his needs and the needs of other Muslim patients previously. However, the man now sincerely believes that this is not permissible according to his current understanding of religious law, and requests a "halal" food option. The hospital refuses to comply with the request and the person alleges discrimination for failure to accommodate his sincerely held belief.



While some accommodations may only meet one person's needs, organizations will find that many of the changes they implement will benefit others as well.

### 9.3.3 Integration and full participation

Employment, housing, services and facilities should be designed, and may need to be adapted, to accommodate the needs of people affiliated by creed in a way that best promotes their integration and full participation.<sup>278</sup>

It is well established in human rights law that equality may sometimes require different treatment that does not offend the individual's dignity. In some circumstances, the best way to ensure the equality of people with a creed may be to exempt them from an activity or duty, or provide separate or specialized services.

Segregated treatment in services, employment or housing is generally less dignified and acceptable, unless it can be shown it's the best way to achieve equality in the circumstances.<sup>279</sup>

**Example:** A school board accommodates students who are not able to take part in school music programming for creed-related reasons by offering students a range of accommodation options. These seek to maximize their participation in programming, while meeting their individual needs. For example:

- A student who is not permitted to blow into an instrument but may otherwise take part in the music program is provided with a percussion instrument (e.g. baseless drum)
- A student who is not permitted to create or perform music but is able to listen to music takes part only in non-performance-based curriculum programming (e.g. music history, theory, critical analysis); alternatively, an individualized program is set up selected from non-performance-related curriculum expectations
- A student who is not permitted to create, perform or listen to music is provided with an accommodation of full withdrawal from music.<sup>280</sup>

## 9.4 Appropriate accommodation

Along with designing inclusively and removing barriers, organizations must also respond to individual requests for accommodation. The duty to accommodate requires that the most appropriate accommodation be determined and provided, short of undue hardship.

Accommodation is considered appropriate if it results in equal opportunity to enjoy the same level of benefits and privileges experienced by others, or if it is proposed or adopted to achieve equal opportunity, and meets the individual's creed-related needs. The most appropriate accommodation is the one that most:

- Respects dignity (including autonomy, comfort, and confidentiality)
- Responds to a person's individualized needs
- Allows for integration and full participation.

Accommodation is a process and a matter of degree, rather than an all-or-nothing proposition, and can be seen as a continuum. The highest point in the continuum of accommodation must be achieved, short of undue hardship.<sup>281</sup> At one end of this continuum is full accommodation that most respects the person's dignity and promotes confidentiality. Alternative accommodation (that which would be less than “ideal”) might be next on the continuum when the most appropriate accommodation creates undue hardship. An alternative (or “next-best”) accommodation may also be implemented in the interim while the most appropriate accommodation is being phased in or put in place at a later date when resources have been put aside.

An organization should first identify the most appropriate or ideal accommodation in the circumstances before considering whether it would cause undue hardship. If an accommodation is then shown to cause undue hardship, the next-best accommodation (short of undue hardship) must be sought and put in place.

**Example:** An employee requires a space in the workplace to perform daily religious prayer observances during the work day. The employer offers use of a closet that is also used for storing garbage. The option does not respect the dignity and health and safety of the accommodation seeker, and would likely contravene the *Code*.

If there is a choice between two accommodations that respond equally to the person's needs in an equally dignified way, then the accommodation provider is entitled to select the one that is less expensive or less disruptive to the organization.

In some cases, the most appropriate accommodation may involve changing policies, practices and other requirements so they are more inclusive.

## 9.5 The legal test

Section 11 of the *Code* prohibits discrimination that results from requirements, qualifications or factors that may appear neutral but have an adverse effect on people identified by *Code* grounds.<sup>282</sup> This is known as “constructive” or “adverse effect” discrimination (see section 7.8 above). Organizations have a duty to accommodate people up to the point of undue hardship, where a person faces adverse effect discrimination based on their creed.

**Example:** A car dealer operates seven days a week and requires its employees to be available to work weekend hours, which are its busiest and most profitable business days. The requirement adversely affects Christian and Jewish employees with a creed that prohibits work on Sabbath days, which fall on the weekend. The business has a duty to accommodate these employees to the point of undue hardship.

### 9.5.1 Establishing adverse effect discrimination

A person must first establish a *prima facie* claim of discrimination before the duty to accommodate is triggered. In the context of creed, this requires showing that a person has been adversely affected by a requirement, qualification or factor in a *Code* social area, at least in part based on their sincerely held creed belief (see section 9.5.3 for more on "sincerely held belief").<sup>283</sup>

Not every adverse impact on a person's creed may be discriminatory under the *Code*. Interference with creed practices or beliefs that are only marginally significant for, or peripherally connected to, a person's creed may not necessarily receive protection.<sup>284</sup> Examples include:

- Taking part in volunteer activities at church,<sup>285</sup> or other social and communal activities connected to a religion or creed<sup>286</sup>
- Accessing religious and cultural programming<sup>287</sup>
- Attending a land claim selection meeting<sup>288</sup>
- Expressing aspects of one's religious identity in ways that are neither required nor perceived as necessary to "establish a connection with the divine" or the "subject or object of one's spiritual faith."<sup>289</sup>

Objective evidence may be required to show that a requirement, rule or practice actually adversely affects a person based on their sincerely held creed belief.<sup>290</sup>

**Example:** A college had previously accommodated a Jewish teacher by scheduling his classes after 1:00 p.m. to enable him to teach a morning computer class at a local Jewish high school. The college withdrew this accommodation after it introduced a new automated scheduling system. The teacher grieved the decision claiming that the college had failed in its duty to accommodate his sincerely held religious belief that he must give back to his community which, he argued, was fulfilled by teaching at a Jewish high school. The grievance board followed the Supreme Court decision in *S.L.*, and noted that while a subjective test is required to determine the existence of a religious belief, "it was necessary to apply an objective test to determine if the religious belief had been infringed." Noting that there are many ways in which the grievor could fulfill his obligation to give back to his community," the board held that it was not the requirement to give back that was infringed but the teacher's particular choice of how to fulfill it. The employer was not required to accommodate this.<sup>291</sup>

### 9.5.2 *Bona fide* requirement defence

Section 11 of the *Code* allows an organization to show that the requirement, qualification or factor that results in discrimination is reasonable and *bona fide* (legitimate). However, to do this, the organization must first show that the needs of the person (including the "needs of the group"<sup>292</sup> they belong to) cannot be accommodated without creating undue hardship.

The Supreme Court of Canada has set out a framework for examining whether the *bona fide* requirement defence has been met.<sup>293</sup> If *prima facie* discrimination or discrimination on its face is found to exist, a respondent must establish on a balance of probabilities that the standard, factor, requirement or rule:

1. Was adopted for a purpose or goal that is rationally connected to the function being performed (such as a job, being a tenant, or taking part in the service)
2. Was adopted in good faith, in the belief that it is necessary to fulfill the purpose or goal, and
3. Is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.<sup>294</sup>

Ultimately, the person who wants to justify a discriminatory requirement, rule or standard must show that accommodation was incorporated into the standard to the point of undue hardship.<sup>295</sup> This means the requirement was designed or changed to include as many people as possible, and that any remaining individual needs were accommodated, short of undue hardship.<sup>296</sup>

Some of the factors to consider during the analysis include:<sup>297</sup>

- Whether the accommodation provider investigated alternative approaches that do not have a discriminatory effect
- Reasons why viable alternatives were not put in place
- The ability to have differing standards that reflect group or individual differences and capabilities
- Whether the accommodation provider can meet their legitimate objectives in a less discriminatory way
- Whether the standard is properly designed to make sure the desired qualification is met without placing undue burden on the people it applies to
- Whether other parties who are obliged to assist in the search for accommodation have fulfilled their roles.

### 9.5.3 Sincerely held creed belief

Section 11 of the *Code* protects people from adverse effect discrimination based on their *personal* religious or creed beliefs, practices or observances, provided they are sincerely held<sup>298</sup> and connected to a religion or creed.

As per the legal test for the duty to accommodate set out above, organizations have a duty to accommodate people's sincerely held creed beliefs.

While protection under section 11 of the *Code* requires that an adversely affected belief or practice be creed-based,<sup>299</sup> it is not necessary for someone to show that the belief, practice or observance is:

- An "essential" element of the creed<sup>300</sup>
- Required or recognized as valid by religious officials or "official" creed teachings<sup>301</sup>
- Consistent with the beliefs, practices or observances of others of the same faith.<sup>302</sup>

Organizations have a duty to accommodate both obligatory and voluntary expressions of faith, as long as they are sincerely held. It is the creed-based, "religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection."<sup>303</sup>

**Example:** Mr. Amselem and two other fellow Orthodox Jewish condominium owners celebrated the Jewish holiday of Succot by erecting a small enclosed temporary hut (known as a "succah")<sup>304</sup> on their condominium unit balcony. When the condo owners association told them to take the succahs down, in part because they violated condo by-laws as stipulated in the declaration of co-ownership, they refused to claiming this violated their religious rights. The association sought an injunction to prohibit the succahs. The Quebec Superior Court granted the injunction in part based on expert testimony from a rabbi that erecting an individual succah is not (objectively speaking) a religious requirement of the faith. The injunction was upheld by the Quebec Court of Appeal. On appeal, the Supreme Court of Canada overturned the decisions and allowed the claimants to retain their succahs on their balconies. The Court said that the proper test to apply in this case is not whether erecting a succah is required by the religion, but rather "whether the appellants sincerely believe that dwelling in or setting up their own individual succah is of religious significance to them, irrespective of whether they subjectively believe that their religion requires them to build their own succah."<sup>305</sup>

Sincerity of belief means honesty of belief.<sup>306</sup> Sincerity of belief should generally be accepted in good faith unless there are evident reasons for believing otherwise. Where warranted, inquiry into a person's sincerity of belief should be as limited as possible (see section 9.5.3 below).<sup>307</sup> An inquiry only needs to establish that an asserted creed belief "is in good faith, neither fictitious nor capricious, and that it is not an artifice."<sup>308</sup> In many cases, this will be unnecessary or relatively easy to show. However, in other cases, evidence may be required, usually from the person asserting the right, to establish that a person's claim is sincere.

Where there is reason to question someone's sincerity,<sup>309</sup> the credibility of a person's accommodation request is an important factor in establishing sincerity of belief. The consistency of a person's current practices with their asserted creed accommodation may need to be examined to establish sincerity of belief.<sup>310</sup> This may require evidence from the accommodation-seeker about their *current* belief and practice at the time of the accommodation request.<sup>311</sup>

While inconsistent adherence to a creed practice in the past or present *may* suggest a lack of sincere belief, it does not necessarily do so. "A sincere believer may occasionally lapse, her beliefs may change over time or her belief may permit exceptions to the practice in particular situations."<sup>312</sup> The context of the inconsistency must be examined. For example, while it may be extremely hard for a person to sacrifice or compromise

their religious or creed-based beliefs, they may have a more compelling need in some contexts that leads them to make that compromise – for instance, the need to keep a job or to maintain access to a service. Sometimes, a departure from usual practice indicates “strength of belief,” which the Supreme Court has said is a separate issue from “sincerity of belief.”<sup>313</sup>

**Example:** An Ontario Court considered whether a Muslim woman who wears a niqab (a veil covering her face, except her eyes) for religious reasons may be required to remove it when testifying about alleged childhood sexual assaults.<sup>314</sup> The Court rejected her accommodation request to wear the niqab while giving evidence. The judge stated that she had not met the sincerity of belief test because she had removed her niqab for her driver’s licence photo in the past, and admitted that she would do so if required for a security check. The judge estimated that her beliefs were not sufficiently strong to warrant accommodation. On final appeal, the Supreme Court of Canada found that her beliefs were sincerely held. It further held that “strength of belief” is a separate matter from sincerity of belief, and beliefs need only be sincere to receive protection.<sup>315</sup>

Creed followers commonly have times in the year that they hold to be particularly significant. During such times, they may more intensely practice their creed beliefs, as compared to other times of the year, without this in any way diminishing their sincerity.

**Example:** A Muslim man stopped shaving his facial hair during the Muslim holy month of Ramadan. He shaved his facial hair at all other times of the year. His employer has a policy that prohibits facial hair for employees. The employer has a duty to accommodate the employees’ religious belief and practice. The fact that the employee only grows his beard during Ramadan should not be seen to necessarily indicate insincerity of belief.

Organizations should be careful not to impose their own standards and viewpoints of what authentic or sincere creed adherence looks like.<sup>316</sup> For example, not all religious or creed traditions require an exclusive commitment.<sup>317</sup>

**Example:** During the summer months, an employee observes Indigenous traditional spiritual practices relating to the land and hunting. The same person is also a member of the Catholic Church. The fact that the employee follows more than one religious or spiritual tradition need not indicate inconsistency or insincerity of belief. An employer may have a duty to accommodate the employee based on both sets of beliefs.

## 9.6 Information to be provided

Asking for information about a person's creed beliefs, practices and related accommodation needs has implications for their privacy and dignity. At the same time, organizations must have enough information to allow them to meet their duty to accommodate.

A person seeking accommodation must inform the accommodation provider that they have a creed belief or practice that requires accommodation. The type of information they may generally be expected to provide includes:

- The needs associated with the creed belief or practice
- Whether the person can perform the essential duties or requirements of the job, of being a tenant, or of being a service user, with or without accommodation (this is more likely to be relevant in employment)
- The type of accommodation(s) that may be needed to allow the person to fulfill the essential duties or requirements of the job, of being a tenant, or of being a service user, *etc.*

When accommodation providers receive an accommodation request, they may need to ask for more information. As a general rule, the accommodation provider should:

- Take requests for accommodation in good faith<sup>318</sup> (unless there is evidence the request is not genuine) and
- Limit requests for information to those reasonably related to establish legal responsibilities, assess needs, limitations or restrictions, and make the accommodation.

Where more information about a person's creed belief or practice is needed, the information requested must be the least intrusive of the person's privacy while still giving the accommodation provider enough information to make an appropriate accommodation. An accommodation provider should be able to explain and clearly justify why the additional information is needed.

In rare cases there may be a reasonable basis to question the adequacy of the information provided or the sincerity of a person's request for accommodation. In the context of creed, questions usually relate to the need to clearly establish, where there is a reasonable basis to potentially believe otherwise, that a person's belief or practice requiring accommodation is in fact (1) sincerely held; (2) connected to a creed; and (3) adversely affected by a requirement or rule, including more precisely how.

Sincerity of belief should generally be accepted in good faith unless there are legitimate reasons for believing otherwise. Where warranted, inquiry into a person's sincerity of belief should be as limited as possible.<sup>319</sup> It need only establish that an asserted creed belief "is in good faith, neither fictitious nor capricious, and that it is not an artifice."<sup>320</sup> In many cases, this will be unnecessary or relatively easy to show. However, in other cases evidence may be required, usually from the person asserting the right, to establish that his

or her claim is sincere. Evidence of consistency of the accommodation seeker's *current* practice of his or her creed belief requiring accommodation may help to establish sincerity of belief. However, inconsistent adherence to a belief or practice does not necessarily indicate insincerity of belief (see section 9.5.3).<sup>321</sup>

It is inappropriate to *require* expert opinions to show that a practice or belief is mandatory or required,<sup>322</sup> or that it is sincerely held. However, a person seeking accommodation may choose to refer an accommodation provider to a religious authority figure or expert to support their accommodation request.<sup>323</sup>

Some objective considerations may also need to be further explored when assessing a creed accommodation request. For a person's belief or practice to be protected under section 11 of the *Code*, they must be able to show a connection between their belief or practice and a creed (see section 4.1).<sup>324</sup>

**Example:** A court rejected a man's request for an exemption from the prohibition against producing and possessing marijuana in the *Controlled Drugs and Substances Act*<sup>325</sup> based on religious and equality rights under sections 2 and 15 of the *Charter*.<sup>326</sup> The man, who was a "Reverend" in the "Church of the Universe," claimed that smoking seven grams of marijuana per day was connected to his religious belief in cannabis as the "tree of life" as mentioned in the Book of Revelations in the Bible. However, the Court found that the man had no belief in God or the Bible itself; there were no rites, rituals or ceremonies associated with his belief, nor any associated moral or ethical precepts or obligations or ultimate ideas about human existence connected to his practice of smoking marijuana.

The Court ultimately found that while his belief in the benefits of marijuana use was deeply held, his practice of smoking marijuana was connected to "the very secular idea that the cannabis plant has many useful applications or 'fruits' that can and should be employed for the betterment of humanity."<sup>327</sup> In describing the man's practice as more of a secular "lifestyle choice" than a religion, the Court stated that while deference must be given to a person's subjective (sincerely held) views on which religious beliefs or practices they may adopt, "such deference does not extend to the threshold question as to whether a practice or belief has a nexus with an actual religion."<sup>328</sup>

More information may be required where it is not evident or clear that a belief connects to a creed under the *Code*,<sup>329</sup> or how its practice "allow[s] the individual to foster a connection with the divine or with the subject or object of [their] spiritual faith"<sup>330</sup> or creed. In these rare cases, organizations should limit inquiry to establishing that a belief or practice requiring accommodation is in fact based in a creed, and establishes, in their view, a connection with the divine or subject or object of their spiritual faith or creed.



Finally, organizations may ask an accommodation seeker to show how their ability to follow their sincerely held creed belief has been adversely affected by a policy, standard, rule, qualification or practice in a social area protected by the *Code*. The person may need to provide information about the nature of their belief or practice to establish an adverse impact and to clarify resulting accommodation needs. Accommodation providers may also ask about the extent that a person's belief may allow for exceptions.<sup>331</sup> If the person does not agree to provide legitimately requested information in any of the above respects, and the accommodation provider can show that this information is needed, the person seeking accommodation may be found to not have taken part in the accommodation process and the accommodation provider would likely be relieved of further responsibility.<sup>332</sup>

## 9.7 Confidentiality

Keeping information about someone's creed private and confidential can be critical because of privacy laws and legal considerations – and also because of the stigma and stereotypes some people may face because of their creed.

An organization should have a valid reason for collecting and using personal information about someone's creed. They should keep confidential any information about a person's creed or related beliefs or practices, as well as any details relating to their creed accommodation arrangement. Not doing so may be discriminatory.

**Example:** A co-op housing provider receives an accommodation request from a tenant who is unable to fulfill his required three hours of voluntary work on Saturday mornings because Saturday is his Sabbath. The housing provider consults other tenants about how they would feel about such an accommodation, despite the fact that it does not directly affect them, and the tenant's voluntary hours could easily be fulfilled on an alternative date without creating undue hardship. Sharing the details of the tenant's accommodation request may breach well-established confidentiality and privacy provisions in law. It could also potentially offend the accommodation seeker's dignity and injure his self-esteem, particularly where this could expose him to unwanted public attention or potential ridicule or insult.<sup>333</sup> This could violate the *Code*.

Organizations should only share information about a person's creed accommodation with people who need the information to make the accommodation, unless the accommodation seeker requests otherwise.

**Example:** Due to a creed-related observance, a person needs flexible scheduling when attending court. Information to support the accommodation is given only to the court's accessibility co-ordinator. It may be sufficient for other court staff to know only that they need to provide the person with the accommodation.

It may be necessary to disclose information about a person's creed-related accommodation needs to others, in some limited and compelling circumstances. This should be done in accordance with privacy laws in a way that maximizes confidentiality in the circumstances.

**Example:** An employer requests that all staff members refrain from heating products containing pork in a second microwave unit that has been purchased to meet the religious accommodation needs of some of its staff members. No personal information about the accommodated staff is disclosed. While the religious nature of the accommodation and the staff accommodated may eventually be inferred by other staff members, this is unlikely to violate the *Code*, based on a breach of confidentiality and dignity.

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### Privacy and confidentiality best practice checklist

- Limit information collected about a person's creed to only relevant information
  - Maximize privacy and confidentiality of any information about a person's creed, taking into account the person's wishes. This includes information that directly or indirectly identifies a person's creed, or related practices and beliefs.
  - To protect the person's confidentiality, only share information relating to a person's accommodation with people directly involved in helping to meet the person's needs.
  - Keep all information exclusively with designated personnel (such as the human resources person) in a secure filing system.
  - In some limited cases where a creed accommodation is obvious to others, providing training to other employees, clients or managers may help prevent backlash or resentment. Training can create a more inclusive and welcoming environment by helping others better understand diverse creed accommodation needs.
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## 9.8 Roles and responsibilities

Accommodation is a multi-party process and a shared responsibility.<sup>334</sup> Everyone must work together cooperatively and respectfully to explore and implement appropriate accommodation solutions.

The person seeking accommodation must:

- Tell the accommodation provider (employer, landlord, service provider, etc.) when they have *Code*-related needs that require accommodation
- As much as possible,<sup>335</sup> communicate accommodation needs within a reasonable time frame in advance of the required accommodation,<sup>336</sup> including any required changes to existing agreed-upon accommodation arrangements
- Answer questions or provide information about relevant restrictions or limitations, where appropriate<sup>337</sup>
- Take part in discussions about possible accommodation solutions

- Cooperate in the accommodation process to the best of their ability
- Meet agreed-upon performance standards and requirements, once accommodation is provided
- Work with the accommodation provider on an ongoing basis to manage the accommodation process.

The accommodation provider must:

- Accept the person's request for accommodation in good faith (unless there is evidence the request is not genuine)
- Limit requests for information to only what is reasonably necessary to identify the nature and extent of the limitation or restriction, and appropriate accommodation needed<sup>338</sup>
- Take an active role in making sure that alternative approaches and possible accommodation solutions are investigated,<sup>339</sup> and canvass various forms of possible accommodation and alternative solutions<sup>340</sup>
- Keep a record of the accommodation request and action taken
- Make sure that information related to accommodation is kept confidential and shared only with people who need the information to put the accommodation in place
- Implement accommodations in a timely way, to the point of undue hardship
- Cover any appropriate costs related to the accommodation.<sup>341</sup>

Although the person seeking accommodation has a duty to help secure appropriate accommodation that will meet their needs, they are not responsible for originating a solution<sup>342</sup> or leading the accommodation process. The accommodation provider is ultimately responsible for putting in place solutions, with the co-operation of the person seeking accommodation. After accommodation is provided, the person receiving the accommodation is expected to fulfil the essential requirements for a job, tenancy, or taking part in a service.

In employment, unions and professional associations must support accommodation measures even if they interfere with collective agreements, unless to do so would create undue hardship.<sup>343</sup> They may also need to take a proactive role as partners in the accommodation process, and share joint responsibility with the employer to facilitate accommodation.<sup>344</sup>

Where an organization contracts out work to a third party (for example, to provide a service or handle employment issues), it should make sure that the third party fulfills its obligations under the *Code*, including the duty to accommodate.

**Example:** An organization hires an employment firm to recruit and hire employees. The employment firm fails in its duty to accommodate prospective employees' sincerely held creed beliefs. Both the organization hiring the employment firm and the contracted employment firm may have breached the *Code*.<sup>345</sup>

## 9.9 Undue hardship

Organizations covered by the *Code* have a duty to accommodate to the point of undue hardship. Accommodation need not be provided if it causes undue or excessive hardship. However, some degree of hardship is acceptable.

The *Code* lists only three considerations when assessing whether an accommodation would cause undue hardship:

- Cost
- Outside sources of funding, if any
- Health and safety requirements, if any.

No other considerations can be properly considered.<sup>346</sup> For example, business inconvenience, employee morale, third party preferences, *etc.* are not valid considerations in assessing whether an accommodation causes undue hardship.<sup>347</sup>

In many cases, it will not be costly to accommodate someone's creed. Accommodation may simply involve making policies, rules and requirements more flexible. While making these more flexible may involve some administrative inconvenience, inconvenience by itself is not a factor for assessing undue hardship.

To rely on the undue hardship defence, an organization will have to show that an accommodation in fact causes undue hardship.<sup>348</sup> It is not up to the person with a creed-related need to prove that the accommodation can be put in place without undue hardship.

The evidence required to prove undue hardship must be objective, real, direct, and, in the case of cost, quantifiable. The organization must provide facts, figures and scientific data or opinion to support a claim that the proposed accommodation in fact causes undue hardship. A mere statement, without supporting evidence, that the cost or risk is "too high" based on impressionistic views or stereotypes, will not be sufficient.<sup>349</sup>

**Example:** The HRTO found that an employer discriminated when it rejected a job applicant after learning he had religious accommodation needs. The HRTO considered the employer's argument that the requested accommodation would cause undue hardship. The employer's claims of challenges posed by the collective agreement ("union problems," scheduling difficulties and overtime costs) were found to be vague and speculative, with no concrete evidence provided.<sup>350</sup>

Examples of objective evidence include:

- Financial statements and budgets
- Scientific data, information and data from empirical studies
- Expert opinion
- Detailed information about the activity and the requested accommodation
- Information about the conditions surrounding the activity and their effects on the person or group with a creed.

### 9.9.1 Costs

The cost standard is a high one. Costs will amount to undue hardship if they are:

- Quantifiable
- Shown to be related to the accommodation, and
- So substantial that they would alter the essential nature of the enterprise, or substantially affect its viability.

**Example:** A small business has four employees, three of whom observe a Sabbath day of rest and cannot work during the company's busiest and most profitable business hours: Friday night and Saturday. The business begins to decline and is approaching bankruptcy. The employer hires another part-time staff member so that it can remain open during this time, and includes as a specific job requirement that the person work the weekend shift. Upon being hired, the new employee requests a religious accommodation for the Friday night and Saturday shift. The employer is unable to provide the accommodation for reasons of undue hardship, as this substantially undermines the continued viability of the business.

The costs that remain after all costs, benefits, deductions and other factors have been considered will determine undue hardship. All projected costs that can be quantified and shown to be related to the proposed accommodation will be taken into account. However, mere speculation (for example, about financial losses that may follow the accommodation of a person with a creed) will not generally be persuasive.

If an accommodation exceeds an organization's pre-determined accommodation budget, the accommodation provider must look to its global budget, unless to do so would cause undue hardship. The costs of accommodation should be distributed as widely as possible across the operation so that no single complex or division disproportionately assumes the costs of accommodation.<sup>351</sup>

Where an accommodation would cause undue hardship, the accommodation provider must find the next-best solution. For example, interim accommodation could be provided while the organization establishes a reserve fund to phase in the accommodation that is the most appropriate.

### 9.9.2 Outside sources of funding

To offset costs, an organization has an obligation to consider any outside sources of funding it can get to make the accommodation. A person seeking accommodation is also expected to avail themselves of any available outside sources of funding to help cover expenses of their accommodation.

Before being able to claim that it would be an undue hardship based on costs to accommodate someone with a creed, an organization would have to show they took advantage of any available government funding or other program to help with such costs.

### 9.9.3 Health and safety

If an accommodation is likely to cause significant health and safety risks, this could be considered “undue hardship.” Employers, housing providers and service organizations have an obligation to protect the health and safety of all their employees, clients and tenants, including people who observe a creed, as part of doing business safely, and as part of fulfilling their legal requirements of the *Occupational Health and Safety Act*.<sup>352</sup> The *Code* recognizes that the right to be free from discrimination must be balanced with health and safety considerations.

An employer, housing or service provider can determine whether modifying or waiving a health or safety requirement or otherwise providing an accommodation will create a significant risk by considering:

- Is the person seeking accommodation willing to assume the risk in circumstances where the risk is solely to their own health or safety?
- Is changing or waiving a requirement or providing any other type of accommodation reasonably likely to result in a serious risk to the health or safety of other employees, tenants, staff or other service users?
- What other types of risks are assumed within the organization, and what types of risks are tolerated within society as a whole?

Assessing whether an accommodation would cause undue hardship based on health and safety must reflect an accurate understanding of risk based on objective evidence rather than stereotypical views. Undue hardship cannot be established by relying on impressionistic or anecdotal evidence, or after-the-fact justifications.<sup>353</sup> Organizations should not claim undue hardship based on anticipated hardships caused by proposed accommodations, if these are based only on speculative or unsubstantiated concerns that certain negative consequences “might” or “could” result if the person is accommodated.<sup>354</sup>

In evaluating the seriousness or significance of risk, organizations should consider:

- The nature of the risk: what could happen that would be harmful?
- The severity of the risk: how serious would the harm be if it occurred?
- The probability of the risk: how likely is it that the potential harm will actually occur?
- Is it a real risk, or merely hypothetical or speculative? Could it happen often?
- The scope of the risk: who will be affected if it occurs?

If the potential harm is minor and not very likely to happen, the risk should not be considered serious. If there is a risk to public safety, consideration will be given to the increased numbers of people potentially affected and the likelihood that a harmful event may happen.

A person with a creed may wish to assume a risk. Where possible, persons with a creed should be allowed to assume risk with dignity, subject to the undue hardship standard. The risk created by modifying or waiving a health and safety requirement must be weighed against the right to equality of the person with a creed.<sup>355</sup>

Where the risk is so significant it outweighs the benefits of equality, it will be considered an undue hardship. Organizations have an obligation under health and safety legislation not to place people in a situation of direct threat of harm. High probability of substantial harm to anyone may constitute an undue hardship.

Organizations must try to mitigate risks where they exist. The amount of risk that exists *after* accommodations have been made and precautions have been taken to reduce the risk (short of undue hardship based on cost) will determine whether there is undue hardship. In some cases, it may be undue hardship to attempt to mitigate risk, such as where the risk is imminent and severe.<sup>356</sup>

## 9.10 Other limits

The *Code* specifies that only three factors will be considered when determining if the test for undue hardship has been met (cost, outside sources of funding and health and safety issues). However, in some cases, courts and tribunals have recognized that even where these three factors are not at issue, there is not a limitless right to accommodation.<sup>357</sup> There may be other narrow circumstances where it may not be possible to accommodate a person's creed. These are discussed further below.

However, an organization must not jump to the conclusion that accommodation is not possible or required. It must still meet its procedural duty to accommodate by examining issues on a case-by-case basis, and seeking out next-best solutions, such as phased-in or interim accommodation. The onus will be on an organization to show the steps it has taken and the concrete reasons why accommodation is not possible.

### 9.10.1 Failing to take part in the accommodation process

Everyone involved in the accommodation process has a duty to cooperate to the best of their ability. In some cases, an organization may be deemed to have fulfilled its procedural and substantive duty to accommodate if the person does not take part in the process.

For example, a person may be considered to have not taken part if they refuse to comply with reasonable requests for information necessary to assess and meet their accommodation needs, or where they refuse to take part in developing accommodation solutions. Decision-makers have also found that persons need to make their religious accommodation needs known in a timely way. Failing to do so may result in a finding that the organization did not breach its duty to accommodate.

**Example:** The HRTO found that an employee who self-identified as a Muslim did not give his employer sufficient notice of his need for four hours of leave to observe a religious holiday. The employer typically had provided time off in the past when sufficient notice was given. In this case, the 72 hours advance notice given by the employee was not enough time for the employer to find a replacement.<sup>358</sup>

Before concluding that a person has failed to cooperate in the accommodation process, organizations should consider if there are any creed or other *Code*-related factors that may prevent the person from taking part. The organization may need to accommodate these factors as well. They should also consider whether there is a need to adjust the accommodation because it is not working.

### 9.10.2 Balancing competing rights

Human rights based on creed have often been at the centre of competing rights scenarios and conflicts. Public discussions have sometimes wrongly contrasted “religious rights” or “religious accommodation” with “human rights” or “equality rights.” Rights based on religion and creed are equality/human rights.<sup>359</sup> While claims to these rights may sometimes conflict with other human rights, a robust system of checks and balances is in place in law to balance and protect all of our human rights to the greatest extent possible.

Generally, when a person makes an accommodation request, the organization will be able to provide the accommodation without it affecting the legal rights of other people.

Sometimes, however, a request for accommodation may turn out to be a “competing human rights” situation. This complicates the normal approach to resolving a human rights dispute where only one side claims a human rights violation. In some cases, only one party is making a human rights claim, but the claim conflicts with the human rights of another party or parties.

Organizations and institutions operating in Ontario have a legal duty to take steps to prevent and respond to situations involving competing rights.

**Example:** An employee who worked the night shift at a fish processing plant had a sincerely held belief that his religious practice required him to “preach, teach, baptise and make disciples.” He insisted on preaching to and trying to convert his co-workers during work hours. Other employees complained, and were moved to the day shift.

After the employee became a supervisor, his religious activities at work became even more concerning in light of his position of authority. His employer repeatedly cautioned him to respect the beliefs of his co-workers and to stop preaching and trying to convert them during his work hours. After he refused to do so, his employment was terminated.

The BC Tribunal found that the employer’s requirement that he not preach during work hours was a *bona fide* occupational requirement based on the competing rights of the other employees. The employer had a duty to maintain an environment



where every employee of any religious background feels comfortable and respected at work. The Tribunal found the employer's response was not too heavy-handed, and it did everything it could to the point of undue hardship. The complaint was dismissed.<sup>360</sup>

The OHRC's *Policy on competing human rights*<sup>361</sup> sets out a framework for analyzing and addressing competing human rights situations. It also provides concrete steps on how organizations can proactively take steps to reduce the potential for human rights conflict and competing rights situations.

Under the *Code*, organizations have a duty to accommodate people's *Code*-related needs. As part of determining what each claim is about, organizations must distinguish between claims that solely affect business operations from claims that affect the rights of other individuals and groups. Claims that affect business operations alone are properly considered within the scope of the duty to accommodate (*i.e.* whether an accommodation is appropriate or amounts to an undue hardship) and are not competing human rights claims.

**Example:** A woman claims discrimination when her employer denies her request for modified work hours so that she can attend weekly religious services and observe her Sabbath. Her request does not appear to affect the legal rights of others. Therefore, this situation is not a competing rights claim, but is one involving a request for human rights accommodation.<sup>362</sup>

Some key principles of a competing rights analysis are highlighted below.<sup>363</sup>

### ***No hierarchy of rights/no right is absolute***

In dealing with competing rights claims, the Supreme Court of Canada has confirmed that there is no hierarchy of *Charter* rights. All have equal status and no right is more important than the others.<sup>364</sup> Related to this is the principle that no right is absolute. Every right is inherently limited by the rights and freedom of others.<sup>365</sup> Therefore, if rights do come into conflict, *Charter* principles require a "reconciliation" that fully respects the importance of both sets of rights so that each is realized to the greatest extent possible.<sup>366</sup>

### ***Importance of context***

Reconciling competing rights cannot be done in an abstract way. Human rights do not exist in a vacuum and their meaning and content depend on context. While legal decisions have identified several fundamental principles that provide direction in how to deal with competing rights, there are no "bright-line rules."<sup>367</sup> Context determines where the line should be drawn between competing rights in a particular case.<sup>368</sup>

**Scoping of rights: determining rights at play and whether they are infringed**

When dealing with potentially competing rights, it is first necessary to determine the rights that are being asserted or are engaged. For example, organizations must assess whether an accommodation request connects to a legitimate right, and whether there is an actual impact on the rights of others under the *Code* or *Charter*.

In many cases the engagement of the right is obvious. But in other cases it may be less clear that a right is triggered. It may be necessary to conduct a further inquiry and hear evidence to establish that the claim falls within the scope of the right as defined by the courts.<sup>369</sup>

In the context of religious rights, many apparent rights conflicts have been resolved by simply asking whether the claim actually falls within the scope of the right in the particular context. Proper scoping of the boundaries of each right may sometimes reveal that there is no actual intrusion of one right onto another.

**Example:** In 2004, the Supreme Court of Canada considered the constitutionality of proposed legislative amendments that would extend the ability to get married to two persons of the same sex.<sup>370</sup> It was argued that equal access to marriage for same-sex couples would violate the equality or religious rights of people who hold religious beliefs opposed to same-sex marriage. The Court rejected this as being a conflict of rights. It said that recognizing the rights of gay and lesbian people to marry could not, in itself, violate the rights of others.<sup>371</sup>

Part of the initial scoping analysis, particularly in creed-related cases, involves considering whether there is a legislative exemption for the situation, or whether the matter falls under the jurisdiction of the *Code*.

**Example:** A woman who objected to the Catholic Church's beliefs on abortion was unable to use the *Code* to challenge an inscription on a monument on Church property.<sup>372</sup> In interpreting the meaning of a "service" or a "facility" under the *Code*, the HRTO considered the right of the Catholic Church to express its freedom of religion. The HRTO concluded that "the manifestation of religious belief in an inscription displayed on church property is not a 'service' or a 'facility'" within the meaning of s. 1 of the *Code*.

When it comes to determining what is protected under creed, the courts have held that the protection of religious beliefs may be broader than the protection of conduct motivated by those beliefs.<sup>373</sup> This is because acting on beliefs may have more of an adverse or harmful impact on the rights of others.<sup>374</sup>

At the same time, there must be evidence of an actual adverse impact on the rights of others. This cannot be based on mere speculation or hypothetical views of how recognizing a creed right or granting a creed accommodation might affect others.<sup>375</sup>

**Example:** The Supreme Court of Canada considered whether graduates of a private Christian university (Trinity Western), which required its students to abide by certain “community standards” that prohibited “homosexual activity,” should be licensed by the British Columbia College of Teachers to teach in the public school system.<sup>376</sup> The College of Teachers argued that teaching programs must be offered in an environment that reflects human rights values, and an institution that wants to train teachers for the public school system must show that it will provide a setting that properly prepares future teachers for the diversity of students. The College further argued that it was justifiably concerned about a risk that as teachers, graduates of Trinity Western’s program would discriminate based on sexual orientation. The Supreme Court found that this case could be resolved through “the proper delineation of the rights and values involved.” Properly defining the scope of the rights avoided a true conflict. The Court found that the proper place to draw a line in this case was between the freedom to hold beliefs versus conduct based on those beliefs. There was no concrete evidence that holding beliefs about “homosexuality” would result in actions by graduates of Trinity Western that would be discriminatory.

Sometimes a competing rights conflict may be wrongly assumed to exist based on preconceived notions, assumptions or stereotypes about people identified by a creed, the nature of their beliefs or practices, or their relation to other *Code*-protected groups. While the human rights grounds most often cited in competing human rights claims include gender, creed, sexual orientation and disability, organizations must be careful not to stereotype, or assume mutually exclusive, conflicting relations between these communities and expressions of identity.<sup>377</sup>

### ***Assessing extent of rights infringement and balancing appropriately***

If two sets of rights are in fact engaged, the organization dealing with the competing rights should look at the extent of the interference with each set of rights. Is the interference with the right significant or is it trivial and insubstantial? Is each right affected at its core (a fundamental aspect of the right) or its periphery? If an interference with one of the rights is found to be trivial, the analysis will end, and that right will generally give way to the other.

**Example:** A gay man went to a printing shop to order letterhead and business cards for the Gay and Lesbian Archives. The shop owner refused to do the printing on religious grounds. A human rights Board of Inquiry found that the printer had discriminated based on sexual orientation.<sup>378</sup> The printer appealed to the Divisional Court,<sup>379</sup> and asked the Court to set aside the decision based on his constitutional right to freedom of religion. In deciding whether the Board’s decision unduly limited this right, the Court noted that the further an activity is from the “core” elements of freedom of religion, the more likely the activity is to impact on others and the less deserving the activity is of protection. The shop

owner's commercial printing services were found to be at the "periphery" of activities protected by freedom of religion. Limits on the exercise of his right were therefore found to be justified to prevent discrimination based on sexual orientation. However, the Court did leave open the possibility of a different result in a different context, for example where the content of the materials being printed might more directly conflict with the core elements of the printer's beliefs.<sup>380</sup>

Where both rights are substantially interfered with, organizations should then ask what harm would be caused by limiting each of the rights. In this analysis, context is vital.

Organizations should make every effort to seek out constructive compromises or accommodations to both sets of rights that minimize the infringement and maximize the fulfillment of each party's rights to the greatest degree possible.<sup>381</sup> Searching for compromises involves exploring measures that may lessen any potential harm to each set of rights. Questions to ask include:

- Can accommodations and adjustments be made to each set of rights to achieve a "constructive compromise"?
- Is there a solution that allows enjoyment of each right?
- If not, is there is a next-best solution that minimizes any adverse impact?

If it is not possible to find a solution that allows maximum enjoyment of each right, the organization should explore whether there is a next-best solution that minimizes any adverse impact.

**Example.** The Court of Appeal for Ontario and Supreme Court of Canada considered whether a Muslim woman who wears a niqab (a veil covering her face, except her eyes) for religious reasons may be required to remove it when testifying about alleged childhood sexual assaults.<sup>382</sup> The Courts emphasized the importance of searching for "accommodations" or "constructive compromises" that might allow for reasonable adjustments to both the witness' freedom of religion and the accused's right to make full answer and defence, such as using an all-female court staff and a female judge.<sup>383</sup>

Sometimes the process of considering the competing rights satisfies the parties. At other times, one right may ultimately need to prevail over another in the particular circumstances, despite the best efforts and processes.

When considering potential options for balancing rights, organizations may sometimes need to consider underlying constitutional values and broader societal interests and harms if either right is compromised. Some of these interests that have been recognized in the case law include respect for human dignity, commitment to social justice and equality, accommodating a wide variety of beliefs, negative stereotyping of minorities, gender equality, protecting the best interests of the child, access to justice and public confidence in the justice system.

**Example:** A majority of Supreme Court of Canada judges concluded that a couple's decision to refuse a potentially life-saving blood transfusion for their baby on religious grounds was protected by freedom of religion.<sup>384</sup> Using a process under the *Child Welfare Act*, the child had been made a temporary ward of the Children's Aid Society, which had consented to the blood transfusion. In considering the constitutionality of the *Child Welfare Act*, the Court balanced the interests of the state in protecting children at risk against the parents' rights to freedom of religion, using section 1 of the *Charter*. It found that the state interest outweighed the religious right, and that the infringement of the parents' *Charter* right was justified. However, in other cases dealing with parents denying medical treatment for children on religious, moral or cultural grounds, the courts have ruled differently, in different contexts, considering such factors as the age of the child,<sup>385</sup> and Aboriginal constitutional and treaty rights under section 35 of the *Charter*.<sup>386</sup>

Searching for solutions can sometimes be challenging, controversial or dissatisfying to one side or another. In any situation, it is important not to jump to any conclusions. The *Code* requires organizations to go through a process on a case-by-case basis to search cooperatively for solutions to reconcile competing rights and accommodate individuals and groups, if possible.

A sound process is a key factor in effective dispute resolution: This process should include:

- Engaging all relevant parties as much as possible in the negotiation process, being mindful of and seeking to mitigate any power differentials
- Seeking win-win solutions and compromises that help opposing parties to see and understand the competing rights of people their rights are in conflict with
- Maintaining privacy, confidentiality and respect for all involved, in all phases of the process.

For more on what makes for a good dispute resolution process, and the relevant steps of analysis, see the OHRC's *Policy on competing human rights*.<sup>387</sup>

## 9.11 Excluded factors

### 9.11.1 Employee morale

In some cases, accommodating an employee, tenant or service user may generate negative reactions from co-workers, tenants or other service users who are either unaware of the reason for the accommodation or who believe that the person is receiving an undue benefit. Reaction may range from resentment to hostility. The OHRC heard that such backlash and resentment were often major challenges faced by both creed accommodation providers and people requesting or receiving accommodations.

A negative reaction cannot be used to justify a failure to accommodate.<sup>388</sup> Rather, the organization and person responsible for providing accommodation should make sure that staff are supportive and are helping to foster an environment that is positive for all employees. Providing training can help others better understand creed diversity, and prevent or mitigate backlash and resentment. It is not acceptable to allow discriminatory attitudes to fester into workplace hostilities that poison the environment for workers self-identifying with a particular religion or creed.

Also, people who follow a religion or creed have a right to accommodation with dignity. It is an affront to a person's dignity if issues of morale and misconception stemming from perceived unfairness are not prevented or dealt with.

### 9.11.2 Third-party preference

Human rights case law notes that third-party preferences are not a justification for discriminatory acts, and the same rule applies to customer preferences.<sup>389</sup>

**Example:** A recreational facility makes sure that several of its open swim classes are available to women only, to accommodate the religious needs and enable the participation of orthodox Jewish, Muslim and old order Mennonite women who live in the area. Some service users object to the accommodation, because they think this is an imposition on "mainstream Canadians" of "foreign values" and "ways of life." The views and preferences of service users are irrelevant as a factor or justification for withdrawing such an accommodation, unless it can be shown that there is an actual competing right at play that is being infringed.

**Example:** A Buddhist organization seeks to build a temple. The municipality denies the permit to build the temple because of resident objections to the building's proposed architecture style. They claim this style does not "fit in" culturally with the surrounding environment. There is no competing right or *bona fide* requirement claimed under the *Code*, or basis in municipal law to justify denying the building permit. The organization alleges discrimination based on creed.

### 9.11.3 Business inconvenience or economic rights

"Business inconvenience" (or "business or economic rights") is not a defence to failing to meet the duty to accommodate.<sup>390</sup>

**Example:** An association of condominium co-owners did not permit several Jewish residents to erect Succahs (temporary hut enclosures) on their balconies.<sup>391</sup> The association argued that these structures would lessen the economic and aesthetic value of their property and unduly interfere with their

property rights. The Court rejected this argument and held that the religious rights and freedoms of the Jewish residents, which would be significantly impaired by a ban on the Succahs, would “clearly outweigh” the unsubstantiated concerns of the other property owners about the decrease in their property value.

If there are demonstrable costs related to decreased productivity, efficiency or effectiveness, they can be taken into account in assessing undue hardship under the cost standard, provided they are quantifiable and can be shown to be related to the proposed accommodation.

#### 9.11.4 Collective agreements or contracts

The courts have determined that collective agreements and contracts must give way to the requirements of human rights law. To allow otherwise would be to permit the parties to contract out of their *Code* rights under the auspices of a private agreement. Subject to the undue hardship standard, the terms of a collective agreement or other contract arrangement cannot justify discrimination that is prohibited by the *Code*.

**Example:** An organization requires all of its employees to sign a term of employment contract that obligates them to work on any day of the week, as needed. The employer uses the terms of this contract to deny creed accommodation requests to employees (for example, time off to observe a religious holiday) where this conflicts with existing work scheduling. This could violate the *Code*, because the employer did not meet the substantive or procedural duty to accommodate short of undue hardship. Even where an employee has signed such a waiver, neither employers nor employees may contract out of their human rights and responsibilities.

A union may cause or contribute to discrimination by taking part in creating a work rule, such as a provision in a collective agreement, that discriminates.<sup>392</sup> Unions and employers are jointly responsible for negotiating collective agreements that comply with human rights laws. They should build the concept of equality into collective agreements.<sup>393</sup>

However, if an employer and a union cannot reach an agreement on how to resolve an accommodation issue, the employer must make the accommodation in spite of the collective agreement. If the union opposes the accommodation, or does not co-operate in the accommodation process, it may be named as a respondent in a human rights application.

**Example:** A school custodian, who was a Seventh Day Adventist, asked his employer to accommodate him by allowing him to not work Friday afternoons so he could observe his Sabbath. The union opposed changing his shift schedule, since it would have required an exception to the collective agreement. Because

the union threatened to file a grievance, the custodian was not accommodated. His employment was eventually terminated when he refused to work a Friday evening shift.

The Supreme Court of Canada confirmed that where the collective agreement has an adverse effect on employees based on creed, the union has a joint and shared responsibility, along with the employer, to search for and provide accommodation to the point of undue hardship. Both the union and employer were jointly liable for the failure to accommodate.<sup>394</sup>

Unions will have to meet the same requirements of showing undue hardship related to costs and health and safety. For example, if the disruption to a collective agreement can be shown to create direct financial costs, this can be taken into account under the cost standard.

### 9.11.5 Perceived unreasonableness of a belief or practice

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“For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society.”  
– Supreme Court of Canada<sup>395</sup>

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A person’s sincerely held creed belief or practice does not need to meet any test of “reasonableness” or “correctness” to trigger the duty to accommodate.<sup>396</sup>

The *Code* duty to accommodate extends to a wide variety of people’s beliefs and practices, provided they are connected to a creed, and subject to limitations as set out in sections 9.9 and 9.10.

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“When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of whether they are right.”  
– Supreme Court of Canada<sup>397</sup>

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It is inappropriate for organizations to assess the “reasonableness” or “correctness” of a person’s beliefs or practices when responding to a request for accommodation,<sup>398</sup> unless there are reasonable grounds to believe that it may promote or incite hatred or violence, or contravene criminal law.<sup>399</sup> Where a creed accommodation infringes on the rights of others, a competing rights approach should be taken.<sup>400</sup> This involves assessing the connection between a belief or practice and an actual right, and its impact on the rights of others, if any.



### 9.11.6 Secularism and the duty of neutrality

The Supreme Court of Canada has affirmed the need for the state and government institutions to remain neutral in regards to religion.<sup>401</sup> This prohibits them (unless otherwise exempted in law) from imposing, "professing, adopting or favouring one belief to the exclusion of all others,"<sup>402</sup> whether the belief is religious or non-religious.

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"[S]tate neutrality is assured when the state neither favours nor hinders any particular religious belief, that is, when it shows respect for all postures towards religion, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the individuals affected."  
– Supreme Court of Canada<sup>403</sup>

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The duty of neutrality is based on the right of individuals and communities to be treated equally in public life, regardless of their religion or creed, as well as fundamental constitutional commitments to multiculturalism, pluralism, freedom and democracy.<sup>404</sup> It does not require that people "park their religious or creed beliefs at the door" just because they are in a "secular" or "public" space.<sup>405</sup>

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"A secular response that requires witnesses to park their religion at the courtroom door is inconsistent with the jurisprudence and Canadian tradition, and limits freedom of religion where no limit can be justified." – Supreme Court of Canada<sup>406</sup>

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"The pursuit of secular values means respecting the right to hold and manifest different religious beliefs. A secular state respects religious differences, it does not seek to extinguish them."  
– Supreme Court of Canada<sup>407</sup>

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"In my view, the *Code* ensures equality because of creed, but does not ban creed from all public spaces. Indeed, such a policy could be contrary to *Code* values of diversity and inclusion."  
– Human Rights Tribunal of Ontario<sup>408</sup>

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It is generally preferable for organizations to achieve equality through universal design that recognizes and includes creed diversity rather than through universal exclusion, unless this can be shown to be the best way to achieve equality in the circumstances.

**Example:** An organization celebrates the Christmas holiday alongside other religious and non-religious holidays and days of significance, equally recognizing (versus equally disregarding) them all.

Organizations must not refuse creed-related accommodations to individual employees, service users or tenants simply because they operate in the secular public sphere.

People have the right to religious and creed accommodation and “changes of procedure” within secular public institutions, under both the *Code* and *Charter*.<sup>409</sup> Not accommodating individuals' religious or creed observances or treating people differently because they have a creed in *Code*-protected social areas (services, goods and facilities, employment, housing, contracts and vocational associations) may contravene the *Code*.

**Example:** A Nova Scotia town had an operating policy not to permit performances that had a religious or political message on its public stage. When a Reverend asked to use the Marina Stage for a presentation called “This Blood is For You” which included the performance of a short drama, gospel songs and preaching the gospel, the request was denied because the performance contained a religious message. As religion was a factor in the decision not to grant the Reverend the use of the town stage, discrimination was found.<sup>410</sup>

At the same time, the right to equal treatment based on creed and the duty to accommodate does not permit individuals to profess, adopt or favour one belief to the exclusion of others when acting in an official organizational capacity or function.<sup>411</sup>

## 10. Specific cases

### 10.1 Creed-based holidays, leaves and ritual observances

Work and service schedules in Ontario have traditionally been structured around a Christian calendar. Many creeds require their members to engage in specific acts of worship and celebration at particular times of the day, week or year. When these observances do not coincide with existing work or service schedules, break times and statutory holidays, people may be adversely affected.

Organizations have a duty to accommodate sincerely held creed observances to the point of undue hardship, including by providing time off for religious holidays, leaves, ritual prayers and Sabbath observances.

**Example:** One of the earliest human rights decisions dealing with accommodating religious days off was the Supreme Court of Canada’s decision in Ontario Human Rights Commission and *O’Malley v. Simpsons-Sears Ltd.*<sup>412</sup> Sears Department Store required its full-time employees to work Friday evening and Saturday shifts on a rotating basis. Ms. O’Malley, an employee, became a Seventh Day Adventist and could no longer work on her Sabbath (from sundown on Friday to sundown on Saturday). She was forced to accept part-time employment with a reduction in earnings and benefits. The Supreme Court of Canada found that the store had failed to show that it could not have done more to accommodate Ms. O’Malley. It further noted that discrimination can arise from neutral rules or requirements that have an adverse effect based on *Code* grounds, whether or not this was intended.

An employer should offer the employee options to have the time off without losing wages.<sup>413</sup> These options might include special/compassionate paid leave, scheduling changes, overtime, use of lieu time, compressed work week arrangements and, if the employer operates on a statutory holiday, working on the holiday (subject to the pay requirements for work on statutory holidays set out in the *Employment Standards Act*).<sup>414</sup> Providing several alternatives and choice, or a “menu of options” is always preferable. Forcing an employee to use vacation time instead of exploring other options would likely be discriminatory.<sup>415</sup>

If the workplace or the employee’s individual circumstances are such that the employee cannot make up the time they are absent for religious reasons without loss of pay, other forms of accommodation must be explored. This may include paid days off equivalent to the number of Christian holidays provided in the workplace as statutory holidays (generally two or three).<sup>416</sup>

**Example:** The Supreme Court of Canada considered a request by Jewish teachers for access to the special purpose paid-leave provision in their collective agreement that would have allowed them to have Yom Kippur off with pay.<sup>417</sup> They were told they could take the day off, without pay. The Court noted that Christian holy days of Christmas and Good Friday are provided for in the school calendar. Therefore, Christian employees were able to observe their religious holidays with pay. As this was not the case for the Jewish teachers, in the absence of some accommodation by the employer, the effect would be discriminatory. Accommodation through scheduling changes was not an available option here, because a teacher can only work when schools are open. Therefore, the employer was required to permit the use of paid days off provided for under the collective agreement.

At the same time, there is no automatic entitlement to paid days off for religious holidays and observances.<sup>418</sup>

**Example:** The Ontario Court of Appeal considered the grievance of a member of the Worldwide Church of God, who needed 11 days off per year for religious holidays.<sup>419</sup> The employer’s policy permitted two days off with pay and then allowed employees to fulfill remaining religious obligations through scheduling changes. The employee was presented with a variety of proposals to meet his religious requirements, but he rejected them arguing that he was entitled to the 11 days off with pay. The Court found that the employer’s policy met its duty to accommodate.<sup>420</sup>

Persons should not be penalized in any way, or be denied benefits or opportunities, as a result of being accommodated.

**Example:** An employee who was unable to work on his Sabbath days alleged that an employer's Attendance Recognition Program discriminated against him, because employees with perfect attendance received bonuses while he was denied them due to his Sabbath absences. The HRTO found that the employer's requirement that the applicant attend work on all scheduled days to have perfect attendance and receive bonuses discriminated based on creed.<sup>421</sup>

Leaves of absence may also be required for other creed-related observances, such as performing a creed-based pilgrimage, rite of passage, or mourning and bereavement ritual.

**Example:** "Shiva" is a week-long mourning period observed in Judaism for immediate family members. For seven days after the burial, the bereaved "sit Shiva" in the home of the deceased. Students and staff who are sitting Shiva at a school are accommodated by being given the necessary time off to mourn during this period.

The duty to accommodate prayer times, Sabbaths, religious holy days and observances applies in employment – and also in all other social areas of the *Code*.

**Example:** An Ontario farmer alleged that his right to be free from discrimination in contracts based on creed was infringed by the Ontario Milk Marketing Board's policy regarding farmers who, for religious reasons, would not ship milk on Sundays. The Milk Board allowed farmers to be recognized as "no Sunday shippers" and arranged for milk pickups on Saturdays and Mondays but at an extra cost to the farmer. The Ontario Board of Inquiry (the precursor to the HRTO) found that this did not sufficiently accommodate the dairy farmers who would not ship on Sundays for religious reasons. The Board found that this was the same as passing the cost of a wheelchair ramp onto the people who use it. It would not be undue hardship to spread the cost of accommodation across the dairy farming community, or for the Milk Marketing Board to find some other means to deal with the costs through its regulatory framework.<sup>422</sup>

Not every sincerely held belief or practice will trigger a duty to accommodate. In some cases, a practice may be found to be more cultural or political than religious or creed-based. There also may not be a duty to accommodate in cases where a creed practice or belief is only marginally significant for, or peripherally connected to, a person's creed.<sup>423</sup>

An employer may take proactive steps to manage and anticipate religious holidays, for example by developing and referring staff to a calendar, policy, guideline or similar resource that sets out common religious holidays or observances of diverse creed groups that may require accommodation. Such lists, however, should not be viewed as an exhaustive or authoritative account of all accommodation needs. Nor should these lists be used to deny recognition of the duty to accommodate the needs of people practicing lesser-known creed observances, or more well-known observances in uniquely personal but sincerely held ways.<sup>424</sup> Treating people as individuals is central to the notion of dignity for persons with a creed and to the concept of accommodation.

“Blanket” rules that make no allowances for unique individual needs or circumstances are unable to meet individual requirements and are therefore likely to be found to be discriminatory.

While religious or creed leaders may also be consulted as part of an organization's efforts to anticipate accommodations through inclusive design measures, the views of creed officials may not over-ride or negate an organization's duty to accommodate the potentially differing, sincerely held beliefs and creed-related needs of individual creed adherents.<sup>425</sup> More information, however, may be needed where it is not clear that an observance connects with a creed right under the *Code*.<sup>426</sup>

**Example:** A school board recognized the “significant faith days” of known religions as legitimately warranting a “religious holiday,” but did not accommodate the faith days of those not on its list. A labour arbitrator found this was discrimination. However, the arbitrator accepted the board’s practice of presuming leave requests for the known “significant faith days” are legitimate, and requesting more information from employees in other cases involving lesser known creeds to verify the legitimacy of the need for leave.<sup>427</sup>

### 10.1.1 Prayer observances

Some creeds require their practitioners to observe short periods of prayer at set times of the day.

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Members of the Islamic faith may perform five daily prayers at specific times which may change throughout the year, depending on the position of the sun and the time of sunrise and sunset. Children may begin praying at an early age. Prayer can be performed individually or in congregation. Men and women generally pray separately. Muslims also attend weekly Friday afternoon congregational prayers. Before prayer, Muslims engage in a process of physical and spiritual purification called ablution, which includes washing the face, hands, head and feet.<sup>428</sup>

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Members of the Jewish faith may pray three times daily – in the evening, morning and afternoon. Many Jewish people try to pray in a “minyan” (congregation), a public quorum that enables the saying of specific prayers. Morning prayers may be said from the time the sun comes up until approximately mid-morning. Afternoon prayers are said from shortly after midday until the sun sets. Sabbath, which is to be devoted to one’s spiritual needs, begins Friday at dusk and ends at nightfall Saturday.<sup>429</sup>

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Where a person is adversely affected and prevented from observing a creed belief as a result of an organizational rule, practice, standard or requirement, organizations have a duty to accommodate the observance short of undue hardship. This duty extends to situations where prayer observances conflict with regular daily routines or hours of work/service.

Time-sensitive prayer observances may be accommodated by various methods, including by:

- Modifying break policies and hours of work or participation in a service to allow a flexible schedule
- Use of lunch or break times in exchange for early departure or staggered hours of work or participation in a service (e.g. school function)
- Alternative arrival and departure times on the days when the person cannot work or fulfill service requirements for the entire period
- Substituting lieu time or rescheduling days when people's creed beliefs do not permit them to work or be present during certain hours.

**Example:** A school board advises school administrators to accommodate students and staff who need to observe time-specific prayers, including when these occur during class time. Teachers are advised to keep in mind such prayer observances when scheduling exams, tests, class outings and overnight trips. Sample accommodations include designating private areas or a room for prayer observances; permitting use of a private washroom, or, if not possible, identifying a washroom within the school for washing before prayers; not requiring participation in school activities during obligatory congregational prayer observances; and allowing students and staff enough preparation time to observe Sabbath, especially during days when the sun sets early.<sup>430</sup>

Employers should offer employees options to take the time off without losing wages or benefits. Generally, insignificant amounts of time required for prayer observances should not result in loss of pay, and should not be placed under more scrutiny than any other short work break.<sup>431</sup> Flexible scheduling options should be used wherever possible short of undue hardship (subject to, but not necessarily limited by, the *Employment Standards Act*).<sup>432</sup>

**Example:** A workplace allows employees to take two 15-minute breaks (one in the morning, the other in the afternoon) in addition to the lunch break. Some employees use the time to have a snack or take a smoke break, while others use the time to fulfill religious prayer observances.

Accommodating prayer observances may sometimes require providing an appropriate private area for individual or congregational devotions, providing this does not cause undue hardship.

When providing a space for creed observances and devotions, organizations are recommended to design them as inclusively as possible to accommodate the diversity of people potentially using the space, and to avoid additional costs later on. This should be done in a way that respects the dignity and privacy of persons with a creed.

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The University of Toronto's Multi-Faith Centre for Spiritual Study and Practice accommodates a wide variety of spiritual and faith-based practices, and encourages interfaith dialogue and spiritual development as part of the learning experience for all students. The Centre is supported by the Campus Chaplains Association, which offers chaplaincy services to Buddhists, Christians (Catholic, Orthodox and Protestant), Hindus, Humanists, Jains, Jews, Muslims, Indigenous peoples, Pagans, and Sikhs. The inclusively designed Centre features five rooms of varying sizes that are available for prayer, worship, and other spiritual practices as well as educational events, forums and meetings. The ventilation system in the Main Activity Hall is designed to accommodate Indigenous, Hindu and other ceremonies involving smoke and/or fire. The Main Hall also has a wall facing east that accommodates large congregational prayers. The quiet room and meditation rooms come equipped with yoga mats, meditation cushions and prayer rugs. The Centre also features an on-premises ablution facility.

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Occasionally, designated spaces for creed observances may face competing demands from different creed adherents, or persons with other human rights-related needs. In these cases, the OHRC recommends organizations apply the OHRC's competing rights framework for reconciling competing rights.<sup>433</sup>

Religious and creed observances sometimes take communal forms.<sup>434</sup> An organization may consider offering on-site space to observe congregational forms of worship, as an inclusive design approach, where people require accommodation during normal business/service hours to fulfill congregational worship needs.

**Example:** A high school permits the use of a designated private space to accommodate the weekly Friday congregational prayer observances of its large Muslim student population.

An inclusive design approach that accommodates the needs of the group is generally preferred to removing barriers after they become apparent, or making "one-off" accommodations. This is because it enables accessibility and inclusivity from the start, proactively meets the needs of many people, and minimizes the need for people to ask for individual accommodations.<sup>435</sup>

While there is a duty to accommodate people's creed-based congregational worship needs and observances, how such needs are met and accommodated may vary from organization to organization, and situation to situation. Accommodating the needs of the group through inclusive design measures such as offering on-site space for congregational observances may not always be possible.<sup>436</sup> It may also sometimes be complex,

particularly where there is significant intra-group diversity and individual differences on how congregational observances should be conducted. While an organization may opt for a form of inclusive design that most meets the needs of the greatest number of people, it must not interfere in “purely religious” matters and forms of worship.<sup>437</sup> It must also accommodate any individuals whose needs may remain unfulfilled by inclusive design measures designed to meet the needs of the group.

Organizations also need to exercise due diligence to make sure that potential competing rights are also protected, and forms of accommodation are developed that most respect and fulfill the rights of all parties (for more on balancing rights, see the OHRC’s *Policy on competing human rights*).

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When accommodating or inclusively designing to meet the “needs of the group,” organizations must:

- Make clear to all involved or affected that this is not an organizationally sponsored activity or endorsement of a particular creed, but rather a way of meeting individuals’ religious accommodation needs
  - Be aware of how the participation of persons in positions of power or authority may be received, avoiding exerting indirect pressure, or appearing partisan
  - Be as inclusive as possible in developing and providing the accommodation, by consulting with as many directly affected parties as possible, and being attentive to internal group dynamics and differences in accommodation needs
  - Treat members of all creed groups requiring accommodation equally, including minorities within creed groups, neither privileging nor disadvantaging, endorsing nor condoning any one over another
  - Maintain an environment that is free of pressure or compulsion in matters of religion and belief
  - Do not interfere in, or become entangled in, what are purely religious or creedal matters
  - Consider and balance any competing rights potentially affected (per the OHRC’s *Policy on competing human rights*).
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## 10.2 Dress code, appearance rules and requirements

Workplaces, services and facilities often have rules about how people should dress or present themselves. These may involve having to wear a uniform or protective gear, or a requirement that no person may wear a beard or head covering. These rules may come into direct conflict with religious requirements. When they do, there is a duty to accommodate the person, short of undue hardship.



**Example:** A security company's policy requiring all security guards to wear a hat and be clean-shaven was found to have discriminated against a turbaned Sikh man who wanted to work as a security guard with the company. In finding the company could have accommodated him without creating undue hardship, the Board of Inquiry (as the HRTO was known then) rejected the company's argument that members of the public would be uncomfortable with a bearded and turbaned security guard.<sup>438</sup>

Considerations when dealing with dress codes include:

- What is the exact nature of the religious or creed observance?
- What is the reason for the uniform or dress code?
- What steps can be taken to accommodate the person short of undue hardship?
- Are there alternatives?
- Are health or safety factors involved?<sup>439</sup>

Sometimes clothing requirements may adversely affect persons based on their creed, because they conflict with creed-based modesty requirements.

**Example:** The York Region District School Board's religious accommodation guidelines (at the time of writing this policy) include many sample accommodations relating to clothing requirements. Examples relating to physical education instructional activities include:

- Accommodating students who are not permitted to wear shorts or T-shirts to class by allowing them to wear other safe and comfortable clothing
- Accommodating students who cannot dress for Phys. Ed. in front of others in the change room for religious reasons, by allowing them to change in a stall within the change room, or to change in an alternate location or time allowing for the needed degree of privacy
- Accommodating students who are not allowed to take part in a swimming class because of the style of swim wear worn, by allowing them to wear an alternate style of swim wear that the family provides and that meets the safety requirements of the pool facility (such as a wet suit or "sun suit").<sup>440</sup>

As a general rule, appearance standards and uniform rules that have no health or safety rationale can be modified easily to accommodate creed observances. Organizational style preferences and cultural customs, norms, conventions or traditions are not a legitimate reason for denying dress or comportment-related creed accommodations.

**Example:** A retail clothing store has a policy that prohibits tattoos, piercing and body art of any kind. A Hindu employee wears a red "bindi" (red dot) on her forehead as part of her religious observance. Another employee who identifies as a practitioner of Traditional African Religion has facial scarification, also for creed-related reasons. The store has a duty to accommodate creed-based expressions in bodily appearance where this can be linked to observing a sincerely held creed belief.

At the same time, organizations need only accommodate actual creed accommodation needs, and not style preferences.

**Example:** An employer was found to be within their right to ask a female employee if it was possible for her to wear a “religiously acceptable form of hijab” (Muslim head covering) that was more consistent with the employer’s dress code. Upon judicial review, the Ontario Divisional Court distinguished between clothing preferences based on “style” and those based squarely on “creed,” with only the latter receiving human rights protection.<sup>441</sup>

Safety considerations are often an issue raised when it comes to religious attire or comportment.<sup>442</sup> If an accommodation is likely to cause significant health and safety risks, this could be considered “undue hardship.” Employers, housing providers and service organizations have an obligation to protect the health and safety of all their employees, clients and tenants, including people who observe a creed, as part of doing business safely, and as part of fulfilling their legal requirements of the *Occupational Health and Safety Act*.<sup>443</sup> See section 9.9.3 for more on handling health and safety risks.

In some cases, clothing or gear with a health or safety rationale may constitute a *bona fide* requirement.

**Example:** A Sikh man was removed from his position at a pulp mill because he could not wear a safety mask in an emergency due to the beard he kept as a tenet of his faith. As a “recaust operator,” he was in charge of the area in the mill where poisonous gases are piped and was responsible for emergency shutdowns of the area should a poisonous gas leak happen. A human rights tribunal found that the mill’s enforcement of a Workers Compensation Board regulation that anyone potentially exposed to poisonous gas wear the safety mask was justified as a *bona fide* requirement. It also found that providing an exemption for workers who wear a beard for religious reasons, as requested in this case, would be an undue hardship as it would prevent the mask from properly sealing and undermine the very reason for the regulation, to protect workers from exposure to poisonous gases. In this case, the risk was not only to the recaust operator but also to other workers. If he became incapacitated from exposure to poisonous gases, he would have to be rescued by co-workers, putting them at risk. As well, he would not be able to carry out the emergency shutdown. Therefore, the employer did not have to accommodate him.<sup>444</sup>

Even where a dress requirement is found to be *bona fide* for health and safety reasons, the employer or service provider may still be obliged to seek to accommodate the employee; for example, by examining whether the employee can be transferred to another available job that does not require the clothing or gear.

Failing to consistently apply health and safety standards (even when they are *bona fide*), for example by enforcing them selectively in cases involving people with a creed, may result in a finding of discrimination.

**Example:** The Human Rights Tribunal of Ontario (HRTO) found that a requirement that hardhats be worn at a Home Depot store that was under construction was selectively and inconsistently enforced. A more stringent approach was applied to a Sikh security guard who wore a turban for religious reasons. This violated his right to be free from discrimination based on religion. The HRTO also found that the personal respondent subjected the security guard to discriminatory treatment in the form of rude and offensive comments and conduct. The personal respondent was found to have goaded him to remove his turban to be allowed to work and also to have threatened him with termination. The comments and conduct were derogatory and discriminatory.<sup>445</sup>

### 10.2.1 Kirpans

Organizations have a duty to accommodate wearing articles of faith up to the point of undue hardship.

Safety concerns have dominated tribunal and court decisions dealing with wearing kirpans in public institutions and workplaces.

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#### What is a kirpan?

A kirpan is a religious object made of iron or steel that is a stylized representation of a sword (resembling a dagger). It may range in size from 15 to 22cm (6 – 9 inches), though size may vary. Initiated (Amritdhari) Sikhs, both men and women, must wear the kirpan next to the body at all times. It must be sheathed and wrapped in a cloth belt next to the body. The kirpan is one of five articles of faith, often called the 5Ks. It symbolizes spiritual wisdom and the duty to stand up against injustice.<sup>446</sup>

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In the context of education, human rights tribunals have generally rejected arguments by school boards prohibiting wearing kirpans to school for safety reasons, on the grounds that wearing a ceremonial kirpan does not raise sufficiently compelling safety concerns.<sup>447</sup>

**Example:** The Ontario Board of Inquiry, upheld by the Divisional Court, found that a school board's policy prohibiting wearing kirpans violated the rights of students and teachers under the *Code*. They rejected the school board's claim that it could not accommodate kirpans without undue hardship.<sup>448</sup> The Supreme Court of Canada considered the same issue in a 2006 decision<sup>449</sup> that again found that prohibiting a student from wearing his Kirpan to school, under any conditions, violated his freedom of religion since it effectively deprived him of his right to attend a public school. The infringement was not found to be justified under s. 1 of the *Charter* as it did not minimally impair his religious right. Instead, the school board could accommodate the student by allowing him to wear his kirpan subject to certain conditions that would ensure safety.

The case law is clear that school policies may not prohibit wearing kirpans to school, even if they may impose certain conditions.

Organizations must take an individual approach to accommodating people's religious needs, with respect to the wearing of a kirpan.

**Example:** The Supreme Court of Canada rejected a school board's argument that it did not violate the freedom of religion of a Sikh student who believed he must wear a metal kirpan. The school board unsuccessfully argued that because other Sikh students in the same school had agreed to carry a plastic instead of metal kirpan to school, the accommodation seeker should have accepted the same accommodation.<sup>450</sup>

Wearing kirpans may be prohibited or limited in some circumstances. In *Multani*,<sup>451</sup> the Supreme Court noted that consideration must be given to the particular context and environment where the rule concerning kirpans is being applied. An aircraft or court environment is much different than an education or employment setting, and the safety considerations are much different.

**Example:** In *Nijjar v. Canada 3000 Airlines Ltd.*,<sup>452</sup> the Canadian Human Rights Tribunal dismissed a man's complaint that he had been denied the right to wear his kirpan aboard a Canada 3000 Airlines aircraft because, among other things, he had failed to show that wearing a kirpan in a way consistent with Canada 3000's policies would be contrary to his religious beliefs.<sup>453</sup>

Recent court decisions and settlements have generally permitted the wearing of kirpans in court, subject to some limitations and individualized risk assessment.<sup>454</sup>

### 10.3 Displaying religious or creed-based symbols

There is nothing in the *Code* that necessarily prevents the display of a religious or creed-based symbol in "secular" or "public" space.<sup>455</sup> Ultimately, a case-by-case approach is required to determine whether the display of a creed symbol may engage, promote or violate *Code* protections.

Allowing someone to display a personal religious or creed symbol in the workplace, housing or service may be an inclusive and equitable practice. It may also be required as part of an organization's duty to accommodate individuals' creed beliefs and practices.

**Example:** An employee who has been under stress at home and work mounts a small eight-sided mirror ("Ba Gua" or "eight trigrams") in her office facing the door. The employee, who practices Taoism, has the creed belief that the mirror will help to re-establish equilibrium in her office by deflecting negative energy, thereby safeguarding her health and well-being. The employer orders her to take it down based on an informal "no religion" in the workplace policy, causing her significant distress. The employer's action may be discriminatory under the *Code*.

Accommodating a person's creed needs by allowing them to wear or display a creed-based symbol need not imply that an organization is endorsing or privileging one creed over another.<sup>456</sup>

**Example:** The Federal Court rejected a claim that the RCMP Commissioner's decision to allow Sikh officers to wear turbans compromised the Sikh officers' and RCMP's ability to appear religiously neutral before the public. The Court noted that there is nothing religious involved in the interaction between the member of the public and the officer, and there is no compulsion or coercion of the member of the public to take part in, adopt or share the officer's religious beliefs or practices. The only action demanded from members of the public is to observe the officer's personal religious affiliation. This was not held to religiously bias the RCMP as an organization, or violate the religious freedom and equality rights of individual members of the public.<sup>457</sup>

At the same time, not every individual expression of religion or creed is protected under the *Code*, or triggers the duty to accommodate.

**Example:** The HRTO dismissed an applicant's claim that his creed rights were violated by an online shopping service when it required him to remove his "Christ fish" avatar (containing the words "Jesus Christ, God's Son, Saviour") from its online forum. The company's Forum Rules prohibited potentially controversial content, including religious and political threads. In its decision, the HRTO held that not every personal manifestation of an individual's creed engages *Code* protections. The applicant here did not assert that his use of the Christ fish avatar was objectively or subjectively required by his religion. Nor did his use of the avatar appear to engender for him any significant or deep personal connection to the divine. Rather, he described his use of the Christ fish as more of a personal and outward display of his religious beliefs, which he compared to a T-shirt or a tattoo. While this made him feel good and reminded him of his faith, the HRTO ruled that it was not a significant enough aspect of his religious belief or practice to engage the *Code's* protection against discrimination based on creed.<sup>458</sup>

There is a significant difference between an individual person expressing their creed belief by using a symbol in a private capacity, and an organization displaying or endorsing a creed-based symbol. Whether the display of a creed symbol in a social area may comply with the *Code* may depend on several factors, including: who is displaying the symbol and why,<sup>459</sup> the symbol's location, visibility,<sup>460</sup> or contemporary significance, the extent it may be associated with the organization as a whole versus an individual person,<sup>461</sup> and whether the display has any significant negative impact (for example, by causing creed-based pressure, exclusion or discrimination against others).<sup>462</sup>

**Example:** A municipality has a large number of street signs named after various Roman Catholic saints. The street signs may simply be an artifact of historical demographics and heritage, as opposed to indicating any current religious bias or affiliation of the municipality.<sup>463</sup>

Organizations, and individuals functioning in an official organizational capacity, have a responsibility to treat all people equally based on their creed, and to maintain an environment free from any religious or creed-based pressure or discrimination. In some cases, the best way to do this may be to prohibit the organizational display of any creed symbol (although this may not negate the organization's duty to accommodate individuals' creed observances).

**Example:** To preserve its religious neutrality, a courtroom has no religious symbols on display on its walls.

Alternatively, an organization may promote equality through universal design and equal recognition and inclusion of diverse creed symbols.

**Example:** A recreational facility equally displays a wide variety of symbols and information about diverse (religious and non-religious) belief systems, inclusively reflecting the cultural and creed diversity of the community it serves.

The individual or organizational display of religious or creed-based symbols in workplaces, services or housing may be limited or prohibited where its display can be shown to interfere with a *bona fide* requirement, create undue hardship, or contravene the rights of others, for instance by:

- Creating an unequal environment for employees, residents or service users (examples include organizationally privileging or disadvantaging one creed over another, or providing a more or less welcoming organizational environment for people based on their creed)
- Creating a poisoned environment for members of a *Code*-protected group
- Exerting religious or creed-based pressure on persons to comply or agree with a particular creed belief, practice or system of beliefs.

Not every exposure to a creed symbol in a social area will be considered to exert religious pressure or to contravene the religious equality or freedom rights of others.<sup>464</sup>

Requiring a person to display an object with religious or creed-based significance in a *Code* social area may violate *Code* rights based on creed or other grounds, depending on the circumstances.

**Example:** An employer required a Jehovah's Witness employee to put up a Christmas poinsettia display in a store, even though the employee advised that this was contrary to his faith. When the employee refused, the employer told him that to keep his job, he must comply. There was no evidence that the employer could not have accommodated the man. However, rather than exempting him from this activity, the employer effectively required him to choose between his faith and his job. This was found to be discriminatory.<sup>465</sup>

## 10.4 Photos and biometrics

Requiring that a person be photographed as a condition of access to a service, employment or benefit may violate the *Code*, if there is a failure to accommodate (to the point of undue hardship) people whose creed beliefs do not allow them to be photographed.

**Example:** A labour arbitrator found that a company could have accommodated its Pentecostal employees' religious objection to biometric hand scanning for company security without creating undue hardship. The company failed in its procedural duty to accommodate because it did not do enough to explore what it could do to accommodate the grievors. In terms of the substantive accommodation, the arbitrator rejected the company's argument that it would have to scrap biometric scanning altogether if the grievors were exempted on religious grounds.<sup>466</sup>

An organization requiring photos to be taken will need to consider whether the requirement is a *bona fide* (legitimate) requirement under the *Code*.<sup>467</sup> This requires determining, among other things, if the purpose for the photograph can be achieved in other ways, without creating undue hardship.

**Example:** Ontario government services requiring photo identification allow for exemptions for a variety of reasons, including people's religious beliefs that forbid the taking of photographs. Service Ontario has a longstanding relationship with the Mennonite community and has put in place a general exemption for health card photos for orthodox or old order members of the community.<sup>468</sup> When capturing required health card photos, Service Ontario accommodates Muslim women who wear a head covering in a variety of ways, depending on the nature of their sincerely held religious belief.<sup>469</sup>

Health and safety and cost considerations under the *Code*, or security-related concerns under section 1 of the *Charter*, may limit the duty to accommodate individuals by exempting them from taking photographs based on their creed, for identification purposes.

**Example:** In 2003, the Province of Alberta adopted new regulations that made the photo requirement for drivers' licenses universal. The photos were to be stored in the province's facial recognition data bank. This was to reduce the risk of drivers' licences being used for identity theft, a growing problem. The new law was challenged in court by members of the Hutterian Brethren colonies, who believe that the Second Commandment prohibits them from having their photograph willingly taken. The Supreme Court of Canada accepted that the universal photo requirement violated their freedom of religion.<sup>470</sup> However, the majority of the Court concluded that the requirement was justified under s. 1 of the *Charter*.

## 10.5 Creed-based exemptions

Where a person would be adversely affected based on their creed, the duty to accommodate can sometimes require organizations to exempt individuals from taking part in activities that would contravene their creed beliefs or practices. Exemptions are a type of accommodation.

**Example:** An employer breached the Newfoundland *Human Rights Code* when it suspended an employee because, for religious reasons, he refused to sell tickets to a social event at which alcohol would be sold.<sup>471</sup> The man was an active member of the Pentecostal church and asserted that a tenet of the Pentecostal faith is that its members must abstain from consuming alcohol and must not encourage its use in any way. The Newfoundland Tribunal found that once the employer learned of his religious objection, rather than suspending the employee, it should have accommodated him by having someone else sell the tickets.

Generally, organizations should first try to find ways to accommodate people's creed beliefs and practices in a way that best promotes their integration and full participation, unless it can be shown that segregation, or full exemption from an activity, is the best way to achieve equality in the circumstances.<sup>472</sup>

**Example:** Rather than having to withdraw from participation in an after-school City-run recreational art program, a student who is not allowed to draw or paint human faces for religious reasons is accommodated by permitting her to work with silhouettes and/or masks or to apply design elements in non-representational ways. Another child who is not allowed to include nationalistic symbols in his artwork for religious reasons is instead invited to create a design reflecting his appreciation of something about living in Canada.<sup>473</sup>

People exempted from an activity because of their creed should not be penalized or disadvantaged, or lose privileges given to others, as a consequence of their exemption. The accommodation process and arrangement must preserve the dignity and privacy of the accommodation-seeker.<sup>474</sup>

Accommodations taking the form of an exemption may be limited by undue hardship, or denied because the activity is a *bona fide* requirement. Where taking part in an activity can be shown to be a *bona fide* requirement, organizations are still required to accommodate to the point of undue hardship (for instance, by assigning an employee an alternative assignment, or moving them elsewhere in the organization).

**Example:** After becoming a Jehovah's Witness, an Ontario nurse would no longer perform certain blood transfusion steps. She worked in the intensive care unit, and following intensive Bible study, concluded she could no longer "hang blood" for a blood transfusion.<sup>475</sup> The employer dismissed her, arguing that hanging blood was essential to a nurse's duties.<sup>476</sup> The majority of the Labour Arbitration Board found that the employer should have accommodated rather than dismissed the nurse, by offering her a nursing position elsewhere in the



hospital, where it was possible to have another nurse hang the blood.<sup>477</sup> However, the board found that the employer was not required to allow the nurse to remain in her specific position in the intensive care unit (or to work in the emergency room) since a requirement that all nurses in these units be able to hang blood was reasonably necessary to be able to respond quickly in an emergency situation to ensure the health and safety of patients in these units.

When granting an accommodation in the form of an exemption, organizations must also consider the competing rights of others. Exemptions from activities contravening a person's creed belief may not always be possible where these substantially infringe on people's competing rights, and/or pose a significant harm or risk.

**Example:** A medical facility accommodates a doctor who does not prescribe contraception pills due to her creed beliefs, while considering the competing rights of patients to equally access health services. The facility takes proactive steps to make sure any service not provided by the accommodated doctor is still provided by the facility to patients in need.

Requests for exemptions can sometimes arise in school settings from parents, students or teachers concerned about curriculum content or activities that contravene their beliefs or are deemed inappropriate for creed-based reasons.

Article 18(4) of the *International Covenant on Civil and Political Rights* calls for state parties (including Canada) "to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."<sup>478</sup> Freedom of religion under the *Charter* extends to the right of parents to raise their children in conformity with their own religious convictions, free from any compulsion or indoctrination in education pertaining to their children's religion, creed or morality.<sup>479</sup>

The duty to accommodate a person's creed-related needs may include providing exemptions from aspects of school curriculum that adversely affect people based on their creed.

**Example:** A school integrates Halloween activities into its Fall curriculum. Children march in a Halloween parade throughout the school wearing costumes. Children who do not celebrate Halloween for religious reasons are exempted from taking part in the parade, and take part in alternative equally fun and educational activities so they do not feel isolated or left out.

As discussed in section 7.4, there is no broad right not to be exposed to views and beliefs that contradict with or differ from one's own, including in school curriculum.<sup>480</sup>

“Children encounter [some cognitive dissonance] every day in the public school system as members of a diverse student body. They see their classmates, and perhaps also their teachers, eating foods at lunch that they themselves are not permitted to eat, whether because of their parents’ religious strictures or because of other moral beliefs. They see their classmates wearing clothing with features or brand labels which their parents have forbidden them to wear. And they see their classmates engaging in behaviour on the playground that their parents have told them not to engage in. The cognitive dissonance that results from such encounters is simply a part of living in a diverse society. It is also a part of growing up. Through such experiences, children come to realize that not all of their values are shared by others. Exposure to some cognitive dissonance is arguably necessary if children are to be taught what tolerance itself involves.”

– Supreme Court of Canada<sup>481</sup>

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Court decisions to date suggest that parents wishing to exempt their children from school curriculum inconsistent with their creed will have to provide evidence to show how being exposed to such ideas and views objectively infringes on their or their children’s freedom of religion, for instance by:

- Interfering with the ability of parents and children to practice, observe, express or transmit their faith (including parents’ ability to pass their faith on to their children)
- Amounting to indoctrination or compulsion in religious or creed-related matters
- Creating an unequal environment, for instance by privileging or disadvantaging one creed over another, contravening the principle of neutrality and non-discrimination.

**Example:** The Supreme Court of Canada rejected the claim of some Quebec parents that their ability to pass on their Catholic faith would be compromised, and their children harmed, by exposure to a new required course instructing students about a variety of religious and secular ethical traditions.<sup>482</sup> The Court affirmed that the government cannot set up an education system that favours or hinders any one religion or vision of religion, and recognized the right of parents to raise their children in their own faith free from compulsion. However, it held that the applicants had failed to show how the program objectively interfered with their raising their children in the Catholic faith, and dismissed the claim that the program was not neutral, or that exposure to a comprehensive presentation about various beliefs would result in indoctrinating students. It further found that the early exposure of children to different realities is a fact of life in Canada’s multicultural society and is arguably necessary if children are to be taught what tolerance itself involves.

In some situations, participation in a program, course or curriculum component may be a *bona fide* requirement to fulfill the required educational learning goals and receive recognition or credit. While flexible alternative arrangements to meet learning goals should be sought, it may not always be possible to accommodate students in fulfilling

the goals in an alternative way that does not create undue hardship. In these cases, students should still be treated with dignity and respect.

### 10.6 Creed-based food restrictions

Persons with a creed may have creed-based dietary restrictions or food practices. Such restrictions may extend to producing, storing, processing, handling, transporting or consuming food. Organizations have a duty to accommodate people's sincerely held creed-based food requirements, up to the point of undue hardship. Not doing so may infringe on a person's right to equally access, take part in or benefit from housing, services, employment, a contract, or membership in a union or professional association.

**Example:** A person in a mental health facility requires vegetarian food options, based on her creed. She is not allowed off the premises to find appropriate food, and she is not able to prepare her own food. The facility has a duty to accommodate her creed-based food requirements up to the point of undue hardship by making appropriate food options available to enable her to stay at the facility.

**Example:** To accommodate employees who cannot physically handle pork products for religious reasons, a food processing plant assigns them to positions that do not require handling these foods.

The best way to handle creed-based food restrictions is to inclusively design food arrangements in advance, to equitably meet people's creed-based dietary needs.

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The York Region District School Board's (YRDSB) religious accommodation guidelines (at the time of writing this policy) offer many examples of inclusive design in dealing with creed-based dietary restrictions. The guidelines advise teachers and cafeteria staff to be aware of food restrictions and to take special care to keep vegetarian and non-vegetarian food separate, and to make sure the same spoons and serving utensils are not used to serve both kinds of food. It further advises that food and snacks prepared using animal by-products (e.g., lard, beef tallow) be properly labelled and not served to students whose religious dietary restrictions do not allow them to eat such foods. Where possible, the YRDSB advises teachers or schools to consider making available packaged foods and snacks that have reliable kosher or halal certification markings visible on the packaging. Teachers or schools are also encouraged, where appropriate, to adjust their snack, pizza days, fun fair or lunch programs to accommodate students' religious (and other) dietary restrictions.

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People sharing a creed may observe creed-based food restrictions in different ways and to differing degrees. It is the individual's sincerely held creed belief that must be accommodated. People who have identified creed-based dietary requirements should therefore be consulted about the precise nature of their food restrictions, to avoid relying on any preconceptions or group-based generalizations about those restrictions.

There may not be a duty to accommodate where this changes the essential nature of an organization's services.

**Example:** It is not discrimination if a steak house that only serves animal-based products does not accommodate a vegetarian patron. Offering steak-related food items on its menu may be considered an essential nature of the service the steakhouse provides. However, a restaurant that already offers vegetarian food options may be required to accommodate a customer whose religion requires a vegetarian diet, by cooking a person's vegetarian meal using cooking utensils that have been cleaned and removed of any traces of meat, unless this can be shown to cause undue hardship.

Where a duty to accommodate can be established, the organization has an obligation to bear the associated costs of accommodation.

**Example:** A Jewish tenant in a supportive housing residence with 10 tenants observes kosher dietary laws that do not permit her to mix milk with meat foods, to store or cook milk and meat together, or to serve them together at the same time. Because the tenant would face exorbitant costs from having to purchase ready-cooked kosher meals to meet her needs, the housing provider buys a second smaller fridge, pots, plates and utensils to enable her to buy and cook her own groceries like the other tenants.

Organizations accommodating food restrictions should provide food that is of comparable nutritional value to that offered to other persons.<sup>483</sup> Organizations should also make sure they treat people requiring accommodation equally.<sup>484</sup>

### 10.6.1 Fasting

Some creeds require their members to fast or abstain from food for set periods of time. When such observances interfere with a person's ability to perform a task, or comply with a particular rule or work day schedule, people belonging to a creed may be adversely affected.

Organizations have a duty to accommodate employees', service users' or tenants' sincerely held creed observances, including fasting, to the point of undue hardship.

**Example:** During the month of Ramadan, Muslims may abstain from food and drink from before the rising of the sun to its setting. They may also engage in lengthy night prayers. The prayers, combined with fasting and waking for pre-dawn meals, may take a physical toll. Persons observing the Ramadan fast may need to adjust their schedule to observe the start and end of the daily fast at sunrise and sundown, and/or to observe night prayers. For example, where possible, employers could permit employees observing the fast to work through the lunch hour in exchange for leaving early to get home in time to break the fast at sunset.

Individuals' understanding and practice of fasting requirements may vary, as may the impact of fasting on them and their accommodation needs.

Sometimes, fasting observances may be physically or mentally demanding. Fasting may also coincide with other intensified forms of religious observance that may have a physical impact. Depending on the person, their physical constitution and sincerely held understanding of the requirements of their faith, fasting may be more or less impairing of a person's ability to engage in physically or mentally demanding activities. Accommodation providers may ask about the extent that a person's belief may allow for flexibility in fasting observances.<sup>485</sup>

Where a person's ability to perform a task or function, or comply with a standard, practice or requirement, is adversely affected because of fasting, organizations have a duty to accommodate to the point of undue hardship, unless they can show that the rule or activity is a *bona fide* requirement. Accommodation arrangements should fulfill individual accommodation needs, which may be unique for each person. Where a creed practice affects a person's pre-existing disability, there may be a duty to accommodate to the point of undue hardship based on the intersecting grounds of creed and disability (see section 7.6.3).

As with all accommodations, the best approach is to anticipate creed-related accommodation needs in advance through inclusive design.

**Example:** A school allows use of a separate area (e.g., the library) for students observing a creed-based fast so they can avoid the cafeteria during lunch breaks. It avoids organizing late-night and food-related events (e.g., pizza days, overnight school trips) if there are a large number of students who observe the fast. The school excuses fasting students from strenuous physical activity, and tries to schedule exams during times when most students are not fasting. If this is not possible, exams are scheduled early in the day, or fasting individuals are permitted to defer the exam to a time when they are not fasting. In addition to accommodating students, the school makes an effort to increase staff and student awareness of fasting to help avoid misunderstandings.<sup>486</sup>

## 11. Indigenous spiritual practices

Indigenous peoples practice diverse spiritual traditions in Ontario,<sup>487</sup> reflecting the diversity of Indigenous peoples in Ontario and Canada.<sup>488</sup> This section addresses the duty to accommodate Indigenous spiritual beliefs and practices in areas covered by the *Code*.<sup>489</sup>

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“Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.”

– United Nations Declaration on the Rights of Indigenous Peoples<sup>490</sup>

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This policy uses “Indigenous”<sup>491</sup> as an inclusive term to encompass all Indigenous peoples and identities, including status, non-status, Indian, Aboriginal, Native, First Nation, Métis and Inuit.

### What is Indigenous Spirituality?

The OHRC does not define “Indigenous Spirituality” in recognition of its diversity and Indigenous peoples’ right to define and determine this for themselves.<sup>492</sup> Other terms may be used or preferred by Indigenous peoples, including those that are more specific to a Nation, language, place and/or people.

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The Inuktitut word “Upirusutuk” is used among Inuit people to mean “having faith.”

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In this policy, “Indigenous Spirituality” refers to the spiritual beliefs and practices that Indigenous peoples identify as being “traditional” or “customary” among Indigenous peoples. This may sometimes include and be practiced in combination with other faith traditions, such as Christianity.<sup>493</sup>

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“Métis spirituality can include both ceremony and Christianity. It is connected to both our Euro-Christian and Aboriginal First Nation roots and practices. As Justice Phelan said: ‘One can honour the feather and the fiddle.’”

– OHRC focus group participant<sup>494</sup>

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It may also include:

- Practices of more recent origin that are inspired by, or seek to revitalize, past Indigenous cultural-spiritual traditions and identities
- Traditional practices that have since come to take on more of a sacred or symbolic meaning in their use today.

**Example.** The quilliq (Inuktitut: ᑦᑭᑦᑭᑦᑭᑦ, IPA: [qul:iq]) is a type of low-intensity oil lamp made from soapstone and an arctic cotton and moss wick fueled by animal oil. It was traditionally used by the Inuit primarily as a survival tool for staying warm in the home, drying clothes and cooking. It is now sometimes used as a ritual teaching tool and as part of opening and closing ceremonies at gatherings, where it has become a sacred symbol of Inuit identity and traditional culture. Illustrating the close interconnection between culture, identity, spirituality and health, we heard one Elder remark while watchfully keeping the low-level flame alight: “I feel good when I use the quilliq.”<sup>495</sup>

While Indigenous spiritual beliefs and practices can vary significantly among different First Nation, Métis and Inuit groups and individuals, and across different regions, some common elements were evident during our engagements. For example, many people spoke of Indigenous Spirituality as a “way of life” and “way of knowing” (or worldview) that was centered on a relationship with the Creator, the land and “all our relations.” This usually included all other beings and forms of life, including what are commonly perceived as inanimate objects, which were generally seen to be imbued with a spirit or soul. Most also viewed Indigenous Spirituality as being inseparable from their traditional Indigenous culture and identity.

### Historical context

During OHRC engagements<sup>496</sup> with Indigenous peoples, many people spoke about the ongoing legacies of colonialism in Ontario. This included the active suppression and denigration of Indigenous culture, language, spirituality and ways of life by government and church authorities, and concerted efforts to destroy, subjugate and assimilate Indigenous peoples.<sup>497</sup>

Residential school survivors talked about being forced to go to church and to not speak their language or practice “traditional ways,” or risk being beaten or even being denied food.

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“Some of our Elders who went to residential schools will not speak about traditional ways or spirituality. It is taboo for them [after being associated with the ‘dark side’ for so many years]. If they do practice, it is often done ‘under the table’ or is not identified as having any religious or spiritual significance.”

– OHRC focus group participant<sup>498</sup>

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Today, many people are reclaiming and reviving Indigenous cultural and spiritual traditions in the process of healing and recovering from historical traumas and their ongoing legacies in the present.<sup>499</sup>

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“[A]s a child, we had to hide who we were...I grew up not saying who I was. My father would say he is Mexican. Only over the last 20 years have I felt safe to be able to say who I am.”

– OHRC focus group participant<sup>500</sup>

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It is important for individuals and organizations in Ontario to understand and not repeat this history of denigration and denial of Indigenous peoples’ spirituality, cultures and identities, and to recognize, respect and accommodate people's Indigenous spiritual practices as a human right in the present with central importance for people's dignity and well-being.

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“Traditional ceremonies and spiritual practices...are precious gifts given to Indian people by the Creator. These sacred ways have enabled us as Indian people to survive – miraculously – the onslaught of five centuries of continuous effort by non-Indians and their government to exterminate us by extinguishing all traces of our traditional ways of life. Today, these precious sacred traditions continue to afford [us] the strength and vitality we need in the struggle we face every day; they also offer us our best hope for a stable and vibrant future. These sacred traditions are an enduring and indispensable ‘life raft’ without which we would be quickly overwhelmed by the adversities that still threaten our survival. Because our sacred traditions are so precious to us, we cannot allow them to be desecrated and abused.”

– Christopher Ronwaien:te Jock<sup>501</sup>

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### Current context

Research and OHRC engagements<sup>502</sup> with Indigenous peoples showed that many Indigenous peoples experience systemic barriers when practicing Indigenous Spirituality. This was often due to organizations’ narrow interpretations of what is protected under the *Code* ground of creed and failure to recognize Indigenous spiritual beliefs and practices as engaging the *Code* protections. Sometimes this was due to the imposition of an overly rigid distinction between “culture” or “tradition” on the one hand and “religion” or “creed” on the other, which made little sense in Indigenous contexts due to the culturally-rooted and holistic<sup>503</sup> nature of Indigenous Spirituality.<sup>504</sup>

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“We don’t have a religion. We have a way of life. It is embedded in our daily life.”

– OHRC focus group participant

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“You cannot put it into a box and say, this is spirituality.”  
– OHRC focus group participant<sup>505</sup>

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“Indigenous spirituality is a more complex phenomenon than the term spirituality alone, as generally understood, implies. Spirituality is closely bound up with culture and ways of living in Indigenous communities and requires a more holistic or comprehensive... approach.”<sup>506</sup>

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Many of the barriers Indigenous peoples encountered were also due to individuals' and organizations' unfamiliarity with Indigenous Spirituality, and how it may differ in form and expression from the way many people understand or practice religion or spirituality.

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“Anishinabek spiritual expression differs substantially from what many people regard as religious.”  
– John Burrows<sup>507</sup>

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“Like many North Americans, my socialization has imbued in me a sense of religion that is limited to churches, congregations and Sunday attendance. Native spirituality cannot be adequately understood in these terms. Perhaps the most challenging aspect of native spirituality to grasp is its all-pervasiveness.”  
– Lori Beaman<sup>508</sup>

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Many people told the OHRC that they preferred not to identify their spiritual beliefs and practices as a religion or a creed. For some, such terms had a negative connotation due to the residential school experience.

Under the *Code*, a person or group does not have to view their spiritual practice or belief as a religion or creed for it to be protected as a creed.<sup>509</sup>

## Legal framework

The Ontario *Human Rights Code*, *Canadian Human Rights Act*, *Canadian Constitution*, *Charter of Rights and Freedoms* and *United Nations Declaration of the Rights of Indigenous Peoples* include legal protections for the fundamental right of Indigenous peoples to freely practice their religious and spiritual traditions, and to be treated equally and with dignity.

Employers, unions, housing and service providers that fall under provincial jurisdiction<sup>510</sup> have a legal duty under the Ontario *Code* to uphold Indigenous peoples' right to be free from discrimination based on creed. As part of this obligation, where there is a negative impact on Indigenous peoples' spiritual beliefs and practices, there is a duty to accommodate up to the point of undue hardship.<sup>511</sup>

The case law has clearly recognized Indigenous Spirituality to be within the meaning of creed under the *Code*.<sup>512</sup> Organizations should generally accept in good faith that a person practices a creed, unless there is significant reason to believe otherwise.<sup>513</sup> When considering if an accommodation request is creed-based, organizations should look at the criteria set out in section 4.1 of this policy.

Individuals and organizations must not impose their own subjective view of what is a creed or creed-related practice (for example, falsely assuming that a creed must have written dogma or articles of faith).<sup>514</sup>

Where there are legitimate reasons to question if an accommodation need or request is creed-based,<sup>515</sup> it is essential that organizations meaningfully engage the Indigenous persons seeking accommodation to learn their perspective on the spiritual or creed-related significance of their sincerely held belief or practice requiring accommodation. Failing to do so may contravene the *Code's* duty to accommodate, including its procedural component.<sup>516</sup>

## **Charter and Constitution Act**

Section 25 of the *Charter*<sup>517</sup> and section 35<sup>518</sup> of the *Constitution Act, 1982* recognize and affirm the constitutional rights of Indigenous peoples in Canada. This includes but is not limited to enforcing treaties and Aboriginal land titles, and the right to preserve traditional cultural practices and activities such as fishing, logging, hunting and other customary and sacred traditions.

In *R. v. Van der Peet*, the Supreme Court of Canada discussed the underlying legal basis for aboriginal rights:

...the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.<sup>519</sup>

On this basis, the Court set out the “integral-to-a-distinctive culture” test still used for determining whether an Aboriginal right under section 35(1) of the Constitution has been engaged:

[I]n order to be an aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right... Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).<sup>520</sup>

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The analysis for determining creed rights under the *Code* is distinct from the test for determining whether an Aboriginal or treaty right has been engaged under the Constitution. For example, to engage creeds rights under the *Code*, there is no need to show the continuity of an Indigenous spiritual belief or practice with a pre-contact Indigenous custom or tradition.<sup>521</sup>

### ***United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)***

Canadian and Ontario laws and human rights provisions affecting Indigenous peoples should be interpreted in light of, and uphold the provisions of, the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). Endorsed by the Government of Canada in 2010,<sup>522</sup> UNDRIP provides an internationally recognized framework for measuring the human rights of Indigenous peoples,<sup>523</sup> setting the “minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world.”<sup>524</sup> Several provisions directly relate to rights associated with practicing Indigenous Spirituality, including but not limited to<sup>525</sup>:

#### **Article 12(1):**

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

**Article 25:**

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

**Article 34:**

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

The sections below outline some of the issues and corresponding rights and responsibilities that may arise under the Ontario *Code*'s duty to accommodate creed practices and beliefs in Indigenous contexts.

### 11.1 Ceremonial practices and customs

Organizations under provincial jurisdiction have a duty to accommodate Indigenous peoples' spiritual beliefs and practices – including ceremonies and sacred customs – under the *Code*, where rules, practices, standards, or requirements negatively impact these in employment, services, housing, contracts, unions or professional or vocational associations.

**Example:** An Indigenous inmate in a correctional facility requested access to Indigenous spiritual services offered through a Native Liaison person, which included healing, talking, sharing or sacred circles, smudge ceremonies, sweat lodges, one-on-one sessions, and making or using a medicine pouch, dream catchers or drums. Despite repeated requests, he did not receive a visit from the Native Liaison nor did he receive Indigenous spiritual literature. However, he did receive a visit from a chaplain and Christian literature within a reasonable period of time. The British Columbia Human Rights Tribunal found that while Christian services were reasonably available, the inmate was effectively denied access to Indigenous spiritual services which amounted to discrimination based on his religion and ancestry.<sup>526</sup>

Some ceremonies may be best facilitated and led by an Elder or knowledge keeper.

The smudging ceremony is a common purification rite performed in Ontario that involves burning one or more sacred medicines, such as sweetgrass, sage, cedar and tobacco. There are many variations on how a smudge is done. The OHRC heard that people often faced barriers when seeking to smudge. This was often due to a lack of clear protocols and inclusive design measures to facilitate the practice in a timely and appropriate way.

As a student I had to submit a request a week in advance for smudging. But if I have a need to smudge, it is not something that I can hold onto for a week.

– OHRC focus group participant

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Smudging may sometimes be required at unpredictable times – for example, at a time of death in a hospital, or a moment of crisis during the school or work day. Where smudging accommodation needs are known to potentially exist, organizations should take proactive steps to facilitate the practice in a dignified and timely way.

**Example:** Many Indigenous ceremonies involve burning traditional medicines like sweetgrass, sage, tobacco and cedar. The Ontario Ministry of Aboriginal Affairs built a smudging room at its offices in Toronto. The new space will allow for Indigenous smudging and other traditional ceremonies to occur at the Ministry. The two-room design features a larger room with a connected smaller space where traditional medicines will be stored, along with access to clean water for ceremonial purposes. When not in use for ceremonial purposes, the combined space can host larger circles and gatherings. The design for the new space includes Indigenous etchings on a floor-to-ceiling curved glass wall and will feature artwork from Indigenous artists. The Ministry is working with Elders to develop guidelines and educational resources to support it in creating a positive and welcoming space. Through the room, Elders and knowledge keepers will be able to share traditional teachings and provide culturally specific guidance. Health and safety measures have been incorporated into the design to meet or exceed those required under the Ontario Building Code.

Deputy Minister Deborah Richardson said, “The smudging room will be a welcome space for everyone who works and visits the Ministry. It will be our special place to connect with and learn about traditional Aboriginal ceremonies, and provide a dedicated space where visiting knowledge keepers and Elders can lead teachings and offer culturally specific counselling.”

Failure to accommodate a person’s Indigenous spiritual belief or practice in a timely and appropriate way may be discriminatory under the *Code*.<sup>527</sup>

**Example:** A school in a community with large numbers of Indigenous students tells a student to go outside to smudge, including in inclement weather. Students who smudge are also ridiculed by other students and falsely accused by students and staff alike of consuming drugs (“smoking up”), or smelling like it.

Telling students to go outside to smudge, including in inclement weather conditions, may breach the school's duty to accommodate by not doing so in a way that respects students' dignity.<sup>528</sup> If it does not appropriately intervene to

address and remedy the negative student and staff comments, the school may also be in breach of its duty to maintain an environment free from discrimination and harassment.

Failing to inclusively accommodate people's Indigenous spiritual practices on an equal basis – including status or non-status First Nation, Métis and Inuit – may also be discrimination under the *Code*.

**Example:** An organization only recognizes First Nations ceremonies as meriting accommodation, and does not accommodate Métis spiritual practices.

Health and safety concerns sometimes pose a barrier to accommodating Indigenous spiritual practices. Only serious and substantiated health and safety risks may be grounds for denying or limiting these requests.

**Example:** A worker at a supportive housing facility for pregnant women and new mothers prevents an Indigenous woman from carrying her baby on her back in an Amauti, a traditional coat with a built in baby carrier. The woman sees this dress and child-carrying custom as being essential to her cultural identity, tradition and way of life. The worker prevents her from using the Amauti for alleged health and safety reasons that are not investigated or substantiated in any way.

Even where a *bona fide* health and safety risk has been identified, organizations must still search for ways to remove or mitigate such risks to facilitate an accommodation, short of undue hardship.<sup>529</sup>

Indigenous Spirituality may also be expressed through other non-ceremonial but customary practices. For example, organizations may have a duty to accommodate Indigenous peoples' food and dress/appearance standards and requirements, where these are connected to an Indigenous cultural-spiritual belief.

**Example:** A boarding home for children requires all children living there to keep short hair. An Indigenous boy who keeps his hair long in a ponytail for cultural and spiritual reasons is made to cut his hair. This violates Indigenous customary practices and sacred laws, and may be discrimination under the *Code*.

**Example:** An Indigenous court clerk of Inuit ancestry wears a seal skin pendant on top of her court gown uniform. The court accommodates her wearing the pin or emblem in recognition of its sacred value for her.

Organizations also have an obligation to be aware of differences between individuals and groups, and to build in conceptions of equality to standards, rules or requirements.<sup>530</sup> This means designing workplaces, services and housing inclusively for the needs of people who practice Indigenous Spirituality, including when developing or changing policies, programs, procedures, standards, requirements or facilities to ensure such needs are met in a timely and appropriate way.<sup>531</sup>

The Sioux Lookout Meno Ya Win<sup>532</sup> Health Centre (SLMHC) provides a broad range of basic and specialized primary health care services to the Sioux Lookout area and northern First Nations.<sup>533</sup> The 145,000 square foot, 60-bed regional hospital integrates traditional and modern medicines and practices and takes a holistic culturally integrated approach to care that recognizes the relationship of the physical, emotional, mental and spiritual aspects of the person. Area First Nations played a central role in founding, planning and building the hospital<sup>534</sup> and continue to have a central governing role today.<sup>535</sup> The facility was designed by Stantec Architecture and Douglas Cardinal, a Blackfoot/Métis architect, in consultation with traditional healer and elder Josiah Fidler (among other area First Nation residents). Its architecture and interior design thoroughly reflect Indigenous teachings.<sup>536</sup> The Centre also features a healing room for Indigenous spiritual practices with an adjacent room to supply and prepare traditional medicines including the four healing plants (tobacco, sage, sweet grass and cedar).

The Chief Sakatcheway Healing Room is equipped with an air exchange system to handle smoke from various ceremonies such as smudging, and representations of the four elements, including: an earthen floored pit filled with earth from the communities of the catchment area; a symbolic pipestone fireplace; a water wall; and windows and skylights to represent air/light. The Centre's Traditional Healing, Medicines, Foods and Supports Program (THMFS) offers patients and clients support and choice in healing approaches. An eight-member Elders Council supports the SLMHC Board in planning, implementing and evaluating programs; two Elders in Residence provide spiritual-cultural support services to patients; interpreter services are available around the clock in three languages and 19 dialects; a roster of healers offers traditional healing practices (Andaaw'iweWIN) to inpatients, along with access to traditional medicines (Maskiki) and foods.

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As part of inclusive design measures to meet Indigenous Spirituality accommodation needs, employers, service providers (e.g. health care professionals, police services, legal services) and housing providers should look at whether their staff have the necessary cultural competency skills to recognize and meet the creed-related needs of Indigenous peoples.<sup>537</sup> This can be especially important for organizations that provide services to the public.

**Example:** A child protection agency that serves Indigenous and other peoples requires its staff to take full-day Indigenous cultural competency training. Policies are in place to make sure Indigenous children are placed in culturally appropriate environments wherever possible, and support programs and services facilitate the practice of Indigenous Spirituality.

A complete organizational strategy is recommended to prevent and address human rights issues based on creed.<sup>538</sup> This strategy should also consider employment

practices to make sure these do not discriminate by preventing the recruitment and/or retention of Indigenous persons with the necessary skills to effectively and equally serve Indigenous members of the public.

**Example:** A hospital that provides religious and spiritual support services to in-care patients fails to provide such services to persons who practice Indigenous Spirituality. The organization seeks to hire a “chaplain” to fill this gap in Indigenous spiritual counselling services, but fails to successfully recruit anyone. The job advertisement requires that applicants have a Masters of Divinity. The organization does not have a rationale for this requirement, and so it would not be a *bona fide* requirement. In fact, this requirement could adversely affect the ability of qualified Indigenous Elders and knowledge keepers to gain employment in this role, and may also prevent the hospital from providing equal services.

## 11.2. Indigenous spiritual practices and scheduling

Some Indigenous spiritual practices require people to take part in specific activities, sometimes at particular times of the day, week or year. When these observances do not coincide with existing schedules, holidays or break times, or conflict with existing leave of absence provisions, organizations may have a duty to accommodate to the point of undue hardship.

For example, this may include providing time off to take part in:

- A ceremony marking a big life moment, such as birth, naming, adoption, coming of age, initiation or death
- A spiritual ceremony such as (but not limited to) a sweat lodge, smudge, pipe ceremony, fasting ceremony, full moon ceremony, solstice celebration or other ceremony marking the seasons or harvest time
- A day of significance – such as National Aboriginal Day, Louis Riel Day, Inuit Day – where a person may be taking part in activities or practices connected to Indigenous Spirituality.



Indigenous Spirituality is often closely connected to land-based activities, such as hunting, trapping, cultivating and harvesting practices.

Some Métis people in Ontario mark the harvest with a festival that provides a special opportunity for the community to connect, take part in traditional Métis cultural activities and pass on traditional skills and oral traditions integral to Métis culture, identity, religion and spirituality.

For some First Nations, ceremonies and traditions marking big life moments may be integrated into seasonal hunting activities. For example, the seasonal goose hunt<sup>539</sup> may sometimes begin with a “walking out” ceremony welcoming children into Cree society. A “walk out” ceremony may also occur in the winter when the child is old enough to walk out for the first time on snowshoes.<sup>540</sup>

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Persons who are knowledge keepers or Elders in the community may also require time off to lead or support ceremonies for other community members.

People may sometimes require time off for grieving. There is a *Code* duty to accommodate such practices, when based on Indigenous spiritual beliefs or customs.<sup>541</sup> Depending on the spiritual custom or tradition followed, a person’s bereavement-related accommodation needs may sometimes conflict with an organization’s policies or collective agreement provisions. For example, the grieving period may extend beyond the time allocated for grieving in an organization’s policy or collective agreement. People may also need time off to observe or lead grieving practices for persons who are not immediate family members, where this is called for by cultural-spiritual custom or tradition.

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The OHRC heard that Inuit people may have namesakes. The person someone is named after may be considered “spiritual family” and may be of even greater significance for a person than their physical family members (by blood or marriage).<sup>542</sup> Attending the funeral and taking part in grieving practices for a namesake may be just as important as for an immediate family member.

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Organizational policy and collective agreement terms should not be used as a basis to deny people accommodation to observe a bereavement practice connected to an Indigenous spiritual belief or custom.<sup>543</sup>

See section 10.1 for more information on accommodating creed-based observances requiring time off.

### 11.3 Access to and use of sacred sites and objects

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“Our relationship to the land defines who we are; we are the caretakers of Mother Earth. What is sacred then is more than a single burial location. The location of medicines, ceremonies, stories, burial sites, traditional harvesting and hunting grounds, villages and trading areas are all locations that are ‘sacred. The locations of these sites are living; they are not ‘artefacts’ relegated to antiquity. As well, instruments created to celebrate stories and ceremonies, protect medicines and honour our ancestors are sacred...[T]he definition of what is ‘sacred’ is determined by the First Nation community itself and [is] reflective of the community’s values of what is sacred.”  
– Chiefs of Ontario<sup>544</sup>

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Organizations may have a duty to accommodate Indigenous peoples’ spiritual practices, including where organizational policies, rules or practices adversely affect, prevent or limit access to or use of sacred sites or objects connected to the practice of Indigenous Spirituality in a *Code* social area.

#### **Sacred sites**

Since Indigenous peoples have lived in Ontario for over 11,000 years,<sup>545</sup> and reserve lands make up less than 1% of Ontario land,<sup>546</sup> many Indigenous sacred sites are located outside reserve boundaries.<sup>547</sup>

Access to, use and preservation of ancestral burial grounds, sacred ceremonial sites and other sacred sites are integral to Indigenous Spirituality. The courts have recognized the territorial aspect to the exercise of religious rights and customs of Indigenous peoples.<sup>548</sup>

Ancestral burial grounds are among the more well-known types of sites that Indigenous peoples consider sacred.<sup>549</sup>

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“In Anishnaabeg<sup>550</sup> culture, there is an ongoing relationship between the Dead and the Living; between Ancestors and Descendants. It is the obligation of the Living to ensure that their relatives are buried in the proper manner and in the proper place and to protect them from disturbance or desecration. Failure to perform this duty harms not only the Dead but also the Living. The Dead need to be sheltered and fed, to be visited and feasted. These traditions continue to exhibit powerful continuity.”  
– Darlene Johnson<sup>551</sup>

“The Anishnaabeg belief is that the souls of their departed ancestors are attached to their bones. As such, Anishnaabeg treat the bones of their ancestors with great reverence, and abhor the disturbance of graves. This has been their way since time immemorial, and will be their way ever-more.”  
– Estate of Dudley George and George Family Group<sup>552</sup>

“It is important to understand how First Nation peoples view burial grounds. To us, our ancestors are alive and they come and sit with us when we drum and sing. We did not bury them in coffins, so they became inseparable from the soil. They are literally and spiritually, part of the earth that is so a part of us. That is one reason why we have such a strong feeling for the land of our traditional territories – our ancestors are everywhere. It is a sacrilege to disturb even the soil of a burial ground. It is an outrage to disturb, in any way, actual remains.”  
– The Chippewas of Nawash Unceded First Nation<sup>553</sup>

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Government and regulatory bodies involved in development and planning activities (including policy or law-making) that may have a negative impact on Indigenous peoples' ability to practice Indigenous Spirituality should consider, prevent and mitigate such impacts. Indigenous peoples should be consulted and involved in decision-making processes to further prevent and mitigate negative impacts and facilitate inclusive design.

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In 1996, the Royal Commission on Aboriginal Peoples (RCAP) recommended that governments return sacred lands to Aboriginal ownership. RCAP also recommended an inventory of historical and sacred sites, legislation to ensure that Aboriginal peoples can prevent or arrest damage to these sites, and a review of legislation affecting the conservation and display of cultural artifacts to ensure that Aboriginal peoples are involved.<sup>554</sup>

The (2007) *Ipperwash Inquiry Report* in Ontario further recommended:

The provincial government should work with First Nations and Aboriginal organizations to develop policies that acknowledge the uniqueness of Aboriginal burial and heritage sites, ensure that First Nations are aware of decisions affecting Aboriginal burial and heritage sites, and promote First Nations participation in decision-making. These rules and policies should

eventually be incorporated into provincial legislation, regulations, and other government policies as appropriate

... Clearer rules and expectations regarding how to address Aboriginal burial and heritage sites will benefit all Ontarians, not First Nations only.

... This would promote respect and understanding of these issues throughout the provincial government. It would also promote consistency and conformity in their application.<sup>555</sup>

The (2015) Final Report of the Truth and Reconciliation Commission of Canada:

[C]alls upon the federal government to work with provincial, territorial, and municipal governments, churches, Aboriginal communities, former residential school students, and current landowners to develop and implement strategies and procedures for the ongoing identification, documentation, maintenance, commemoration, and protection of residential school cemeteries or other sites at which residential school children were buried. This is to include the provision of appropriate memorial ceremonies and commemorative markers to honour the deceased children.<sup>556</sup>

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The desecration or destruction of sacred sites or objects, and/or failure to engage or consider the impact on affected Indigenous communities, may violate several provincial,<sup>557</sup> national and international laws.

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The OHRC has made recommendations to better address the human rights and Aboriginal rights implications of provincial land use planning.<sup>558</sup> Ontario's (2014) Provincial Policy Statement (PPS) under the *Planning Act*<sup>559</sup> says that planning authorities shall consider the interests of Aboriginal communities in conserving cultural heritage and archaeological resources. The PPS defines cultural heritage to include, among other things, buildings, structures, monuments and geographical areas that may have been modified by human activity. The PPS also says that it shall be implemented in a way that is consistent with and affirms existing Aboriginal and treaty rights in the *Constitution Act* as well as the Ontario *Human Rights Code* and the *Canadian Charter of Rights and Freedoms*. The PPS encourages coordination with Aboriginal communities<sup>560</sup> when dealing with planning matters, including managing natural and cultural heritage and archaeological resources.

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The Crown (including both the federal and provincial government) has a fiduciary duty to consult and accommodate Indigenous peoples when it considers actions or decisions that may affect potential or established Aboriginal or Treaty claim or rights under the *Constitution*.<sup>561</sup>

Freedom of religion under section 2(a) of the *Charter* may also extend rights protections relating to access to, preservation of and use of sacred sites and objects. These religious rights do not require that the Indigenous spiritual belief or practice existed since the time of pre-European contact.<sup>562</sup>

UNDRIP contains important provisions that should guide and inform enforcing human rights protections relating to Indigenous peoples' right to access, use and preserve sacred sites and objects.<sup>563</sup>

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***United Nations Declaration on the Rights of Indigenous Peoples, Article 12:***

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the *right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.*

2. *States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with Indigenous peoples concerned (emphasis added).*

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The Inter-American Court of Human Rights (IACHR) – which enforces the American Convention on Human Rights which Canada has not yet ratified – has made several important decisions giving concrete effect to such provisions.

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In *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,<sup>564</sup> the IACHR described the importance of the land to Indigenous peoples and why such rights must be protected in what has been described as a “landmark decision”<sup>565</sup>:

Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but [have] a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.<sup>566</sup>

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### **Sacred objects**

As part of the duty to accommodate, organizations may also be obliged to facilitate and not prevent access to sacred objects and items required to observe an Indigenous spiritual practice in a *Code* social area.

“At school, students that want to smudge are told to step outside – a fact that defines them as “other.” Once my son was wearing a medicine pouch and was asked by his teacher what was in it. When he said that it contained tobacco, he was told to remove it as tobacco is not allowed in school.”

– OHRC focus group participant<sup>567</sup>

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**Example:** Recognizing the close relationship between traditional Anishnaabe food consumption and health, culture, spirituality and identity, the Sioux Lookout Meno Ya Win Health Centre (SLMHC) offers all patients traditional foods (miichim) once a week in accordance with nutritional guidelines. The hospital, which serves many northwestern Ontario Indigenous peoples, also offers a selection of premade frozen miichim meals to patients who are interested in staying with their traditional diets on a daily basis. SLMHC negotiated with relevant authorities to get exemptions from legislation and regulations that would otherwise have prevented the hospital from receiving, storing and serving uninspected food and game (including moose, caribou, beaver, small game, whitefish, geese, ducks, local blueberries and wild rice, etc.) donated by local hunters, gatherers and outfitters.<sup>568</sup> The exemption enables the hospital to create a healing, comfortable and familiar environment for patients by serving traditional foods. It also enables the hospital to accommodate patients’ Indigenous cultural and spiritual practices, including those which require access to and use of miichim for ceremonial practices (such as for sacred “offering”<sup>569</sup> or feasting purposes).

Appropriate forms of accommodation should not create undue delays or pose unnecessary barriers to access such items, nor risk the integrity of such objects, in violation of Indigenous Spiritual norms, customs, laws and standards.

**Example:** Prison authorities subject Elders who provide spiritual support to Indigenous inmates to lengthy search and screening processes upon entry, inappropriately handling sacred ceremonial objects and medicines in the process. Their handling of such objects effectively renders them unusable for the intended purposes, due to Indigenous customary laws governing this.

**Example:** A court room has a ventilated smudge room that also contains sacred items such as the Eagle feather. When persons involved in court proceedings request to hold a feather during the proceeding, they are told the smudge room is locked and are effectively denied from doing so.

In exceptional cases, there may be a *bona fide* requirement to search, handle or limit access to items (as set out in section 9.5.2 of this policy).

Organizations should take proactive measures to prevent and mitigate negative impacts on people's Indigenous spiritual practices, including by developing policies and procedures to ensure that accommodations are appropriately provided and sacred items are not inappropriately handled or denied access to.

**Example:** The Toronto Zoo developed a protocol, guideline and education for employees on how to gather, keep and distribute Eagle feathers. Many Indigenous people consider Eagle feathers to be sacred, and they are often part of an Elder's bundle. It is offensive for an Eagle feather to be handled by someone other than the persons prescribed by customary law.

## 12. Preventing and responding to discrimination

The ultimate responsibility for maintaining an environment free from discrimination and harassment rests with employers, housing providers, service providers and other responsible parties covered by the *Code*. It is not acceptable to choose to ignore discrimination or harassment based on creed, whether or not a human rights claim has been made.

Organizations and institutions operating in Ontario have a legal duty to take steps to prevent and respond to breaches of the *Code*. Employers, housing providers, service providers and other responsible parties must make sure they maintain accessible, inclusive, discrimination and harassment-free environments that respect human rights. All of society benefits when people of diverse creed backgrounds are encouraged and empowered to take part at all levels.

**Example:** A school board develops detailed guidelines supported by policy, procedure, communications and designated staff to manage and inclusively design for religious accommodations in schools. At the start of the school year, students, families and employees are invited to inform the school of any beliefs or practices requiring accommodation through the proactive use and distribution of Religious Accommodations Invitation Forms, and through inquiries during parent-teacher interviews.<sup>570</sup>

Employers, housing providers, service providers and other responsible parties violate the *Code* where they directly or indirectly, intentionally or unintentionally infringe the *Code*, or where they do not directly infringe the *Code* but authorize, condone or adopt behaviour that is contrary to the *Code*.

Under section 46.3 of the *Code*, a corporation, trade union or occupational association, unincorporated association or employers' organization will be held responsible for discrimination, including acts or omissions, committed by employees or agents in their employment. This is known as vicarious liability. Simply put, it is the OHRC's position that an organization is responsible for discrimination that occurs through the acts of its employees or agents done in the normal course, whether or not it had any knowledge of, participation in, or control over these actions.

**Example:** Staff in a co-op housing complex refuse to investigate a tenant's allegation that another tenant is discriminating against her based on her creed and ethnic origin. The board providing the housing would be responsible and potentially liable for condoning discrimination and not responding to this allegation.

Vicarious liability does not apply to breaches of the sections of the *Code* dealing with harassment. However, because the existence of a poisoned environment is a form of discrimination, when harassment amounts to or results in a poisoned environment, vicarious liability is restored. Further, in these cases the "organic theory of corporate liability" may apply. That is, an organization may be liable for acts of harassment carried out by its employees if it can be proven that management was aware of the harassment, or the harasser is shown to be part of the management or "directing mind" of the organization.<sup>571</sup>

The decisions, acts, or omissions of the employee will engage the liability of the organization in harassment cases where:

- The employee who is part of the "directing mind" engages in harassment or inappropriate behaviour that is contrary to the *Code*, or
- The employee who is part of the "directing mind" does not respond adequately to harassment or inappropriate behaviour he or she is aware of, or ought reasonably to be aware of.

Generally speaking, managers and central decision-makers are part of an organization's "directing mind." In employment, employees with only supervisory authority may also be part of the "directing mind" if they function, or are seen to function, as representatives of the organization. Even non-supervisors may be considered to be part of the "directing mind" if they have *de facto* supervisory authority or have significant responsibility for guiding others. An example might be a member of the bargaining unit who is a lead hand.

There is also a clear human rights duty to not condone or further a discriminatory act that has already happened. To do so would extend or continue the life of the initial discriminatory act. This duty extends to people who, while not the main actors, are drawn into a discriminatory situation through contractual relations or in other ways.<sup>572</sup>

Depending on the circumstances, employers, housing providers, service providers and other responsible parties may be held liable for failing to respond to the actions of third parties (such as service users or customers, contractors, etc.) who engage in discriminatory or harassing behaviour.<sup>573</sup>

Multiple organizations may be held jointly liable where they all contribute to discrimination. For example, a union may be held jointly liable with an employer where it has contributed towards discriminatory workplace policies or actions – for example, by negotiating discriminatory terms in a collective agreement, or blocking an appropriate accommodation, or failing to address a harassing or poisoned workplace environment.



Human rights decision-makers often find organizations liable, and assess damages, based on the organization's failure to respond appropriately to address discrimination and harassment.

**Example:** An employee experienced a humiliating RCMP investigation after a co-worker reported him as someone she suspected as having been involved in the 9/11 attacks. A tribunal found that the co-worker had acted based on stereotypes about the applicant's Muslim religion. The tribunal also found that while the employer was not responsible for the report to the RCMP, which was made outside the workplace, it was responsible for discriminatory racial profiling in the workplace as it allowed the suspicions about the employee to continue in the workplace and failed to take any actions to address the impact on him. Instead, the employer left the man to fend for himself in a poisoned work environment.<sup>574</sup>

An organization may respond to complaints about individual instances of discrimination or harassment, but it may still be found to have not responded appropriately if the underlying problem is not resolved. There may be a poisoned environment, or an organizational culture that condones discrimination, despite dealing with the behaviour of the individual perpetrators. In these cases, organizations must take further steps, such as training and education, to better address the problem.

Some things to consider when deciding whether an organization has met its duty to respond to a human rights claim include:

- Procedures in place at the time to deal with discrimination and harassment
- How promptly the organization responded to the complaint
- How seriously the complaint was treated
- Resources made available to deal with the complaint
- Whether the organization provided a healthy environment for the person who complained
- Whether the action addressed the issue appropriately
- How well the action taken was communicated to the person who complained.<sup>575</sup>

Organizations should develop strategies to prevent discrimination based on all *Code* grounds, but should give specific consideration to human rights based on creed.

A complete strategy to prevent and address human rights issues should include:

- A barrier prevention, review and removal plan<sup>576</sup>
- Anti-harassment and anti-discrimination policies
- An education and training program<sup>577</sup>
- An internal complaints procedure<sup>578</sup>
- An accommodation policy and procedure.<sup>579</sup>

In its publication entitled *A policy primer: guide to developing human rights policies and procedures*,<sup>580</sup> the OHRC provides more information to help organizations meet their human rights obligations and make sure their environments are free from discrimination and harassment.

## 12.1 Cultural competency

As part of the duty to keep environments free from discrimination and harassment, employers, service providers (e.g. health care professionals, police services, legal services) and housing providers should look at whether their staff have the necessary cultural competency (including religious) skills to take into account the needs of people from diverse creed backgrounds, with a range of unique identities.

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Cultural competence has been defined as “a set of congruent behaviors, attitudes and policies that come together in a system or agency or among professionals that enables that system, agency or professionals to work effectively in cross-cultural situations.”<sup>581</sup>

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It is especially important for organizations that provide services to the public to have staff members with cultural (including religious) competency skills. The ability to interact comfortably with people from diverse cultural and religious backgrounds and identities is key to recognizing and meeting the human rights-related needs of different groups and communities, including people belonging to diverse creed communities.

**Example:** A hospital provides cultural and religious competency training for its staff members and makes sure they have a diverse roster of counsellors and chaplains on hand to support end-of-life care for persons of diverse creed faiths.

When interacting with people, organizations should use an individualized approach that recognizes the unique identity of each person, without relying on preconceived notions, assumptions or stereotypes.

## 12.2 Recruitment and hiring procedures

Trying to get information about a person’s creed directly or indirectly during the recruitment or hiring process is not acceptable, unless this relates to a *bona fide* requirement or otherwise meets the requirements for an exemption under the *Code* (as discussed below).

**Example:** An employer that asked a job applicant questions about religion during his interview to determine whether he had the same “values” and would “fit” into the company culture was found have contravened section 23(2) of the *Code*,

which prohibits oral inquiries of a job applicant that directly or indirectly classify or indicate qualifications based on a prohibited ground, including the applicant's religious or creed beliefs.<sup>582</sup>

In general, invitations to apply for employment, application forms and selection processes cannot contain:

- Questions about availability for work that are asked in a way that reveals the applicant's creed
- Questions designed to reveal that religious requirements may conflict with the prospective employer's work schedules or workplace routines
- Inquiries as to religious affiliation, places of worship that are attended, or customs observed.

**Example:** A person who applied for a client care centre business clerk position alleged that she was screened out in a telephone interview when the interviewer learned that she could not work on Saturdays for religious reasons. She alleged that the interview was abruptly ended after she revealed that she was a Seventh Day Adventist and Saturday was her Sabbath. The HTRC concluded that the woman's inability to work on Saturdays was a factor in her being denied a follow-up in-person interview as the employer failed to provide enough evidence of a non-discriminatory reason for screening her out at the telephone stage.<sup>583</sup>

Only once a person has been offered employment do they have an obligation to notify the employer of any religious requirements that are relevant to their duties, and to request accommodation, as the need arises.

**Example:** A job applicant passed the initial screening phase of a job competition. While he was being trained, he requested time off for Friday prayer and offered to write a test that was scheduled for Friday afternoon later that evening. The employer refused him the time off and asked whether he would need time off for Friday prayers if the company hired him. After he confirmed that he would, the employer advised that it "couldn't go forward with his application." In finding discrimination, the HTRC confirmed that the employer had a procedural duty to take adequate steps to assess and explore accommodation options, which it had failed to do. The HTRC also rejected the employer's argument that the job candidate was required to disclose his need for accommodation earlier in the recruitment process and, by not doing so, had been deceitful.<sup>584</sup>

In exceptional circumstances, a job applicant may need to tell the employer their creed-based work limitations during the hiring process, where their creed observances will clearly and unambiguously prevent them from fulfilling the essential requirements of the job (e.g. fulfilling the terms of a part-time job that requires, as an essential advertised requirement, the ability to work exclusively on a day that conflicts with the applicant's Sabbath).

Nothing prevents an employer from asking questions about creed during the recruitment or hiring phase, if the questions are otherwise permitted by the *Code* (for instance, due to an exemption). Exemptions may apply for organizations that are pursuing a special program hiring under section 14 of the *Code*, or that qualify as a special interest organization or special employer under sections 18 and 24.<sup>585</sup> People should be informed where there are *bona fide* (legitimate) creed-based qualifications, restrictions or preferences for an employment position, provided such restrictions or preferences are in accordance with the terms of a *Code*-based statutory defence.

**Example:** A job advertisement for a Sunday school teacher for children at a Mennonite church clearly explains to potential applicants that they are looking specifically for persons of the Mennonite faith to teach the program, in accordance with section 24 of the Ontario *Human Rights Code*.

For organizations that may legitimately impose creed-based qualifications or restrictions, application and interview questions should not extend beyond what is reasonably necessary to assess the job applicant's ability to meet *bona fide* creed-based job qualifications or requirements.

**Example:** A denominational school requests information to confirm the religious affiliation of persons applying for teaching positions, since the job involves communicating religious values to students. While this is permissible under the *Code*, this does not grant open license to inquire into every detail about a job applicant's personal religious and moral life during the recruitment and hiring process. Questions relating to creed should focus only on those aspects that are relevant to assessing their ability to fulfill *bona fide* creed-based qualifications.

## Appendix A: Purpose of OHRC policies

Section 30 of the *Code* authorizes the OHRC to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*. The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to comply with the *Code*. They are important because they represent the OHRC's interpretation of the *Code* at the time of publication.<sup>586</sup> Also, they advance a progressive understanding of the rights set out in the *Code*.

Section 45.5 of the *Code* states that the Human Rights Tribunal of Ontario (HRTO) may consider policies approved by the OHRC in a human rights proceeding before the HRTO. Where a party or an intervenor in a proceeding requests it, the HRTO *shall* consider an OHRC policy. Where an OHRC policy is relevant to the subject matter of a human rights application, parties and intervenors are encouraged to bring the policy to the HRTO's attention for consideration.

Section 45.6 of the *Code* states that if a final decision or order of the HRTO is not consistent with an OHRC policy, in a case where the OHRC was either a party or an intervenor, the OHRC may apply to the HRTO to have the HRTO 'state a case' to the Divisional Court to address the inconsistency.

OHRC policies are subject to decisions of the Superior Courts interpreting the *Code*. OHRC policies have been given great deference by the courts and the HRTO,<sup>587</sup> applied to the facts of the case before the court or the HRTO, and quoted in the decisions of these bodies.<sup>588</sup>

## Endnotes

<sup>1</sup> The numbers of Ontarians practicing religions and creeds other than the historically dominant Protestant and Catholic denominations and/or identifying with no religion or creed at all have significantly expanded. A 2013 Pew Forum study of religious demographic trends in Canada found that Ontario has experienced the greatest increase in persons affiliated with minority religions among provinces in Canada. The share of Ontario residents identifying with faiths other than Protestant or Catholic has risen from about 5% in 1981 to 15% in 2011. Pew Research Center's Forum on Religion & Public Life. (2013). "Canada's Changing Religious Landscape: Overview". Retrieved July 15, 2013 from [www.pewforum.org/Geography/Canadas-Changing-Religious-Landscape.aspx](http://www.pewforum.org/Geography/Canadas-Changing-Religious-Landscape.aspx).

As well, more people of all faiths are understanding and practicing their faith in individual ways. These social and demographic trends are projected to accelerate in the future. For more on such social and demographic trends in Ontario and Canada, see the OHRC's *Human rights and creed research and consultation report*.

<sup>2</sup> In January 2012, the OHRC hosted a *Policy Dialogue on human rights, creed and freedom of religion* at the University of Toronto's Multi-Faith Centre, in partnership with the University of Toronto's Religion in the Public Sphere Initiative and Law School. Papers from the event, which brought together community partners, academics, legal professionals and human rights and diversity practitioners, were published in a special issue of *Canadian Diversity*. Several essays on human rights and creed were also presented at another major consultation event ("Legal Workshop") in March 2012, at York University's Osgoode Hall Law School, hosted in partnership with York University's Osgoode Hall Law School, Centre for Public Policy and Law and the Centre for Human Rights. These are also available on the OHRC website. The OHRC conducted several focus groups and interviews, as well as an online survey of the general public in 2013 and 2014. A summary of the *survey results* is available on the OHRC's website. A *Creed Case Law Review*, conducted in 2012, is also available on the OHRC website.

<sup>3</sup> The OHRC's *Human rights and creed research and consultation report* is available on the OHRC's website.

<sup>4</sup> See for example Grim, B. J. & Finke, R. (2011). *The Price of Freedom Denied*. New York: Cambridge University Press.

<sup>5</sup> Canada's highest Court has repeatedly affirmed the key place of religious freedom and equality rights based on creed at the centre of Canada's liberal democratic legal tradition. For instance, the Supreme Court of Canada has stated:

"A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct...If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free." (*R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at paras. 94-95, [*Big M*]; See also *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, [*Amselem*]; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 759) [*Edwards Books*].

<sup>6</sup> *Amselem*, *ibid.* at para. 1.

<sup>7</sup> *Dufour v. J. Roger Deschamps Comptable Agréé* (1989), 10 C.H.R.R. D/6153 (Ont. Bd. of Inquiry) [*Dufour*] at 617.

<sup>8</sup> For instance, the Supreme Court of Canada stated in *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at paras. 47-48, [*Loyola*]:

Religious freedom must therefore be understood in the context of a secular, multicultural and democratic society with a strong interest in protecting dignity and diversity, promoting equality, and ensuring the vitality of a common belief in human rights....A pluralist, multicultural democracy depends on the capacity of its citizens "to engage in thoughtful and inclusive forms of deliberation amidst, and enriched by," different religious worldviews and practices: Benjamin L. Berger, "Religious Diversity, Education, and the 'Crisis' in State Neutrality" (2014), 29 *C.J.L.S.* 103, at p. 115.

At para. 45, the Supreme Court also quoted from a European Court of Human Rights decision in *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A No. 260-A:

"Freedom of thought, conscience and religion...is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a

precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it" [p. 17].

<sup>9</sup> "[A] multicultural multireligious society can only work...if people of all groups understand and tolerate each other": *Loyola, ibid* at para. 47, quoting *Adler v. Ontario*, [1996] 3 S.C.R. 609 at para. 212, McLachlin J. (as she then was), dissenting in part.

<sup>10</sup> In the first major Supreme Court decision on freedom of religion under the *Charter*, *R. v. Big M Drug Mart Ltd.*, the Court set out both the essence of the right to freedom of religion and its limits "as are necessary to protect public safety, order, health, or morals or the fundamental right and freedoms of others". The Court then further qualified the appropriate scope of such limits under the *Charter*, in effect safeguarding constitutional rights from limits on the basis of "majority values":

What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of "the tyranny of the majority" (*Big M, supra* note 5 at 337).

For more on the nature of limits on rights in light of core constitutional values and state interests, see *Loyola, supra* note 8 at paras. 45-47.

<sup>11</sup> This diversity preceded large-scale immigration to Canada, and was characterized by the diverse spiritual traditions of the varying Indigenous communities living in Ontario for millennia before European settlement. The main forms of religious diversity among early European settlers overwhelmingly involved variations of Christianity. Jewish people have been present in Ontario since the 1700s. Statistical data on religion since the late 1800s also reveals that Sikhs, Muslims, Buddhists and Hindus, even if not always counted, have also all been present in Canadian society at least since the first census. See Beaman, L. and Beyer, P. (Eds.). (2008). *Religion and Diversity in Canada*. Boston: Brill Academic Publishers. See also Bromberg, A. (2012). On religious accommodation and discrimination in the experience of Jewish communities in Ontario. *Canadian Diversity*, 9(3), 61-63.

<sup>12</sup> In its decision in *Samur v. City of Quebec and Attorney General*, for instance, the Supreme Court traced the first expression of religious freedom in Canadian law to the 1763 Treaty of Paris, which, while bringing New France under the control of the British Crown (and by default the Anglican Church of England), simultaneously "grant[ed] the liberty of the Catholick [sic] religion to the inhabitants of Canada": [1953] 2 S.C.R. 299 at 357. See Bhabha, F. (2012). From whence to where and what not to wear: Refining the conception of religious freedom. Paper presented at the Ontario Human Rights Commission/ York University Legal Workshop on Human rights, creed and freedom of religion. Osgoode Hall, York University. March 29-30, 2012.

<sup>13</sup> See *Human rights and creed research and consultation report* for more on the history of how religious diversity has been managed and governed through Canadian law and government policy.

<sup>14</sup> "That is, mainstream Protestant, or, to a lesser degree, Roman Catholic". Seljak, D. (2012). Protecting religious freedom in a multicultural Canada. *Canadian Diversity*, 9(3), p.9. Religious studies scholar Peter Beyer (2008, p.14) further describes the cultural-religious norm for much of Canada's history: "There were the white, European, Christian and civilized peoples, some of who were admittedly 'more equal than others'; then there were the unalterable 'others' who had to be kept apart or, to the extent deemed possible, 'civilized'". Beyer, P. (2008). From far and wide: Canadian religious and cultural diversity in global/local context. In Beaman, L. & Beyer, P. (Eds.). *Religion and Diversity in Canada* (pp. 9-39). Boston: Brill Academic Publishers.

<sup>15</sup> This policy uses "Indigenous" as an inclusive term to encompass all Indigenous peoples and identities, including status, non-status, Indian, Aboriginal, Native, First Nation, Métis and Inuit. It acknowledges a preference of Indigenous peoples to name themselves in keeping with Article 33(1) of the *United Nations Declaration on the Rights of Indigenous Peoples* ("Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions [...]"). The term does not exclude other self-identified terms, nor deny or prevent the recognition of "aboriginal and treaty rights" under the Canadian *Constitution*. Other terms are used in some places throughout this policy (e.g. First Nation, Métis or Inuit) when referring to a more specific sub-grouping of Indigenous peoples. Other terms such as Aboriginal or Indian may also be used where quoted in a citation from another source.

<sup>16</sup> Summarizing the key impact and intent of the *Indian Act* of 1876, Beyer (2008, *supra* note 14), notes:

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By the end of the 19th century, Canadian governments were pursuing a concerted policy whose aim was to assimilate Aboriginal people completely, to dissolve their separate identities both culturally and religiously. The *Indian Act* of 1876 was the corner stone and provided the blueprint for this policy. It effectively made Aboriginal people wards of the state, proscribed their religious practices, suppressed their distinct and highly varied forms of social and political organization, and attempted to socialize their children in residential schools run by Christian churches and designed to eliminate all distinct aboriginal cultural features, including language (p. 14).

<sup>17</sup> Jose R. Martinez Cobo, United Nations Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and later, Special Rapporteur on Discrimination against Indigenous Populations, in his *Study on the Problem of Discrimination against Indigenous Populations*, launched in 1972 and completed in 1986; UN Doc. E/CN.4/Sub.2/1986/7 at para. 379; also available as a United Nations sales publication (U.N. Sales No. E.86.XIV.3). Note, however, that the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) does not define Indigenous to allow for Indigenous peoples to name and describe themselves. This is in part in recognition of the history of Indigenous peoples having suffered from having definitions imposed by others (as noted by the Chairperson-Rapporteur of the Working Group on Indigenous Populations, Ms. Erica-Irene Daes, In UN Doc. E/CN.4/Sub.2/AC.4/1995/3, p. 4; cited on p.6 (fn 40) in International Law Association. (2010). Interim Conference Report, The Hague Conference (2010) – Rights of Indigenous Peoples. Retrieved June 22, 2015 from [www.ila-hq.org/en/committees/index.cfm/cid/1024](http://www.ila-hq.org/en/committees/index.cfm/cid/1024).

Nonetheless, in the 1980s, the United Nations Special Rapporteur on Discrimination against Indigenous Populations, José Martínez Cobo, developed the cited working definition for use with the Working Group of Indigenous Populations. It remains one of the most cited descriptions of the concept of indigenous. Several further key criteria, short of an official definition, have since been “advanced within several different international fora, most recently in the Permanent Forum on Indigenous Issues...[which further identified] the following characteristics:

- *Self-identification*: self-identification as both indigenous and as a people;
- *Historical continuity*: common ancestry and historical continuity with pre-colonial and/or presettler societies;
- *Special relationship with ancestral lands*: having a strong and special link with the territories occupied by their ancestors before colonial domination and surrounding natural resources. Such a link will often form the basis of the cultural distinctiveness of indigenous peoples;
- *Distinctiveness*: having distinct social, economic or political systems; having distinct language, culture, beliefs and customary law;
- *Non-dominance*: forming non-dominant groups within the current society;
- *Perpetuation*: perseverance to maintain and reproduce their ancestral environments, social and legal systems and culture as distinct peoples and communities” (International Law Association, *ibid.*, pp. 7-8 citing UN Permanent Forum on Indigenous Issues, Fact Sheet, 21 October 2007).

For more on the evolution of the definition of Indigenous in international human rights legal contexts and fora, see International Law Association, *ibid.*; see also “The Concept of Indigenous Peoples” background paper prepared by the Secretariat of the Permanent Forum on Indigenous Issues, United Nations, Department of Economic and Social Affairs, Division for Social Policy and Development; PFII/2004/WS.1/3; Last retrieved online June 25, 2015 at [www.un.org/esa/socdev/unpfii/documents/workshop\\_data\\_background.doc](http://www.un.org/esa/socdev/unpfii/documents/workshop_data_background.doc).

<sup>18</sup> Residential schools were conceived by the government of the day as a primary way to assimilate Aboriginal Peoples into Western European culture, by removing First Nations children from their families and communities, and prohibiting the expression of Aboriginal language, culture, identity and spirituality within these schools. These schools operated from 1880 to 1990 in Ontario (with the last school in Canada closing in Saskatchewan in 1996). The Indian Residential School Settlement Agreement identified 139 residential schools for purposes of providing compensation to former students. For more on the history and impact of residential schools in Canada, see the Canadian Truth and Reconciliation Commission’s (2012) publication, *They Came for the Children*. Retrieved October 11, 2013 from the TRC website at [www.trc.ca](http://www.trc.ca).



<sup>19</sup> According to the (1996) *Report of the Royal Commission on Aboriginal Peoples*, Indigenous peoples identified four policies as "among the most unjust policies imposed upon them": the *Indian Act*, Residential Schools, Forced Relocation and Treatment of Veterans...[V]iewed cumulatively," the Report states, "what emerged was an abuse of power that was systemic and excessive." The Report further recognizes that these unjust policies, "while rooted in history, have effects that continue to this day." *Royal Commission Report on Aboriginal Peoples*. (1996). Ottawa: Canada Communication Group – Publishing, October 1996. Retrieved online October 31, 2014 from [www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.aic-inac.gc.ca/ch/rcap/sg/sgmm\\_e.html](http://www.aic-inac.gc.ca/ch/rcap/sg/sgmm_e.html)).

<sup>20</sup> The opening sentence is attributed to: Scott, Duncan (1914), *Indian Affairs, 1867-1912*, Chapter IV The Future of the Indian, p.211. Retrieved online at [www.canadianpoetry.ca/confederation/DScott/address\\_essays\\_reviews/vol1/indian\\_affairs\\_1867\\_1912.html](http://www.canadianpoetry.ca/confederation/DScott/address_essays_reviews/vol1/indian_affairs_1867_1912.html). The remaining statements are attributed to Scott as found in the National Archives of Canada, Record Group 10, vol 6810, file 470-2-3, vol 7, pp. 55 (L-3) and 63 (N-3).

<sup>21</sup> Discrimination and marginalization of Christian minorities sometimes also intersected with other forms of racism and prejudice against "less desirable" classes and "races" of European immigrants. See *Human rights and creed research and consultation report* for more on this history. According to Bhabha, *supra* note 12, Jehovah's Witnesses have played a particularly significant role in advancing religious freedom in Canadian law. For more on Seventh Day Adventists' historical experience in Ontario see also [Bussey, B. W. \(2012\). Humbug! Seventh-day Adventist conscientious objectors in WWII standing before the mobilization board. \*Canadian Diversity\*, 9\(3\), 71-74.](#)

<sup>22</sup> After Indigenous Peoples, Jewish people formed the largest non-Christian religious minority group in Canada, historically. They were also among the most severely discriminated against religious communities, as well as among the earliest non-Christian religious groups to settle in Ontario (as early as the 1700s) (see Bromberg, *supra* note 11). The extensive web of Jim Crow-like restrictions overtly barring Jewish access to, and participation in, various mainstream social, political, economic and cultural institutions in Ontario society well into the 20<sup>th</sup> century is discussed in the OHRC's *Human rights and creed research and consultation report*.

<sup>23</sup> For a detailed discussion see Abella, I. & Troper, H. (1982). *None Is Too Many: Canada and the Jews of Europe, 1933 to 1948*. Toronto: Lester & Orpen Denny's.

<sup>24</sup> Henry, F. & Tator, C. et al. (2009). *The Colour of Democracy: Racism in Canadian Society* (4th Ed.). Toronto: Nelson Thomson.

<sup>25</sup> *Noble et al. v. Alley*, [1951] S.C.R. 64.

<sup>26</sup> For more discussion and examples, see [Buckingham, J. E. \(2012\). The relationship between religions and a secular society. \*Canadian Diversity\*, 9\(3\), 12-15.](#)

<sup>27</sup> See for example Angus McLaren and Arlene Tigar McLaren. (1997). *The Bedroom and the State* (2nd edition). Oxford University Press. See also Stuart, A. (2010). Freedom of Religion and Gender Equality: Inclusive or Exclusive. *Human Rights Law Review* 10:3, pp. 429-459.

<sup>28</sup> For example, see also Human Rights Committee, General Comment No. 28: Equality of rights between men and women (Article 3), 29 March 2000, CCPR/C/21/Rev.1/Add.10; 8 IHRR 303 (2001) at para. 5; and Council of Europe (CE), Parliamentary Assembly Res. 1464 (2005) on Women and Religion in Europe, 15 September 2005, Doc. 10670 at para. 2 and 7.1; cited in Stuart (*ibid.*, 2010).

<sup>29</sup> Patrick Kelly and Samuel Moore, the first two men in Canada historically recorded as having been criminally convicted of sodomy for what the court records clearly describe as consensual sexual activity, arrived at Kingston Penitentiary in 1842. Both men were sentenced to death, although their sentences were later commuted; Moore was released from prison in 1849 and Kelly in 1853. ("Life in the Provincial Penitentiary at Kingston 1841-1867". *The Drummer's Revenge*, August 26, 2007. Retrieved online March 13, 2015 at <https://thedrummersrevenge.wordpress.com/2007/08/26/life-in-the-provincial-penitentiary-at-kingston-1841-1867/>). The last person ever to be imprisoned for "homosexual acts" was in 1965. In 1968, Justice Minister Pierre Trudeau introduced an omnibus bill reforming the *Criminal Code of Canada*, which sought to liberalize Canadian law around social issues such as homosexuality, abortion and divorce. Trudeau's characterization was captured in the statement that there was "no place for the state in the bedrooms of the nation." In 1969, Canada decriminalized "homosexual acts" between consenting adults with the passage of the *Criminal Law Amendment Act, 1968-69*.

<sup>30</sup> In his paper “Bugger Off: Exploring legal, ethical, and religious aspects of sodomy,” Dr. Don Cochrane, Emeritus Professor of Education at the University of Saskatchewan argues that “[a]ttitudes about sodomy have been deeply influenced by Christian thought and institutions.” He explains:

Connections between sodomy and religion are easily illustrated. For example, even the basic English legal terms used to denote gay sexual experience are derived from the history of Christian religion.

“Bugger” – a term much favoured in England – is derived from Medieval Latin “*bulgarus*” meaning heretic and was arrived at in Western Europe by associating the Balkans with what were deemed heretical sects such as the Bogomils and their alleged sexual practices. If the theological lineage of “bugger” is somewhat deviant, the etymology of “sodomy” is, by contrast, theologically mainstream. In Genesis 19, the city of Sodom was reportedly destroyed by fire sent from heaven because of the unnatural carnal wickedness of its inhabitants. How to interpret this destructive act by a vengeful God has been the subject of much vigorous debate, but we can be confident in thinking that Biblical and church history have deeply influenced the very language in which many think and talk negatively about homosexuality” (Retrieved March 30, 2015 at [www.usask.ca/education/profiles/cochrane/cochrane.pdf](http://www.usask.ca/education/profiles/cochrane/cochrane.pdf). An earlier draft of this paper was presented at the 29th annual conference of the Association of Moral Education held in Krakow, Poland, July 16-20, 2003).

<sup>31</sup> Note that “faith” as used here may refer to commitment to any system of belief, not just “religious faith.”

<sup>32</sup> In this context, prejudice may be described as deeply held negative attitudes about people based on their creed.

<sup>33</sup> *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61 at para. 326, [“*Quebec v. A*”].

<sup>34</sup> *Peel Law Association v. Pieters*, 2013 ONCA 396 at paras. 111-114, [Pieters].

<sup>35</sup> For example, see findings from a January/February 2014 national survey by the Canadian Race Relations Foundation and the Canadian Institute for Identities and Migration, which revealed that, “in descending from oldest to youngest, there is an increasingly negative view of all religious groups in Canada, the most negative view held by younger Canadians”. Younger Canadians Hold More Negative Views About Religious Groups. (2014, May 28). *Canada Newswire*. Negative attitudes were highest among all generations towards Muslims (44%), followed by “Religious” people in general (31%), Aboriginals (26%) and Immigrants (24%). For more information see also: Information Handout on Religion, Racism, Intergroup Relations and Integration Results. Retrieved from Canadian Race Relations Foundation website at [www.crrf-fcrr.ca/en/news-a-events/item/24974-information-handout-on-religion-racism-intergroup-relations-and-integration-results-from-january-2014-survey](http://www.crrf-fcrr.ca/en/news-a-events/item/24974-information-handout-on-religion-racism-intergroup-relations-and-integration-results-from-january-2014-survey).

<sup>36</sup> For more on such stereotypes see Bradamat, P. (2007). Religion in Canada in 2017: Are we prepared? *Canadian Issues*, 199-122. See also Seljak, D., Rennick, J., Schmidt, A., Da Silva, K. & Bradamat, P. (2007). Religion and Multiculturalism in Canada: The Challenge of Religious Intolerance and Discrimination. Multiculturalism and Human Rights research reports #2 (Unpublished). Commissioned by the Department of Canadian Heritage.

<sup>37</sup> *Gilbert v. 2093132 Ontario*, 2011 HRTO 672. However, the HRTO also found that the pub’s decision to cancel the event was made out of legitimate, non-discriminatory business concerns.

<sup>38</sup> See *Human rights and creed research and consultation report* for more discussion of systemic faithism.

<sup>39</sup> See *Human rights and creed research and consultation report* for more discussion and examples of what Seljak calls the “Christian Canada” era and of Ontario’s historical privileging of Christianity in public and institutional life, in keeping with the religious sensibilities of the overwhelming majority of the population in Ontario historically. Among the most obvious ongoing examples of this in public life today is the public funding of only Catholic schools in Ontario. Scholars have highlighted many other current institutional and symbolic forms of what Seljak (2012) refers to as “residual Christianity” in the present. See also Seljak, D. (2012). Protecting religious freedom in a multicultural Canada. *Canadian Diversity*, 9(3), 8-11. Retrieved from [www.ohrc.on.ca/en/creed-freedom-religion-and-human-rights-special-issue-diversity-magazine-volume-93-summer-2012/protecting-religious-freedom-multicultural-canada](http://www.ohrc.on.ca/en/creed-freedom-religion-and-human-rights-special-issue-diversity-magazine-volume-93-summer-2012/protecting-religious-freedom-multicultural-canada).

<sup>40</sup> See section 9.11.6 for more on Canadian legal discussion of the meaning of “secular” and the Supreme Court’s embrace of an “open secular” model. Also, see the OHRC’s *Human rights and creed research and consultation report*.

<sup>41</sup> *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at paras. 87-88, [Saguenay]. See also section 10.3 on the display of creed-based symbols.

<sup>42</sup> In many contemporary controversies around religion in the public sphere – for instance, those involving Muslims, Jews, Sikhs, Hindus, Buddhists and non-mainstream Christian minorities – such norms have been, or are perceived to be, violated or threatened. Survey and opinion poll research also show that a double standard is sometimes at play where religion in public is tolerable if it is consistent with Canada’s mainline Christian past, but is unacceptable when laid claim to by religious minorities. See *Human rights and creed research and consultation report* for more discussion of how cultural norms and assumptions about religion find expression in law. See also Beaman, L. (2003). The Myth of Pluralism, Diversity, and Vigor: The Constitutional Privilege of Protestantism in the United States and Canada. *Journal for the Scientific Study of Religion*, 42, 311-325; Seljak 2012, *supra* note 14; Seljak et al. 2007, *supra* note 36; Sullivan, W. (2007). *The Impossibility of Religious Freedom* (1<sup>st</sup> ed). Princeton, New Jersey: Princeton University Press; Berger, B. (2012). Inducing Fundamentalisms: Law as a Cultural Force in the Domain of Religion. *Canadian Diversity*, 9(3), 25-29.  
[www.ohrc.on.ca/sites/default/files/Diversity%20Magazine\\_Creed\\_freedom%20of%20religion-human%20rights\\_accessible.pdf](http://www.ohrc.on.ca/sites/default/files/Diversity%20Magazine_Creed_freedom%20of%20religion-human%20rights_accessible.pdf).

<sup>43</sup> Many different definitions of racism exist. While they may differ in complexity and emphasis, all definitions include ideology that either explicitly or implicitly asserts that one racialized group is inherently superior to others. Racism differs from simple prejudice in that it has also been tied to the social, political, economic and institutional power that the dominant group in society holds. See the OHRC’s *Policy and guidelines on racism and racial discrimination* for a general discussion of the key elements for understanding racism.

<sup>44</sup> *The Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* defined racialization “as the process by which societies construct races as real, different and unequal in ways that matter to economic, political and social life” (1995. Toronto: Queen’s Printer for Ontario, at pp.40-41; Co-Chaired by: D. Cole & M. Gittens). Racialization extends to people in general, and also to specific traits and attributes that are connected in some way to racialized people and are deemed to be “abnormal” and of less worth. People may have prejudices related to various racialized characteristics. In addition to physical features, other characteristics can be racialized, including: beliefs and practices; accent or manner of speech; name; clothing and grooming; diet; leisure preferences; places of origin; citizenship.

<sup>45</sup> Salyer, L. 2010, p.179. Review of “What blood won’t tell.” *Journal of Legal Education*, 60 (1): 179-82.

<sup>46</sup> For more on what scholars have called the “racialization of religion”, see Meer, N. (2013). Racialization and Religion: Race, Culture and Difference in the Study of Antisemitism and Islamophobia. *Ethnic and Racial Studies*, 36(3):385-98; Modood, T. (2005) *Multicultural Politics: Racism, Ethnicity and Muslims in Britain*. University of Minnesota Press; Bayoumi, M. (2006). Racing Religion. *The New Centennial Review*, 6(2):267-93; Selod, S. and Embrick, D. G. (2013). Racialization and Muslims: Situating the Muslim Experience in Race Scholarship. *Sociology Compass*, 7(8):644-55.

Religion and race may be linked in several ways, both as cause and effect of each other. For example, a Canadian Press news story reported how a Danish psychologist attributed a range of social problems in the Islamic world to intermarriage among first cousins permitted under religious law, which he claimed “may have done catastrophic damage to their gene pool.” (As reported in an Oct 27, 2010 *Hamilton Spectator* news article, “Psychologist critical of Muslim ‘inbreeding’ informed expert’s opinion on Khadr”; Retrieved January 20, 2015 from [www.thespec.com/news-story/2175926-psychologist-critical-of-muslim-inbreeding-informed-expert-s-opinion/](http://www.thespec.com/news-story/2175926-psychologist-critical-of-muslim-inbreeding-informed-expert-s-opinion/)). This linking of religion, social problems and genetics is consistent with traditional “race thinking” in which culture (including religion) and character are connected with biology, i.e. as things borne in the blood.

<sup>47</sup> According to Galonnier (2015, p.5),

the racialization of Islam refers to the process of assigning a racial meaning to the fact of being Muslim, associating it with a number of phenotypical and cultural characteristics that are deemed unchanging and hereditary. This phenomenon is not new. The formal origins of Islam’s racialization can be traced back to 15th and 16th century Spain, where the category of race emerged via a troubled connection to religion (Soyer 2013, Harvey 2005, Frederickson 2002). According to Rana (2011, p. 33-39), this is the time when “Muslim groups began to be defined via racial mixture and notions of blackness.”

Sources: Galonnier, J. (2015). When "White Devils" Join the Deen: White American Converts to Islam and the Experience of Non-Normative Whiteness. *OSC Notes & Documents* n° 2015-01, February; Soyer, F. (2013). Faith, Culture and Fear: Comparing Islamophobia in Early Modern Spain and Twenty-First Century Europe. *Ethnic and Racial Studies*, 36(3):399-416; Harvey, L. P. 2005. *Muslims in Spain 1500-1614*, Chicago: University of Chicago Press; Frederickson, G. M. (2002). *Racism: A Short History*, Princeton: Princeton University Press. Rana, J. (2007). The Story of Islamophobia. *Souls: A Critical Journal of Black Politics, Culture and Society*, 9(2):148-61.

<sup>48</sup> Observing this trend, American Professor of Law Neil Gotanda writes:

After 9/11, hate-crime attacks against Arabs, Muslims, South Asians, and others who 'looked like' Muslim terrorists were widely reported and discussed. In popular commentary and in scholarly journals, there was widespread discussion on how racial violence was aimed at a newly emerging racial category (Saito 2001; Volpp 2002; Ahmad 2004). The San Francisco Chronicle reported that 'a new racial stereotype is emerging in America. Brown-skinned men with beards and women with head scarves are seen as 'Muslims' - regardless of their actual faith or nationality' (Kuruwila 2006). The exact characterizations varied, yet most included Islam or Muslim as a part of the category (2011, p185-186. The Racialization of Islam in American Law. *Annals of the American Academy of Political and Social Science*, Vol. 637, Race, Religion, and Late Democracy. September 2011, pp. 184-195.

Cited sources: Saito, N. T. (2001). Symbolism under siege: Japanese American redress and the "racing" of Arab Americans as "terrorists". *Asian Law Journal* 8:1-26; Volpp, L. (2002). The citizen and the terrorist. *UCLA Law Review* 49: 1575-99; Ahmad, M. I. (2004). A rage shared bylaw: Post-September 11 racial violence as crimes of passion. *California Law review* 92 (5): 1259-95; Kuruwila, M.C. (2006). 9/11: Five years later. Typecasting Muslims as a Race. *San Francisco Chronicle*. September 3. Retrieved April 3, 2015 from [www.sfgate.com/news/article/9-11-Five-years-later-TYPECASTING-MUSLIMS-AS-A-2470155.php](http://www.sfgate.com/news/article/9-11-Five-years-later-TYPECASTING-MUSLIMS-AS-A-2470155.php).

<sup>49</sup> There is robust scholarly literature exploring why and how differences of religion, culture and ethnicity can sometimes be "racialized," including in ways that lead to more hardened positions and justifications for discriminating against ethnic and religious minorities. This has variously been referred to as the "new racism" or "neo-racism" (racism without race), which is different from historically dominant forms of racism based on biology and skin colour. Noting the ways religion is often implicated in "neo-racism," social and political theorist Etienne Balibar (2007, p.85) explains:

What we see here is that biological or genetic naturalism is not the only means of naturalizing human behaviour and social affinities...[C]ulture can also function like a nature, and it can in particular function as a way of locking individuals and groups a priori into a genealogy, into a determination that is immutable and intangible in origin.

For more on the distinctive qualities of contemporary "neo racism," see Barker (1981) on "new racism," Miles (2003) on "racialization," Modood (1997) on "cultural racism" and Taguieff (2001) on "differentialist racism." Cited sources: Balibar, E. (2007). Is there "neo-racism"?. In Gupta, T. D., James, C.E., Maaka, R. C. A., Galabuzi, G.E. & Anderson, C. (Eds.), *Race and Racialization: Essential Readings* (pp. 83-88). Toronto: Canadian Scholars Press Inc.; Barker, M. (1981). *The New Racism*. London: Junction Books; Miles, R. (2003). *Racism* (2nd Ed.). New York: Routledge. Modood, T. et al. (1997). *Ethnic Minorities in Britain*. London: Policy Studies Institute; Taguieff, P.-A. (2001). *The Force of Prejudice*. Minneapolis: University of Minnesota Press.

<sup>50</sup> Coined in the 1870s, the term "anti-Semitism" was created by people who were explicitly promoting race-based hatred of Jews. Historians have argued that this term reflects a transition from religion (or "anti-Judaism") to race as a basis for discrimination, hatred and violence against Jews. For more on the historical evolution from anti-Judaism or "Judenhass" (hatred of Jews) to the Anti-Semitic racism of the modern era, as first coined ("Antisemitismus") by its German intellectual exponent, Wilhelm Marr in 1879, see the OHRC's *Human rights and creed research and consultation report*. See also Bunzl, M. (2007). Anti-semitism and Islamophobia. In Bunzel, M. (Ed.). *Anti-semitism and Islamophobia: Hatreds Old and New in Europe* (pp. 1-46). Chicago: Prickly Paradigm Press.

<sup>51</sup> For instance, concerns have been raised about the rise of a "new anti-Semitism" that is framed more on anti-Zionism, politics and religion than on race. See Ben-Moshe (2007). The New Anti-Semitism. In Gopalkrishnan, N. and Babacan, H. (Eds.). *Racisms in the New World Order. Realities of Cultures*,

*Colours and Identity* (pp. 107-123). UK: Cambridge Scholars Publishing. While acknowledging how anti-Zionism can take antisemitic forms, the (2004) *Report of the European Union's Monitoring Centre for Racism and Xenophobia* suggests that only if Jews are targeted "as Jews" is it legitimate to speak of "antisemitism." Anti-Zionist viewpoints, from this perspective, are only antisemitic if "Israel is seen as being a representative of 'the Jew,'" as opposed to "hostility towards Israel as 'Israel,' i.e. as a country that is criticized for its concrete policies." European Monitoring Centre on Racism and Xenophobia. (2004). Manifestations of antisemitism in the EU 2002-2003; cited in Bunzl, 2007, *ibid*.

<sup>52</sup> The OHRC's use of "antisemitism" instead of "anti-Semitism" is for reasons consistent with the European Union Monitoring Centre on Racism and Xenophobia's use of the term, as stated in its 2002-2003 report:

The notation "antisemitism" will be given preference to the notation "anti-Semitism." This allows for the fact that there has been a change from a racist to a culturalist antisemitism, and in this context helps to avoid the problem of reifying (and thus affirming) the existence of races in general and a "Semitic race" in particular (*ibid*. Retrieved May 10, 2014 from [http://fra.europa.eu/sites/default/files/fra\\_uploads/184-AS-Main-report.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/184-AS-Main-report.pdf), p.11).

The term "antisemitism" is also preferred over anti-Semitism because in undermining the notion of a "Semitic race," it also undermines claims by persons belonging to other non-Jewish cultural or national groups who claim to belong to a "Semitic" racial grouping and to also experience anti-Semitism. This, critics argue, undermines and weakens the term's specific history, meaning and association with prejudicial attitudes and discrimination directed specifically against Jewish people. Also see Mock, K. and Shipman, L. It's time to end word games and combat racism. *Originally published in 1992 in the Canadian Jewish News*; adopted by the Commission on Antisemitism at the World Conference on Racism, Durban, South Africa, 2001, and adapted for a presentation to Tel Aviv University's Antisemitism Documentation Project, 2002.

<sup>53</sup> Canadian Race Relations Foundation. (2013). *Glossary of terms: Antisemitism*. Retrieved September 23, 2014 from [www.crr.ca/en/component/glossary/Glossary-70/A/Antisemitism-18](http://www.crr.ca/en/component/glossary/Glossary-70/A/Antisemitism-18).

<sup>54</sup> *Ibid*.

<sup>55</sup> Partly in recognition of this, in 2009, the Canadian Parliamentary Coalition to Combat Antisemitism was established by all four major federal political parties to investigate and combat antisemitism, including new antisemitism.

<sup>56</sup> Scholars have observed how Islamophobia and other contemporary forms of discrimination and prejudice based on religion and creed in Ontario have been significantly shaped by forces of globalization, including the global flow of media, communications and people, and awareness (and sometimes transplantation) of conflicts elsewhere in the world. The events of "9/11" and the "War on Terror" have had a major impact on shaping local prejudice and discrimination, at times casting a dark shadow and acrimonious tone over public debates about multiculturalism and religious accommodation in the public sphere. See the OHRC's *Human rights and creed research and consultation report*; see also Esposito, J. and Kalim, I. (Eds.). (2011). *Islamophobia: The Challenge of Pluralism in the 21<sup>st</sup> Century*. New York: Oxford University Press.

<sup>57</sup> While the term Islamophobia literally signifies "fear" of "Islam", it is generally held to mean more than this, to include: both individual as well as institutional and systemic forms of intolerance and discrimination; both anti-Islamic (the religion) and anti-Muslim (group of people) sentiments and behaviour.

<sup>58</sup> See Razack, S. (2008). *Casting Out: Race and the Eviction of Muslims From Western Law and Politics*. Toronto: University of Toronto Press.

<sup>59</sup> See Gottschalk, P and Greenberg, G. (2007). *Islamophobia: Making Muslims the Enemy*. Rowman & Littlefield Publishers. Also see Poynting, S., and Perry, B. (2007). Climates of Hate: Media and State Inspired Victimisation of Muslims in Canada and Australia since 9/11. *Current Issues in Criminal Justice* 19(2); Bakht, N. (2008). *Belonging and Banishment: Being Muslim in Canada*. TSAR Publications.

<sup>60</sup> The OHRC's review of 2010-11, 2011-12 and 2014-15 creed human rights complaints filed at the *Human Rights Tribunal of Ontario* found that Muslims accounted for the highest number of HRTO applications citing creed as a ground of discrimination in all three years. While HRTO applications are insufficient on their own to prove actual discrimination patterns (as they indicate only perceived discrimination, as filed through human rights complaints), this finding is consistent with social science

literature and survey research on the topic. See the OHRC's *Human rights and creed research and consultation report* for further analysis of HRTO human rights complaints based on creed.

<sup>61</sup> Social science and survey research indicates a growing pattern of distrust, fear and animosity towards Muslims in Ontario and Canada since the events of 9/11; a trend, scholars note, making Islamophobia increasingly common and socially acceptable (see *Human rights and creed research and consultation report*). For example, in a comprehensive 2006-2007 Environics Canada survey (cited in Adams, 2009, p.23), 28% of the general Canadian population sampled believed that “most” or “many” Canadians are hostile towards Muslims. Adams, Michael. (2009). Muslims in Canada: Findings from the 2007 Environics Survey. *Horizons*, 10(2), pp. 19-26. Government of Canada, Policy Research Initiative. Retrieved from [http://publications.gc.ca/collections/collection\\_2009/policyresearch/CP12-1-10-2E.pdf](http://publications.gc.ca/collections/collection_2009/policyresearch/CP12-1-10-2E.pdf). A diverse range of later opinion polls and surveys show growing levels of animosity towards Muslims, who are generally perceived to be the least trusted and the most disliked of all religious, ethnic or racial groups among the general Canadian population. For example, the results from the last of three comprehensive national surveys about religion, religious freedom and values by Angus Reid Global show that more than half of Canadians (54%) view Islam unfavourably, up from 46% in 2009 (“Canadians view non-Christian religions with uncertainty, dislike”, Angus Reid Global, October 2, 2013, retrieved January 11, 2015 from [www.angusreidglobal.com/wp-content/uploads/2013/10/Canadians-view-non-Christian-religions-with-uncertainty-dislike.pdf](http://www.angusreidglobal.com/wp-content/uploads/2013/10/Canadians-view-non-Christian-religions-with-uncertainty-dislike.pdf)). Another September 10, 2010 survey by the Canadian Race Relations Foundation and the Association for Canadian Studies found that 30.9% of Canadians “strongly disagree” that “Muslims share our values”. *Muslims and non-Muslims in Canada and the United States: Nine Years after 9-11*. Retrieved January 18, 2015 at [www.crr.ca/divers-files/en/survey/muslims\\_canada\\_usa.pdf](http://www.crr.ca/divers-files/en/survey/muslims_canada_usa.pdf). For more on the growing acceptability of Islamophobia, see Allen, C. (2010). *Islamophobia*. Burlington, VT: Ashgate Publishing Company. See also Lean, N. (2012). *The Islamophobia Industry*. Pluto Press.

<sup>62</sup> See CBC News, Nov 27, 2013. Arrests in post 9/11 'hate' attack on Hamilton Hindu temple: New evidence has led to three arrests for temple arson. Retrieved online January 21, 2015 at [www.cbc.ca/news/canada/hamilton/news/arrests-in-post-9-11-hate-attack-on-hamilton-hindu-temple-1.2442098](http://www.cbc.ca/news/canada/hamilton/news/arrests-in-post-9-11-hate-attack-on-hamilton-hindu-temple-1.2442098).

<sup>63</sup> *Randhawa v. Tequila Bar and Grill Ltd.*, 2008 AHRC 3 at para. 66.

<sup>64</sup> *Declaration on Racism, Discrimination, Xenophobia and Related Intolerance against Migrants and Trafficked Persons*. Asia-Pacific NGO Meeting for the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. Teheran, Iran. 18 February 2001; as cited in *International Migration, Racism, Discrimination and Xenophobia. A publication prepared by: International Labour Office (ILO), International Organization for Migration (IOM), Office of the United Nations High Commissioner for Human Rights (OHCHR)*. (2001). Retrieved online July 3, 2014 at [www.unesco.org/most/migration/imrdx.pdf](http://www.unesco.org/most/migration/imrdx.pdf).

<sup>65</sup> For a review of terms used in other jurisdictions, and the implications based on applicable principles of statutory interpretation, see *Human rights and creed research and consultation report* (Section IV, 2.1).

<sup>66</sup> During its creed consultation, the OHRC heard how the very term “creed” may denote and reflect a particular western, Christian historical understanding of religion and belief, with its emphasis on formal doctrine and written statements of belief (see *Human rights and creed research and consultation report*). It also heard, from the perspective of various Indigenous Peoples’ in particular, how the term tends to compartmentalize or single out what for many is lived and experienced as a holistic way of life.

<sup>67</sup> Several decisions have recognized the possibility of creed meaning more than religion. For instance, in *R.C. v. District School Board of Niagara*, the HRTO stated: “I rely upon the French translation of ‘creed’ in the *Code*, *croissance*. This reflects a broader understanding of creed that reflects beliefs rather than only identification with a formal set of religious views”: 2013 HRTO 1382 at para. 42, [R.C.]. See also *Singh v. Security and Investigation Services Ltd.* (31 May, 1977), Toronto (Ont. Bd. Inq., Cumming) [unreported], cited in *Rand v. Sealy Eastern Ltd.* (1982), 3 C.H.R.R. D/938 (Ont. Bd. Inq.) at para. 8373. In *Singh*, one of the earliest Ontario decisions dealing with creed, the Board, hearing the complaint of a Sikh man who was denied employment because of his beard and turban, described creed as derived from the Latin “credo” meaning “I believe,” and looked to the Oxford and Webster Dictionary definitions:

Oxford: Creed... “An accepted or professed system of religious belief: the faith of a community or an individual, especially as expressed or capable of expression in a definite formula.”

Webster's: Creed ... "Any formula of confession of religious faith; a system of religious belief, especially as expressed or expressible in a definite statement; sometimes, a summary of principles or set of opinions professed or adhered to in science or politics, or the like; as his hopeful creed." [Emphasis in original.]

<sup>68</sup> As noted earlier, understandings of creed and what are considered creed-based beliefs and practices evolve over time, and differ cross-culturally, as do forms of discrimination based on creed. A flexible, principled approach to describing creed is taken here to allow for the *Code* to be given a broad, purposive, liberal and contextual interpretation. For a discussion of the challenges and limitations of any effort to provide a universal and precise definition of such terms as religion or creed, see Sullivan, W., *supra* note 42; Kislowicz, K. (2012). Trying to put an ocean into a paper cup: an argument for the "un-definition of religion" *Canadian Diversity*, 9(3), 29-32. Retrieved from [www.ohrc.on.ca/en/creed-freedom-religion-and-human-rights-special-issue-diversity-magazine-volume-93-summer-2012/trying-put-ocean-paper-cup-argument-un-definition-religion](http://www.ohrc.on.ca/en/creed-freedom-religion-and-human-rights-special-issue-diversity-magazine-volume-93-summer-2012/trying-put-ocean-paper-cup-argument-un-definition-religion); Szybel, D. (2012, March 29-30). Giving credence to philosophical creeds: The cases of Buddhism and veganism. Paper presented at the Ontario Human Rights Commission/York University Legal Workshop on Human rights, creed and freedom of religion. Osgoode Hall, York University. Retrieved from <https://docs.google.com/file/d/0BwFvhg37TTCjS1Awa1JSNkJZNWM/preview?pli=1>.

<sup>69</sup> *Amselem*, *supra* note 5 at paras. 39, 46.

<sup>70</sup> *Ibid.* at para. 39. See also Richard Moon, "Freedom of Religion Under the *Charter of Rights*: The Limits of State Neutrality" (2012), 45 *U.B.C. L. Rev.* 497, at pp. 498-99 [Moon], cited in *Loyola*, *supra* note 8, at para. 44:

Underlying the [state] neutrality requirement, and the insulation of religious beliefs and practices from political decision making, is a conception of religious beliefs or commitment as deeply rooted, or commitment as an element of the individual's identity, rather than simply a choice or judgment she or he has made. ... If religion is an aspect of the individual's identity, then when the state treats his or her religious practices or beliefs as less important or less true than the practices of others, or when it marginalizes her or his religious community in some way, it is not simply rejecting the individual's views and values, it is denying her or his equal worth [Footnote omitted; p. 507.]

<sup>71</sup> This draws on *Amselem*, *supra* note 5 at para. 39, where the court describes religion as "typically involv[ing] a particular and comprehensive system of faith and worship." It also draws on descriptions of religion, for purposes of protection under section 2(a) of the *Charter*, in *Edward Books*, *supra* note 5 at para. 97 ("These beliefs govern one's conduct and practices"), as well as in *Bennett v. Canada (Attorney General)*, 2011 FC 1310 (CanLII) [*Bennett*] at para. 55 ("Is comprehensive, providing a *telos*, an overarching array of beliefs...").

<sup>72</sup> This draws on statements in *Edwards Books*, *supra* note 5 and *R.C.*, *supra* note 67. In *Edwards Books*, the Supreme Court of Canada alludes to the nature of beliefs protected under section 2(a) of the *Charter* (at para. 97):

The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices.

This also draws on indicators for religion discussed in *Bennett v. Canada (Attorney General)*, 2011 FC 1310 (CanLII) at para. 55 rev'd. on other grounds 2013 FCA 161 such as:

- a. Addresses ultimate ideas...about life, purpose and death;
- b. Contains metaphysical beliefs which transcend the physical and apparent world;
- c. Contains a moral and ethical system;
- d. Is comprehensive, providing a *telos*, an overarching array of beliefs that coalesce to provide the believer with answers to many, if not most, of the problems and concerns that confront humans.

While this policy recognizes the distinctness of religious beliefs from other kinds of beliefs, the criteria here do not preclude the possibility of a comprehensive non-religious belief system being a creed under the *Code*.

<sup>73</sup> Legal decisions have discussed the collective dimension of religion and creed. Most recently see Supreme Court of Canada decision in *Loyola*, *supra* note 8 at para. 60. However, this does not mean that people may not differ in how they understand or practice a professed system of belief (see section 9.3.2).

Nor need this prevent persons from receiving human rights protections who may have unique or hybrid belief systems.

<sup>74</sup> According to the Supreme Court in *Quebec (Commission des droits de la personne & des droits de la jeunesse) v. Montreal (City)*, because of its quasi-constitutional status the *Code* and other human rights legislation must be given a large and liberal interpretation in light of both its context and objectives: [2000] 1 S.C.R. 665 at paras. 27-29, [*Montreal (City)*]; see also *Ontario (Human Rights Comm.) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at 546-547 [*O'Malley*].

According to *O'Malley*, the Preamble of the *Code* is a guide to its nature and purpose. This states in part:

Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

And Whereas it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province.

<sup>75</sup> The Supreme Court of Canada has stated: “Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*”; *Big M*, *supra* note 5 at para. 123.

<sup>76</sup> *Amselem*, *supra* note 5 at para. 39.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> Courts and tribunals have recognized a wide variety of religious and spiritual beliefs under human rights legislation and the *Charter*, including Indigenous spiritual practices (see *Kelly v. British Columbia (Public Safety and Solicitor General) (No. 3)*, 2011 BCHRT 183 (CanLII) [*Kelly*]), Wiccans (see *Re O.P.S.E.U. and Forer* (1985), 52 O.R. (2d) 705 (C.A.) [*Forer*]), Raelians (see *Chabot c. Conseil scolaire catholique Franco-Nord*, 2010 HRTO 2460 (CanLII) and Falun Gong practitioners (see *Huang v. 1233065 Ontario*, 2011 HRTO 825 (CanLII) [*Huang*]).

<sup>80</sup> *Communications, Energy and Paperworkers Union of Canada Local 722-M v. Global Communications*, 195 L.A.C. (4<sup>th</sup>) 217, [2010] C.L.A.D. No. 298 (QL).

<sup>81</sup> See for instance *Jazairi v. Ontario (Human Rights Commission)*, 1999 CanLII 3744 (Ont. CA) [*Jazairi ONCA*], and *Al-Dandachi v. SNC-Lavalin Inc.*, 2012 ONSC 6534 (CanLII).

<sup>82</sup> In *Al-Dandachi v. SNC-Lavalin Inc.*, *ibid.*, the Ontario Superior Court of Justice refused a defendant’s motion to strike a human rights claim in a civil action. The plaintiff alleged that he was dismissed from his employment because he expressed views about the armed conflict in Syria which were inextricably linked to his identity as a Syrian Canadian and a Muslim. The employer argued that the man’s claim was in essence one of discrimination based on his political views and the *Code* does not cover this. The Superior Court cited the Court of Appeal in *Jazairi ONCA*, *ibid.*, and found that the Court of Appeal expressly left open the possibility that some other system of political opinion could amount to a creed. It also noted that the claim made a link between the dismissal and the man’s views as a person of Syrian origin whose religious beliefs are against extremism. Therefore, the Court was unable to conclude that it was plain and obvious the claim could not succeed.

<sup>83</sup> *Jazairi v. Ontario (Human Rights Commission)*, [1997] CanLII 12445 (Ont. S.C.) at paras. 34, 39, 40. [*Jazairi ONSC*]; *aff’d Jazairi ONCA*, *supra* note 81. The Court of Appeal for Ontario upheld the original decision, and confirmed the importance of assessing each creed claim on its own facts. The Court of Appeal noted that whether or not some other political perspective that is made up of a cohesive belief system could amount to a creed was not before it. It commented that it would be a mistake to deal with such important issues in the abstract. See *Jazairi ONCA* at para. 28.

<sup>84</sup> See section 9.6 for more about information to be provided, including appropriate nature and scope of such inquiry.

<sup>85</sup> While the subjective approach to freedom of religion confirmed in *Amselem* suggests that it is a person’s personal understanding of their religion or creed that is at issue, not what others say or do, provided this is sincerely held, this does not rule out objective inquiry into whether a person’s belief or



practice is sufficiently connected to a religion or creed in the first instance (see sections 9.5. and 9.6). See also *Bennett, supra* note 71 at paras. 7-8, citing *Amselem, supra* note 5 at paras. 50, 42, 39.

<sup>86</sup> In *Huang, supra* note 79, the Respondent unsuccessfully disputed that Falun Gong is a creed on this basis.

<sup>87</sup> *Ibid*, at para. 34. The HRTO clarified at paras 32-34:

There is, in my view, a difference between placing limits on the exercise of a religious freedom because it interferes with others' rights and refusing to recognize a religious movement as a "creed" because some of its beliefs may be inconsistent with the values expressed in the *Charter*.

As the Commission points out, courts and human rights tribunals have generally been careful not to judge the validity of sincerely held religious beliefs...

It is not for the Tribunal to determine whether or not a belief system is reasonable, whether it would withstand scientific scrutiny, or whether it espouses beliefs that are consistent with *Charter* values.

<sup>88</sup> See *Huang, ibid*. This could lead to the exclusion of a number of valid religions and creed-based practices such as those that are not "monotheistic," lack authoritative sacred texts, or are considered "pagan" or "new" religions. For example, in *Forer, supra* note 79, Wicca was found to fall within the meaning of the term "religion" in a collective agreement. This labour arbitration decision adopted "a broad, liberal and essentially subjective" approach to religious observance set out in an earlier Ontario Court of Appeal decision. In that case, the Court of Appeal noted the variety of religions and religious practices in Canada and stressed that what may be regarded as a religious belief or practice by one religion may be regarded as secular by another. Religion is not to be determined from the perspective of the "majority" or "mainstream" in society.

<sup>89</sup> *Huang, supra* note 79.

<sup>90</sup> The Supreme Court has affirmed a high threshold for what may be considered "hatred" in the context of human rights legislation prohibiting hate speech. A definition of hatred in the context of legislative provisions prohibiting hate speech is set out in *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 SCR 467 at para. 59. The Court summarized the requirements stating:

In light of these three principles, where the term "hatred" is used in the context of a prohibition of expression in human rights legislation, it should be applied objectively to determine whether a reasonable person, aware of the context and circumstances, would view the expression as likely to expose a person or persons to detestation and vilification on the basis of a prohibited ground of discrimination.

Hateful practices may also be subject to provisions of the *Criminal Code*.

<sup>91</sup> Section 13(1) of the *Code* prohibits the publication or public display of any notice, sign, symbol, emblem or other similar representation that indicates an intention to infringe a right (discriminate) under a social area (for example, the publication of intent to deny housing, employment or services such as access to a restaurant or retail store because of an individual's race, religion or other enumerated ground). However, this provision is not to interfere with freedom of expression of opinion (as stated in section 13[2]).

<sup>92</sup> See *Haykin v. Roth*, 2009 HRTO 2017 (CanLII), [*Haykin*], confirming that harassment in services can be prohibited as discrimination under the *Code*.

<sup>93</sup> See *Lane v. ADGA Group Consultants Inc.*, 2007 HRTO 34 (CanLII); *ADGA Group Consultants Inc. v. Lane* (2008), 91 O.R. (3d) 649 (Ont. Div. Ct.) [*ADGA v. Lane*] and *Osvald v. Videocomm Technologies*, 2010 HRTO 770 (CanLII) at paras. 34 and 54.

<sup>94</sup> Section 47 of the *Code* reads: (1) This Act binds the Crown and every agency of the Crown. (2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act. R.S.O. 1990, c. H.19, s. 47 (2).

<sup>95</sup> See e.g. *Loyola, supra* note 8 at paras. 59-60. The associational dimension of creed rights is also addressed in section 8, which discusses among other things *Code* defences and exemptions granted to religious organizations, in recognition of this collective dimension of creed rights and expression.

<sup>96</sup> Recognizing the defining role of religion in people's lives, worldview and identity, the Supreme Court of Canada affirmed that religion is "constructively immutable" because it is "changeable only at

unacceptable cost to personal identity." *Corbiere v. Canada* (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203, at para. 13.

<sup>97</sup> *Moon*, *supra* note 70, cited in *Loyola*, Supreme Court of Canada, *supra* note 8 at para. 44. See also *Saguenay*, *supra* note 41 at para. 73, citing *Moon*: "Professor R. Moon points out that a religious belief is more than an opinion. It is the lens through which people perceive and explain the world in which they live. It defines the moral framework that guides their conduct. Religion is an integral part of each person's identity."

<sup>98</sup> It is well-established in law that people protected under the ground of creed are entitled to the same level of protection as people protected under other *Code* grounds. Arguments that a person can avoid discrimination or intolerance by modifying their behaviours or beliefs and making different choices has been rejected as a justification for discriminatory behaviour (see e.g. the Supreme Court of Canada decision in *Quebec v. A.*, *supra* note 33 at paras. 336-337).

<sup>99</sup> See section 7.8 for more information.

<sup>100</sup> See section 7.10 on "Reprisal" for more information.

<sup>101</sup> See *Knibbs v. Brant Artillery Gunners Club*, 2011 HRTO 1032 (CanLII) [*Knibbs*], and *Petterson and Poirier v. Gorcak (No. 3)*, 2009 BCHRT 439 (CanLII) [*Petterson*].

<sup>102</sup> The *Code*, in contrast, applies to both the public sector and private entities.

<sup>103</sup> The equality provisions of the *Charter* in section 15 state:

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, **religion**, sex, age or mental or physical disability.

15. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, **religion**, sex, age or mental or physical disability (emphasis added).

<sup>104</sup> *Big M*, *supra* note 5 at paras. 94-95.

<sup>105</sup> In *Big M*, *ibid*, the Supreme Court of Canada stated (at paras. 122-123):

[An] emphasis on individual conscience and individual judgment also...lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental." They are the *sine qua non* of the political tradition underlying the *Charter*.

Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.

See also *Amselem*, *supra* note 5 at para. 1; *Edwards Books*, *supra* note 5 at 759.

<sup>106</sup> *Big M*, *ibid* at paras. 122-123. See also *R. v. Little*, 2009 NBCA 53 (CanLII) at para. 6, stating in *obiter*: "Of course, s. 2(a) does more than protect religious beliefs. It makes room for the conscientious objector whose judgment is informed by other sources." Although there has been no majority decision where the Supreme Court has defined "freedom of conscience" as distinct from "freedom of religion," the courts have generally interpreted conscience in ways that encompass conscientiously-held non-religious beliefs, whether grounded in "secular morality" (*R. v. Morgentaler*, [1988] 1 SCR 30 at 179, Wilson J), the positions of "atheists, agnostics, sceptics and the unconcerned" (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*] at para.90; see also *Simoneau c. Tremblay*, 2011 QCTDP 1 (CanLII) at paras. 208 and 209) or "profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being" (*Edwards Books*, *supra* note 5 at 759).

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<sup>107</sup>In *Freitag v. Penetanguishene (Town)*, the HRTO clearly distinguished between the *Charter* freedom of religion and *Code* protections for creed (2013 HRTO 893 (CanLII) at paras. 27, 42) [*Freitag* HRTO]: "The *Charter* and the *Code* are different statutory instruments and a finding of a breach of section 2(a) of the *Charter* is not dispositive of the allegations of discrimination before me under the *Code* ... [T]o the extent that observations from these [*Charter* section 2(a)] cases are imported into a *Code* analysis, they must be considered in a manner which is consistent with the long-standing interpretive principles which govern an analysis of discrimination under the *Code*. And although there are obvious linkages between section 2(a) of the *Charter* and the concept of discrimination, the different interpretive approaches to the *Charter* and the *Code* raise the possibility of two different outcomes even where the issues and evidence are similar in nature."

Moon (2012) also highlights what he contends are necessary differences between analyses under the *Code* and *Charter*, in part because the *Charter*, unlike the *Code*, is principally concerned with the state's action and legislative prerogative, and must consider unique related concerns, such as to not overburden or incapacitate the state in such functions. See Moon, R. (2012, March 29-30). Accommodation and compromise under s. 2(a) of the *Charter*. Paper presented at the Ontario Human Rights Commission/York University Legal Workshop on Human rights, creed and freedom of religion. Osgoode Hall, York University. Retrieved from <https://docs.google.com/file/d/0BwFvHg37TTCjQVN4WkhqS2pTdm8/preview> See also *Human rights and creed research and consultation report* for more discussion of the relation between *Code* and *Charter* rights based on creed and religion.

<sup>108</sup> The *Code* prohibition of discrimination based on creed, in this respect, is more like the section 15(1) *Charter* right to "equality before and under the law...without discrimination based on...religion." Even here, the courts and tribunals have noted significant differences between *Code* and section 15 *Charter* discrimination analyses, and contexts of application, which are important to bear in mind when referring to *Charter* case law analyses in *Code* contexts. For more on the relationship between equality jurisprudence under the *Charter* and *Code*, see *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 (CanLII) at para. 19; see also *Freitag* HRTO, *supra* note 107 at para. 41.

<sup>109</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 69-71. The HRTO explicitly affirmed the relevance of international human rights law and jurisprudence, particularly when interpreting the ground of creed under the *Code*: *R.C.*, *supra* note 67 at paras. 40-41.

<sup>110</sup> *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, at para. 70.

<sup>111</sup> Article 2 states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 7 states:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

<sup>112</sup> Article 13 (3) of the *International Covenant on Economic and Social Rights (ICESR)* – ratified by Canada – similarly states:

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

<sup>113</sup> The *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* was adopted by the United Nations General Assembly in 2007, and ratified by the Government of Canada in 2010. UN declarations provide internationally recognised "standards" for measuring countries' compliance with international human rights law (including norms, covenants and conventions). Although the Declaration is not legally binding in the same way that a Convention is, it reflects legal commitments that are already

enshrined in existing international treaty commitments and may be considered international “customary law” and thus have legal effect.

<sup>114</sup> Also see Articles 8, 11, 12(2), 13, 18, 25, 31, 34 for more specific provisions on the rights of Indigenous peoples relating to the practice of their religious and spiritual traditions.

<sup>115</sup> Article 28 of the *ICESR* and Article 50 of the *International Convention on Civil and Political Rights (ICCPR)* provide that the provisions of these covenants (including Article 18 of the *ICCPR*) shall extend to all parts of federal States without any limitations or exceptions. For more on this, see the OHRC’s research paper, *Human rights commissions and economic and social rights* ([www.ohrc.on.ca/en/human-rights-commissions-and-economic-and-social-rights/social-cultural-and-economic-rights-under-international-law](http://www.ohrc.on.ca/en/human-rights-commissions-and-economic-and-social-rights/social-cultural-and-economic-rights-under-international-law)).

<sup>116</sup> *Moore v. British Columbia (Education)*, [2012] 3 S.C.R. 360 [Moore]; *Pieters*, *supra* note 34; and *R.B. v. Keewatin-Patricia District School Board*, 2013 HRTO 1436 (CanLII) at para. 204.

<sup>117</sup> For example, in *R.C.*, *supra* note 67, the HRTO comments on the analysis of whether discrimination has occurred: “There is no particular formula; it is a flexible and contextual inquiry that, depending on the case, may involve consideration of factors such as historical disadvantage, correspondence with actual characteristics, impact on other groups and the nature of the interest affected” (at para. 46, citing *Quebec v. A.*, *supra* note 33 at paras. 418, 531).

<sup>118</sup> Social and historical contexts of inequality are considered in HRTO and court decisions dealing with religion and creed; see e.g. *R.C.*, *ibid* at paras. 45-48 on social and historical contexts of inequality, and at paras. 49-50 on the unique immediate context – in this case, a school setting involving young school age children.

<sup>119</sup> *Freitag* HRTO, *supra* note 107.

<sup>120</sup> *R.C.*, *supra* note 67 at para. 46, citing *Quebec v. A.*, *supra* note 33 at paras. 328-330, 335.

<sup>121</sup> *Gray v. A&W Food Service of Canada Ltd.* (1994), CHRR Doc 94-146 (Ont. Bd. Inq.); *Dominion Management v. Velenosi*, 1997 CanLII 14482 at para. 1 (Ont. C.A.); *Smith v. Ontario (Human Rights Commission)*, 2005 CanLII 2811 (ON SCDC) at para. 9; *King v. CDI Career Development Institutes Ltd.*, 2001 CanLII 39086 (SK HRT).

<sup>122</sup> *Smith v. Network Technical Services Inc.* 2013 HRTO 1880 (CanLII).

<sup>123</sup> *Big M*, *supra* note 5 at para. 123; see also *R.C.*, *supra* note 67 at paras. 32-37.

<sup>124</sup> *Tesseris v. Greek Orthodox Church of Canada*, 2011 HRTO 775 (CanLII) [Tesseris]; see also *Dallaire v. Les Chevaliers de Colomb*, 2011 HRTO 639 (CanLII).

<sup>125</sup> *Tesseris*, *ibid*.

<sup>126</sup> *Williams v. Children’s Aid Society of Toronto*, 2011 HRTO 265 (CanLII).

<sup>127</sup> See *Johnson v. Halifax Regional Police Service* (2003), 48 C.H.R.R. D/307 (N.S. Bd.Inq.) [Johnson] at para. 57 for an example where deviations from normal practice supported a finding of race discrimination. See also *Pieters v. Peel Law Association*, 2010 HRTO 2411 (CanLII), *aff’d*. *Pieters*, *supra* note 34.

<sup>128</sup> Muslims (including people wrongly perceived as Muslim) and Sikhs were commonly among creed community members to report incidents of overt creed harassment (in particular Muslim women wearing a head covering).

<sup>129</sup> See *Haykin*, *supra* note 92, confirming that harassment in services is prohibited under the *Code*.

<sup>130</sup> Section 10(1) of the *Code*. In *Murchie v. JB’s Mongolian Grill*, 2006 HRTO 33 (CanLII) at para. 161, the HRTO found that a serious single incident could constitute harassment. However, more often a single incident is treated as a form of discrimination (see section 7.3 on poisoned environment). See for example *Romano v. 1577118 Ontario Inc.*, 2008 HRTO 9 (CanLII) and *Haykin*, *supra* note 92.

<sup>131</sup> See *Reed v. Cattolica Investments Ltd.* (1996), 30 C.H.R.R. D/331. See also, *Gregory v. Parkbridge Lifestyle Communities Inc.* 2011 HRTO 1535 (CanLII) at paras. 86-87 [Gregory] citing *Ghosh v. Domglas Inc. (No. 2)* (1992), 17 C.H.R.R. D/216 (Ont. Bd. Inq.) at paras. 43-48 and *Dhanjal v. Air Canada*, (1996), 28 C.H.R.R. D/367 at para. 50 (C.H.R.T.), [Dhanjal], *aff’d* *Dhanjal v. Canada (Human Rights Commission)*, 1997 CanLII 5751 (Fed. Ct.).

<sup>132</sup> See e.g. *S.S. v. Taylor*, 2012 HRTO 1839 (CanLII) at para. 71.

<sup>133</sup> See e.g. *Harriott v. National Money Mart*, 2010 HRTO 353 (CanLII) at para. 104.

<sup>134</sup> *Dastghib v. Richmond Auto Body Ltd. (No. 2)* (2007), 60 C.H.R.R. D/167 (B.C.H.R.T.). The BC Tribunal found that the applicant was discriminated against based on race, colour and religion and noted

the particular impact of the name-calling after the events of 9/11: “In my view, the references to Bin Laden and Hussein, in the context of 9/11, and the manner in which these two persons were being portrayed in the media, would lead to an inference that a person was being compared to a mass murderer, a dictator, or a terrorist. Especially in the aftermath of 9/11, such remarks made against a person of Muslim and Middle Eastern origin are extremely insensitive, a racial slur, and thus discriminatory.” (at para. 212)

<sup>135</sup> *Perez-Moreno v. Kulczycki*, 2013 HRTO 1074 (CanLII).

<sup>136</sup> R.S.O. 1990, c. O.1. s. 32.0.1-32.0.7.

<sup>137</sup> See *R. v. Feltnate*, 2012 NSSC 319 (CanLII) for an example of a criminal case involving religion/creed. Also see *Human rights and creed research and consultation report* for further analysis of hate crime trends based on creed.

<sup>138</sup> In *Dhanjal*, *supra* note 131, the Canadian Human Rights Tribunal noted that the more serious the conduct, the less need there is for it to be repeated. Conversely, the Tribunal held the less serious the conduct, the greater the need to show its persistence. See also *General Motors of Canada Limited v. Johnson*, 2013 ONCA 502 (CanLII).

<sup>139</sup> *Islam v. Big Inc.* 2013 HRTO 2009 (CanLII) at para. 275, [*Big Inc.*], *aff'd. Big Inc. v. Islam*, 2015 ONSC 2921 (CanLII), quoting *Xu v. Quality Meat Packers Ltd.*, 2013 HRTO 533 (CanLII) at para. 108. See also *Smith v. Menzies Chrysler*, 2009 HRTO 1936 (CanLII); *Dhillon v. F.W. Woolworth Co.* (1982), 3 C.H.R.R. D/743 at para 6691 (Ont. Bd. Inq.); *Naraine v. Ford Motor Co. of Canada (No. 4)* (1996), 27 C.H.R.R. D/230 at para. 50 (Ont. Bd. Inq.), *aff'd. Ontario (Human Rights Commission) v. Naraine*, 2001 CanLII 21234 (Ont. C.A.), citing *Dhillon v F.W. Woolworth Co.* (1982), 3 C.H.R.R. D/743 at para. 6691.

<sup>140</sup> See *Dhanjal*, *supra* note 131 and 138; *Johnson*, *supra* note 127; *Moffatt v. Kinark Child and Family Services* (1998) 35 C.H.R.R. D/205 (Ont. Bd. Inq.); *Kharoud v. Valle-Reyes* (2000), C.H.R.R. Doc. 00-144 (B.C.H.R.T.); *Dhanjal*, *supra* note 131.

<sup>141</sup> See also *Lee v. T.J. Applebee's Food Conglomeration* (1987), 9 C.H.R.R. D/4781 (Ont. Bd. Inq.).

<sup>142</sup> This could also be discrimination on other intersecting race related Code grounds.

<sup>143</sup> See e.g. *Vanderputten v Seydaco Packaging Corp.*, 2012 HRTO 1977 (CanLII) [*Vanderputten*].

<sup>144</sup> See *Smith v. Ontario (Human Rights Commission)*, (2005), 52 C.H.R.R. D/89 (Ont. Div.Ct.) and *Naraine v. Ford Motor Company* [1996], 27 C.H.R.R. D/23014 (Ont. Bd. Inq.); *aff'd 34 C.H.R.R. D/405* (Ont. Div. Ct.); *rev'd* (2001), 209 D.L.R. (4th) 465 (Ont. C.A.); leave to appeal refused [2002] S.C.C.A. No. 69 (QL).

<sup>145</sup> *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825. The Supreme Court of Canada considered Malcolm Ross' claim that his religious rights were violated by a human rights Board of Inquiry order that prevented him from continuing to teach because of his off-duty antisemitic comments. In addition to finding that Mr. Ross' off-duty comments effectively poisoned the school environment, the Supreme Court also found that the school board had failed to maintain a positive environment and had discriminated in its failure to take a proactive approach to the controversy surrounding Ross.

<sup>146</sup> *Vanderputten*, *supra* note 143; *McKinnon v. Ontario (Ministry of Correctional Services)*, [1998] O.H.R.B.I.D. No. 10 [*McKinnon*].

<sup>147</sup> Specifically, disguising his voice and speaking in an accent supposedly of someone from the Middle East, the detective stated that the man had been taking airline pilot lessons at Buttonville Airport. He also suggested that his locker should be searched for a flying manual in Arabic and stated that he was an "evil Islamic militant." *Yousufi v. Toronto Police Services Board*, 2009 HRTO 351 (CanLII) [*Yousufi*].

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ghosh v. Domglass Inc.* (1992), 17 C.H.R.R. D/216 (at D/227) at para. 76, as cited in *McKinnon v. Ontario (Ministry of Correctional Services)*, *supra* note 146. For more on corporate liability for actions or inactions of “directing minds” in an organization, see section 12.

<sup>150</sup> *Dufour*, *supra* note 7.

<sup>151</sup> The principle was established in the *Charter* context in *Big M*, *supra* note 5.

<sup>152</sup> As the Supreme Court stated in *Big M*, *supra* note 5 at para. 123: “[W]hatever else freedom of conscience and religion may mean, it must at the very least mean this: government [and by extension other public organizations governed by the *Charter*] may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose.”

<sup>153</sup> *S.L. v. Commission scolaire des Chênes*, [2012] 1 S.C.R. 235 [S.L.]; *Saguenay*, *supra* note 41; *Loyola*, *supra* note 8. For more on the duty of neutrality see Section 9.11.6 on secularism and the duty of neutrality.

<sup>154</sup> See *Dufour*, *supra* note 7 and *Streeter v. HR Technologies*, 2009 HRTO 841 (CanLII) [*Streeter*]. An employer may legitimately require certain religious qualifications for a job if it is a religious organization and can meet the requirements of a defence set in the *Code*; see sections 8.2 and 8.3.

<sup>155</sup> *Streeter*, *ibid.* The HRTO found that the religious discussions and actions went beyond what might be considered “normal” in an office and were an attempt to persuade Mr. Streeter to engage in an issue that had nothing to do with the company’s business or his work.

<sup>156</sup> *Dufour*, *supra* note 7.

<sup>157</sup> In *Dufour*, *ibid.* and *Streeter*, *supra* note 154, the Tribunal made a point of noting that not all religious discussions violate the *Code*.

<sup>158</sup> *Lapcevic v. Pablo Neruda Non-Profit Housing Corporation*, 2010 HRTO 927 (CanLII). The HRTO found that there was not enough information to establish that the supervisor ought to have known the conduct was unwelcome.

<sup>159</sup> One of the leading Supreme Court of Canada decisions dealing with religious rights, *Big M.*, *supra* note 5, considered a *Charter* challenge to the federal *Lord’s Day Act* which made it illegal for stores to remain open on Sundays, with some exceptions. The Supreme Court found that the purpose of the law was to compel the observance of the Christian Sabbath and that this purpose infringed freedom of religion. The Court also noted that imposing the requirements of the Christian faith creates a hostile climate for, and gives the appearance of discrimination against, non-Christian Canadians. It also found that compelling a day of rest preferred by one religion was inconsistent with preserving and enhancing the multicultural heritage of Canadians.

<sup>160</sup> For example, in *Freitag v. Penetanguishene (Town)* (1999), 47 O.R. (3d) 301 (C.A.) [*Freitag ONCA*] the Court of Appeal for Ontario held that the purpose of opening municipal meetings with the Lord’s Prayer was to impose “a Christian moral tone on the deliberations of Council” and violated the rights of non-Christians. See also *Saguenay*, *supra* note 41.

<sup>161</sup> In *Allen v. Renfrew (Corp. of the County)* 2004 CanLII 13978 (ON S.C.) [*Allen v. Renfrew*], a “Secular Humanist” challenged Renfrew County Council’s use of a non-sectarian prayer at its monthly meetings. The Ontario Superior Court found that a broadly inclusive and non-denominational prayer, even one that refers to God, while not consistent with the beliefs of some “minority groups,” was not an infringement of religious freedom under the *Charter*. The Court also rejected the argument that mentioning God in a prayer at a government meeting could be seen as a coercive attempt to compel religious observance. However, this decision predates an HRTO decision finding a similar optionally observed, non-denominational opening prayer contrary to the *Code*; *Freitag HRTO*, *supra* note 107, and *Freitag ONCA*, *supra* note 160; See also *Saguenay*, *supra* note 41.

<sup>162</sup> *Saguenay*, *ibid.* (see especially paras. 135-140). The Court distinguished *Freitag ONCA*, *supra* note 160, and *Allen v. Renfrew*, *supra* note 161 (at paras. 138-140).

<sup>163</sup> *Saguenay*, *supra* note 41, at para. 120. The Court further stated that this resulted in people with theistic beliefs being able to “participate in municipal democracy in an environment favourable to the expression of their beliefs. Although non-believers could also participate, the price for doing so was isolation, exclusion and stigmatization. This impaired [the applicant’s] right to exercise his freedom of conscience and religion.”

<sup>164</sup> *Saguenay*, *ibid.*, at para. 137.

<sup>165</sup> For example, see *Saguenay*, *ibid.* at para. 101, where the Supreme Court found that providing the applicant (an atheist) and other persons attending City Council meetings time to physically leave the chamber during the recitation of an opening prayer only further “accentuated” and “highlight[ed] the exclusive effect of the practice.” (See also paras. 122-125). See also *Freitag ONCA*, *supra* note 160 at paras. 39-40.

<sup>166</sup> In *Zylberberg v. Sudbury Board of Education*, the Court of Appeal for Ontario explained that the “standpoint of pupils in the sensitive setting of a public school” must be considered, and that the “peer pressure and the classroom norms to which children are acutely sensitive... are real and pervasive and

operate to compel members of religious minorities to conform with majority religious practices.” 1988 CanLII 189 (Ont. CA) at 20-21.

<sup>167</sup> For more on religion in the public sphere, see section 9.11.6.

<sup>168</sup> The Supreme Court stated in *S.L.*, *supra* note 153 at para. 40:

[T]he suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the multicultural reality of Canadian society and ignores the Quebec government’s obligations with regard to public education. Although such exposure can be a source of friction, it does not in itself constitute an infringement of s. 2(a) of the *Canadian Charter* and of s. 3 of the *Quebec Charter*.

In reaching this conclusion, the Court quoted, at para. 39, its earlier comments on “cognitive dissonance” from *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 [*Chamberlain*] at paras. 65-66.

See section 10.5 for further considerations in education.

<sup>169</sup> For example, in *R.C.*, *supra* note 67 at paras. 46-48, the HRTO considered social and historical relations of power, inequality and disadvantage between creed communities, and the unique circumstances of an elementary school setting.

<sup>170</sup> For example, in *R.C.*, *ibid.* at para 60, the HRTO stated that “creed-based activities outside the classroom need not be eliminated, so long as participation is optional, no pressure is applied on students to participate, the school is neutral and it makes clear that it is facilitating such optional activities for all creeds, not promoting any particular creed.”

<sup>171</sup> In *Canadian Civil Liberties Assn. v. Ontario* (Minister of Education), 1990 CanLII 6881 (Ont. CA) [*Elgin County*], the Court of Appeal for Ontario considered a provincial regulation that made periods of religious education a compulsory part of the public school curriculum. Following an earlier decision in *Zylberberg* (see *supra* note 166), the Court held that the purpose and effect of the regulation were to provide for religious indoctrination, which the *Canadian Charter* does not authorize. However, the Court noted at 344 that a program that teaches about religion and moral values without indoctrination in a particular faith would not breach the *Charter*. The Supreme Court of Canada approvingly cited *Elgin County* in *S.L.*, *supra* note 153 at para. 20

<sup>172</sup> *Elgin County*, *ibid.* at 40-41, citing *Religion in the Public Schools*, (American Association of School Administrators, 1986) at 33 [emphasis added, replicating the Ontario Ministry of Education’s “Education About Religion in Ontario Public Elementary Schools”, which quoted the guidelines with emphasis (retrieved September 24, 2010, [www.edu.gov.on.ca/eng/document/curricul/religion/religioe.html](http://www.edu.gov.on.ca/eng/document/curricul/religion/religioe.html))].

<sup>173</sup> See *Loyola*, *supra* note 8.

<sup>174</sup> *Loyola*, *supra* note 8 at para. 48 [emphasis in the original], quoting Benjamin L. Berger, “Religious Diversity, Education, and the ‘Crisis’ in State Neutrality” (2014), 29 *C.J.L.S.* 103 at 115.

<sup>175</sup> For example, in the past, a school board only allowed Christian literature to be distributed to students. It revised its policy to permit the distribution of materials from other religions but in practice only Christian literature continued to be distributed. There was no effort to publicize the new policy or make sure that members of other creeds were aware that they could provide materials. When persons of a non-Christian faith asked to have materials distributed, there would be no follow-up. Discrimination was found to have occurred, despite the existence of the new policy: *R.C. supra* note 67.

<sup>176</sup> There is a wealth of jurisprudence establishing the phenomenon of racial profiling. See, for example, *Nassiah v. Peel Regional Police Services Board*, 2007 HRTO 14 (CanLII) [*Nassiah*]; *Shaw v. Phipps*, 2012 ONCA 155 (CanLII); *McKay v. Toronto Police Services Board*, 2011 HRTO 499 (CanLII) [*McKay*]; *Pieters*, *supra* note 34 . See also the OHRC’s *Policy and guidelines on racism and racial discrimination*, available online at: [www.ohrc.on.ca/en/policy-and-guidelines-racism-and-racial-discrimination](http://www.ohrc.on.ca/en/policy-and-guidelines-racism-and-racial-discrimination), and the OHRC’s 2003 report, *Paying the Price: The human cost of racial profiling*, available online at: [www.ohrc.on.ca/en/paying-price-human-cost-racial-profiling](http://www.ohrc.on.ca/en/paying-price-human-cost-racial-profiling).

<sup>177</sup> “September 11th in Hindsight: Recovery and Resolve” (2002), online: Canadian Broadcasting Corporation [cbc.ca/september11/content\\_files/text/poll\\_nw.html#section3](http://cbc.ca/september11/content_files/text/poll_nw.html#section3) retrieved May1, 2003.

<sup>178</sup> Council on American-Islamic Relations Canada. (September 22, 2002). Survey More Than Half of Canadian Muslims Suffered Post-9/11 Bias. Retrieved from [www.caircan.ca/itn\\_more.php?id=A90\\_0\\_2\\_0\\_M](http://www.caircan.ca/itn_more.php?id=A90_0_2_0_M). See also Reem Bahdi, Olanyi Parsons and Tom Sandborn. (2010). Racial Profiling B,C. Civil Liberties Association Position Paper. In Marcuse, R. (ed.)

BCCLA: *Racial Profiling*. Vancouver: BCCLA, 31 at 35; CTV.ca News Staff. (March 21, 2005). 1 in 6 Canadians victims of Racial Profiling: Poll. Retrieved December 29, 2008 from [www.ctv.ca/servlet/an/story/CTVNews/20050321/racism\\_ipsos\\_050321](http://www.ctv.ca/servlet/an/story/CTVNews/20050321/racism_ipsos_050321); Powell, Terry. (March 21, 2005). One in Six Canadians Victims of Racism. Canadian Press. Retrieved December 29, 2008 from [www.caircan.ca/mw\\_more.php?id=P1488\\_0\\_7\\_0\\_C](http://www.caircan.ca/mw_more.php?id=P1488_0_7_0_C); Hanniman, W. (2008). Canadian Muslims, Islamophobia and National Security. *Int'l J L, Crime & Jus* 36, 271 at 273-275.

<sup>179</sup> See Esposito, J. and Kalim, I., *supra* note 56; Poynting, S., and Perry, B., *supra* note 59; Razack, S., *supra* note 58; Gottschalk, P and Greenberg, G, *supra* note 59.

<sup>180</sup> *Yousufi*, *supra* note 147; *Kinexus Bioinformatics Corp. v. Asad*, 2008 BCHRT 293 (CanLII) [*Kinexus*], *aff'd. Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33 (CanLII). The OHRC also received many reports of racial and creed-based profiling in response to our 2013 Creed Survey.

<sup>181</sup> *Kinexus*, *ibid*.

<sup>182</sup> A kirpan, a religious object, is a stylized representation of a sword (resembling a dagger) worn by Sikh men.

<sup>183</sup> *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 at 71 [*Multani*].

<sup>184</sup> *Pieters*, *supra* note 34; *R. v. Brown* (2003), 64 O.R. (3d) 161 (Ont. C.A.). See also, *R. v. Richards*, 1999 CanLII 1602 (Ont. C.A.); *Pearl v. Peel Regional Police Services*, 2006 CanLII 37566 (Ont. C.A.); *R. v. Khan*, 2004 CanLII 66305 (Ont. Sup. Ct.) [*Khan*].

<sup>185</sup> For example, in *Khan*, *ibid.* at para. 65, 68, the police officers' explanation for why they stopped Mr. Khan and searched his car was found to be inconsistent with the documentary evidence and to defy common sense. The Court concluded that the reasonable inference was that Mr. Khan was stopped because of racial profiling, because he was a young Black male driving an expensive car.

<sup>186</sup> In *Johnson*, *supra* note 127 at para. 57, the Nova Scotia Board of Inquiry held that in deciding whether there is a *prima facie* case of differential treatment, a board of inquiry must try to establish how events normally unfold in a given situation. Deviations from normal practice and evidence of discourtesy or intransigence are grounds for finding differential treatment.

<sup>187</sup> *Johnson*, *ibid.* The Board of Inquiry found that the unprofessional way the complainant was treated during a traffic stop was based on the person's race and that it would be hard to imagine similar treatment of a White driver. See also *Radek v. Henderson Development (Canada) Ltd.* (No. 3) (2005), 52 C.H.R.R. D/430 (B.C.H.R.T.) at para. 471 [*Radek*]; *Nassiah*, *supra* note 176 at paras. 100-106.

<sup>188</sup> See *Radek*, *ibid.*

<sup>189</sup> For example, see *McKay*, *supra* note 176.

<sup>190</sup> *R. v. Parks*, 1993 CanLII 3383 (Ont. C.A.). See also *Adams v. Knoll North America*, 2009 HRTO 1381 (CanLII), *aff'd. Knoll North America Corp. v. Adams*, 2010 ONSC 3005 (CanLII).

<sup>191</sup> The analysis proposed in the context of racial profiling is: "[T]o consider if differential treatment has occurred, the board must necessarily hypothesize about how events would have unfolded if the driver and passenger of the vehicle had been white rather than black. ... I find it difficult to imagine that these events would have unfolded the same way if a white driver from Texas had been involved in this stop." See *Johnson*, *supra* note 127 at paras. 51 and 57. See also *Abbott v. Toronto Police Services Board*, 2009 HRTO 1909 (CanLII).

<sup>192</sup> For example, in *Maynard v. Toronto Police Services Board*, 2012 HRTO 1220 (CanLII) at paras. 175 and 176 [*Maynard*], the HRTO found that a police officer "cast his investigative net so wide" that race was the predominant factor leading him to investigate a young Black man.

<sup>193</sup> *Maynard*, *ibid.* at para. 154; *Policy and Guidelines on Racism and Racial Discrimination (2005)*, Ontario Human Rights Commission at 20.

<sup>194</sup> For more on the concept of intersectionality, and its application in case law, see the OHRC's (2001) Discussion Paper, "An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims" ([www.ohrc.on.ca/en/intersectional-approach-discrimination-addressing-multiple-grounds-human-rights-claims](http://www.ohrc.on.ca/en/intersectional-approach-discrimination-addressing-multiple-grounds-human-rights-claims)).

<sup>195</sup> The OHRC's review of Human Rights Tribunal of Ontario complaints ("applications") citing creed as a ground of discrimination found that a majority of creed applications also cited a race-related ground (for more analysis of HRTO creed applications, see the OHRC's *Human rights and creed research and consultation report*). See also section 3.3 for further exploration of current trends.



<sup>196</sup> *Big Inc.*, *supra* note 139.

<sup>197</sup> See, for example, *R. v. N.S.*, [2012] 3 S.C.R. 726 [N.S.].

<sup>198</sup> For more on intersectional gender and creed dynamics, see for instance Caroline Sweetman's (ed.) *Gender, Religion and Spirituality*. 1998. UK: Oxfam International.

<sup>199</sup> See section 10.6.1 for more on the duty to accommodate the creed practice of fasting as an example. The duty to accommodate may be limited or not exist where this creates undue hardship, or the rule, standard or task is shown to be a *bona fide* requirement. See section 9.5.2 for more on *bona fide* requirements.

<sup>200</sup> For example, in *Krall v. Vedic Hindu Cultural Society* (2005), 56 C.H.R.R. D/306 (B.C.H.R.T.), a Hindu woman filed a complaint with the B.C. Human Rights Tribunal against a Hindu Temple, after she was asked to leave on one occasion and to worship at the back of the temple because when she prays she goes into a trance, screams, gesticulates and jumps up and down. The Tribunal noted that as a person's personal interpretation of their faith is protected, the restrictions imposed on the worshipper did constitute discrimination based on religion. However, the Tribunal went on to find that her behaviour was disruptive to other worshipers and frightening for the children. Therefore, the Temple reasonably accommodated her by asking her to worship at the back. See *Creed Case Law Review* for some recent case law examples. For more on this broader growing trend of intra-religious diversity, and the role of secularization and individualization, see the OHRC's *Human rights and creed research and consultation report*. For more on the decline of centralized institutional forms of religious authority in the modern period and its implications for contemporary religious diversity, see also Woodhead, L. et al. (2009) *Religions in the Modern World (revised 2nd edition): Traditions and Transformations*. New York: Routledge.

<sup>201</sup> *Hadzic v. Pizza Hut*, (1999), 37 C.H.R.R. D/252 (B.C.H.R.T.).

<sup>202</sup> *McGuire v. Better Image Property Maintenance Inc.* (2006), CHRR Doc. 06-744, 2006 BCHRT 544.

<sup>203</sup> *Rill v. Kashruth Council of Canada*, 2008 HRTO 162 (CanLII). The applicant, who had previously been certified, attempted to re-apply to become a kosher caterer in February 2008 because he understood the Kashruth Council's policy permitted a non-orthodox caterer to be certified as long as an orthodox mashgiach was present at all times to supervise the cooking process. However, the respondent did not permit him to re-apply.

<sup>204</sup> See section 9.2.

<sup>205</sup> See Ontario's *Human Rights Code*, section 12, for more information on discrimination because of association: [www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_90h19\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90h19_e.htm)

<sup>206</sup> *Ibid.*

<sup>207</sup> See e.g. *Knibbs*, *supra* note 101, and *Petterson*, *supra* note 101.

<sup>208</sup> Section 11(1) of the *Code* says that discrimination may occur:

Where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member.

<sup>209</sup> *Big Inc.*, *supra* note 139 at para. 112.

<sup>210</sup> This is set out in section 11(1)(a) of the *Code*.

<sup>211</sup> This is set out in section 11(1)(b) of the *Code*. See sections 8 (statutory defences) and 9.8 (limits on duty to accommodate) for more on exceptions provided by law.

<sup>212</sup> In *Moore*, *supra* note 116, the Supreme Court of Canada reaffirmed its earlier definition of systemic discrimination set out in its seminal 1987 decision *Canadian National Railway Co. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 as "practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics" (at p. 1138-1139). The OHRC uses "systemic discrimination" when referring to individual institutions, or a system of institutions, that fall under the jurisdiction of the *Code* (e.g. the education system).

<sup>213</sup> For more on building a human rights-based organizational culture, see: [www.ohrc.on.ca/en/human-rights-and-policing-creating-and-sustaining-organizational-change/7-best-practices-police-human-rights-organizational-change#sthash.YLXtrHzo.dpuf](http://www.ohrc.on.ca/en/human-rights-and-policing-creating-and-sustaining-organizational-change/7-best-practices-police-human-rights-organizational-change#sthash.YLXtrHzo.dpuf)

<sup>214</sup> As the HRTO stated in *Big Inc.*: "Reprisal for the purposes of the *Code* involves deliberate action. Unlike an allegation of discrimination, where intention is not a necessary element to prove a violation of

the *Code*, the applicant must establish that the action was taken with an intent to punish or retaliate”: *supra* note 139 at para. 186, citing *Noble v. York University*, 2010 HRTO 878 (CanLII) [*Noble*], *Jones v. Amway of Canada Ltd.*, 2001 CanLII 26217 (HRTO), *Ketola v. Value Propane Inc.*, 2002 CanLII 46510 (HRTO), and *Moffatt v. Kinark Child & Family Services* (1998), 35 CHRR D/205.

<sup>215</sup> *Noble, ibid.* at para. 34.

<sup>216</sup> *Noble, ibid.* at para. 33.

<sup>217</sup> The letters complained about being “forced to taste pork” and eat other foods during the Muslim holy month of Ramadan; being refused a day off to celebrate the Muslim religious holiday of Eid; and facing threats of being fired and replaced by White staff.

<sup>218</sup> *Big M, supra* note 5.

<sup>219</sup> See for instance the OHRC’s Summary of human rights and creed survey findings. Focus group feedback from religious minorities, many of whom spoke more specifically for more recent immigrants to Ontario, also revealed this.

<sup>220</sup> See section 13 for some best practices.

<sup>221</sup> *Caldwell v. Stuart*, [1984] 2 S.C.R. 603.

<sup>222</sup> *Ibid.*

<sup>223</sup> *Ontario Human Rights Commission v. Christian Horizons* (2010), 102 O.R. (3d) 267 (Div. Ct.), [Christian Horizons]

<sup>224</sup> Available for download [11/25/2014] at [www.ohrc.on.ca/en/your-guide-special-programs-and-human-rights-code](http://www.ohrc.on.ca/en/your-guide-special-programs-and-human-rights-code).

<sup>225</sup> Section 18 of the *Code* states:

The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified. R.S.O. 1990, c. H.19, s. 18; 2006, c. 19, Sched. B, s. 10.

<sup>226</sup> See *Kostiuk v. Toronto Community Housing Corporation*, 2012 HRTO 388 (CanLII) at para. 44 and *Martinie v. Italian Society of Port Arthur* (1995), 24 C.H.R.R. D/169 (Ont. Bd. Of Inquiry) at paras. 47-49.

<sup>227</sup> See *Martinie, ibid.* at para. 48. See section 8.3 for more on how the courts and tribunals have assessed whether an organization is “primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination” under section 24(1) of the *Code*.

<sup>228</sup> *Ibid.*

<sup>229</sup> *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772 at para. 33.

<sup>230</sup> *Loyola, supra* note 8, at para. 60.

<sup>231</sup> *Code*, s. 24(1)(a).

<sup>232</sup> On the one hand, it protects and promotes freedom of religion and the right to associate and join together in groups to express religious or creed-based views through carrying out joint activities. It is to be interpreted liberally and purposively. On the other hand, the defence limits the rights of others in situations where the section applies (for example, people who are not members of the association, and whose rights may thereby be infringed). In this case, it must be interpreted restrictively and an employer seeking to rely on the defence must be able to show that it applies in the circumstances. See *Christian Horizons, supra* note 223 at paras. 57-62.

<sup>233</sup> *Heintz v. Christian Horizons, 2008 HRTO 22 (CanLII) [Heintz, HRTO]* at para. 149. See section 12 of this policy for more on organizational liability for human rights violations.

<sup>234</sup> *Ibid.* at paras. 112-113, as confirmed in the Divisional Court decision *Christian Horizons, supra* note 223 at para. 26.

<sup>235</sup> *Ibid.*

<sup>236</sup> *Heintz, HRTO, ibid.* at paras. 115-117, as confirmed in the Divisional Court decision, *Christian Horizons, supra* note 223 at para. 26.

<sup>237</sup> In *Christian Horizons, ibid.*, the Divisional Court clarified how the second element in s. 24(1)(a) should be interpreted. It found that in determining whether a particular group serves the interests of its members, defined by a characteristic such as creed, one must look to the purpose of the association. The language and purpose of s. 24(1)(a) require an analysis of the nature of the particular activity engaged in by a

religious organization to determine whether it is *seen by the group as fundamentally a religious activity*. This must be followed by an assessment of whether that activity furthers the religious purposes of the organization and its members, thus serving the interests of the members of the religious organization (see paras. 64, 73).

<sup>238</sup> *Christian Horizons*, *ibid* at paras. 65-67.

<sup>239</sup> *Ibid* at paras. 73, 77.

<sup>240</sup> Example drawn from *Heintz*, HRTO, *supra* note 233 at paras. 192-195.

<sup>241</sup> *Christian Horizons*, *supra* note 223 at para. 80, citing *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202, at p. 208. This two-part *bona fide* occupational qualification (BFOQ) defence, derived from *Etobicoke*, differs from the standard three-part *bona fide* requirement (BFR) test derived from Supreme Court of Canada decision in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (*Meiorin*), as there is no duty to accommodate short of undue hardship (see also *Heintz*, HRTO *supra* note 233 at para. 169).

<sup>242</sup> *Christian Horizons*, *ibid.* at para. 84 citing *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279 at para. 56.

<sup>243</sup> This requires an objective “consideration of whether the actual activity of the organization, the services it provides, and the job functions in the provision of those services, necessitates the imposition of the discriminatory qualification” (*Heintz*, HRTO *supra* note 233 at para. 181). The HRTO further states at para. 178 that the scope of the analysis may cover not only individual job duties but also a wider consideration of the nature of employment, including the activity and objects of the organization.

<sup>244</sup> *Christian Horizons*, *supra* note 223 at para. 88.

<sup>245</sup> In *Caldwell v. Stuart*, *supra* note 221, the Supreme Court of Canada concluded that a Catholic school could terminate the employment of a Catholic teacher who married a divorced man in a civil ceremony contrary to the Church’s rules. The Court accepted that the respondent school had the “right” to preserve the religious basis of the school by employing teachers who accept and practice the teachings of the Church. Therefore, the requirement of religious conformity by Catholic teachers was found to be a legitimate and *bona fide* job qualification.

<sup>246</sup> See *Christian Horizons*, *supra* note 223 at para. 90. In *Caldwell v. Stuart*, the Supreme Court of Canada further stated that “[i]t will be only in rare circumstances that such a factor as religious conformance can pass the test of bona fide qualification.” (*Caldwell v. Stuart*, *ibid.* at p. 625; cited in *Christian Horizons* at para. 90).

<sup>247</sup> *Heintz*, HRTO, *supra* note 233 at para. 201; *Christian Horizons*, *ibid* at paras. 95-97.

<sup>248</sup> The Ontario Superior Court decision in *Christian Horizons*, *ibid* at para. 98 confirmed the validity of the HRTO’s approach in *Heintz* (see *supra* note 233 at para. 200) of considering the practices of other similar organizations that impose religious qualifications when assessing the objective validity of the qualification (BFOQ analysis).

<sup>249</sup> See *Heintz*, HRTO, *supra* note 233 at para. 185, citing *Parks v. Christian Horizons (No.1)* (1992), 16 C.H.R.R. D/40; (1993) at para. 57. Such inconsistencies may suggest that the qualification or standard is not in fact a *bona fide* requirement, and/or indicate bad faith and discriminatory intent or effect.

<sup>250</sup> *Heintz*, HRTO, *supra* note 233 at para. 204.

<sup>251</sup> *Ibid*, at para. 205.

<sup>252</sup> Section 18.1 was added to the *Code* in 2005, after same-sex marriage rights were conferred in Canadian law.

<sup>253</sup> This exemption only applies to religious officials registered under section 20 of the *Marriage Act*, in the context of marriage ceremonies and related activities in sacred places. It does not apply to civil marriage officials (see Supreme Court of Canada’s *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 decision, and the Saskatchewan Court of Appeal decision, *Marriage Commissioners Appointed Under the Marriage Act (Re)*, 2011 SKCA 3 (CanLII).

<sup>254</sup> According to section 18.1(3) of the *Code*, “‘sacred place’ includes a place of worship and any ancillary or accessory facilities.”

<sup>255</sup> *Smith v. Knights of Columbus* (2005), 55 C.H.R.R. D/10, 2005 BCHRT 544. While accepting this *bona fide* requirement defence, the Tribunal also found that the Knights, in suddenly telling the couple they could not rent the hall after they had already signed the contract and sent out the wedding invitations,

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should have taken active steps to lessen the negative effect on the couple's rights and dignity (such as meeting with them to explain the situation, formally apologizing, immediately offering to reimburse them for any expenses as a result of cancelling the contract and perhaps offering to help find another solution).

<sup>256</sup> Section 19(1) of the *Code* effectively means that it is not a breach of the *Code* to have government-funded Roman Catholic separate schools. The *Code* states:

19. (1) This Act shall not be construed to adversely affect any right or privilege respecting separate schools enjoyed by separate school boards or their supporters under the *Constitution Act, 1867* and the *Education Act*. R.S.O. 1990, c. H.19, s. 19 (1).

Duties of teachers

(2) This Act does not apply to affect the application of the *Education Act* with respect to the duties of teachers. R.S.O. 1990, c. H.19, s. 19 (2).

Denominational school rights under section 93 of the *Constitution* preserve and protect denominational schools. This was a fundamental part of the "Confederation compromise." While there do not appear to be any human rights tribunal decisions to date interpreting section 19 of the *Code*, several decisions have dealt with aspects of separate school rights under the *Charter* and provincial human rights law in other jurisdictions.

<sup>257</sup> [1996], 3 S.C.R. 609.

<sup>258</sup> However, the United Nations Human Rights Committee has stated that funding of only Roman Catholic schools in Ontario is discriminatory under the *ICCPR*. In *Waldman v. Canada* (Communication No. 694/1996, U.N. Doc. CCPR/C/67/D/694/1996 [1999]), a Jewish parent from Ontario submitted a complaint to the United Nations Human Rights Committee. The Committee found that the exclusive funding of only Roman Catholic schools in Ontario violated Article 26 of the *ICCPR* (prohibition of discrimination) (see Arie Hollis Waldman v. Canada, Communication No. 694/1996, U.N. Doc. CCPR/C/67/D/694/1996 [5 November 1999]), retrieved January 26, 2015 at [www1.umn.edu/humanrts/undocs/session67/view694.htm](http://www1.umn.edu/humanrts/undocs/session67/view694.htm)).

<sup>259</sup> However, under the *Education Act*, there are exemptions from religious instruction in certain circumstances. Any student in Ontario can attend a Catholic high school, regardless of religious beliefs. Certain students (who are qualified to be resident pupils of a secondary school operated by a public board but who attend a secondary school operated by a Roman Catholic Board) can seek an exemption from religious courses and also religious programs including such activities as religious liturgies and retreats; see *Education Act*, R.S.O. 1990, c. E.2, s. 42 and *Erazo v. Dufferin-Peel Catholic District School Board* (2014), 119 O.R. (3d) 347 (Sup. Ct.) ONSC 2072 (CanLII).

<sup>260</sup> *Loyola*, *supra* note 8, at para. 62.

<sup>261</sup> *Ibid*, at para. 74.

<sup>262</sup> *Ibid*, at para. 71. Here, the Court cites Justice Deschamps's decision in *S.L.*, *supra* note 153, at para. 40. The Court also cites *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, at paras. 46 and 48 in support of this point. However, the Court clarifies that the requirement to teach ethics and other religions from a neutral perspective "does not mean that Loyola's teachers are foreclosed from explaining the Catholic perspective and its differences from other faiths" (at para. 78).

<sup>263</sup> See *Daly, et al v. Attorney General of Ontario* (1999), 44 O.R. (3d) 349 (C.A.).

<sup>264</sup> *Supra* note 221.

<sup>265</sup> *Hall (Litigation guardian of) v. Powers* (2002) 59 O.R. (3d) 423.

<sup>266</sup> *Ibid*. The principal question the Court considered was whether allowing a gay student to attend his prom with his boyfriend prejudicially affects rights with respect to denominational school under s. 93 of the *Constitution Act*. The Court's answer was "no." First, the evidence showed a diversity of opinion within the Catholic community, so it was not clear what course of action would be needed to ensure that denominational school rights would not be prejudicially affected. Second, the right in question (to control who could attend school dances), was not in effect in 1867. Lastly, viewed objectively, it could not be said that the conduct in question goes to the essential denominational nature of the school. Ultimately, the Court concluded that Mr. Hall's equality rights would be more severely impaired if he lost out on the opportunity to attend his prom. On the other hand, an injunction would not compel or restrain teachings within the school or affect Catholic beliefs. As an injunction would restrain conduct and not beliefs it would

not impair the defendants' freedom of religion. In the end, the case was discontinued before proceeding to a full trial of the constitutional issues involved.

<sup>267</sup> See section 9.5 for the legal test. The duty to accommodate based on creed was recognized by the Supreme Court of Canada in *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536, where the Court held that the employer must accommodate an employee whose religion forbade her from working from sundown Friday to sundown Saturday.

<sup>268</sup> This is in keeping with the fundamental aims of the Ontario *Human Rights Code*, as laid out in the *Code's* Preamble, which includes creating "a climate of understanding and mutual respect for the dignity and worth of each person, so that each person feels a part of the community, and [is] able to contribute fully to the development and well-being of the community and the Province."

<sup>269</sup> *Janssen v. Ontario Milk Marketing Board* (1990), 13 C.H.R.R. D/397 (Ont. Bd. Inq.) at para. 30.

<sup>270</sup> *Derksen v. Myert Corps. Inc. (No. 2)*, 2004 BCHRT 60, 50 C.H.R.R. D/109.

<sup>271</sup> The Center for Universal Design at North Carolina State University defines universal design as "the design of products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design." See [www.tiresias.org/guidelines/inclusive.htm](http://www.tiresias.org/guidelines/inclusive.htm). Information retrieved July 30, 2004.

<sup>272</sup> *Meiorin*, *supra*, note 241, at para. 68.

<sup>273</sup> *Ibid.*

<sup>274</sup> See *Meiorin*, *supra* note 241 at paras. 65-6 and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [Grismer], at paras. 22 and 42-45. See also *ADGA v. Lane*, *supra* note 93.

<sup>275</sup> *ADGA v. Lane*, *ibid.* at para. 107 (Ont. Div. Ct.) and more recently *Lee v. Kawartha Pine Ridge District School Board*, 2014 HRTO 1212 (CanLII) at paras. 96-97.

<sup>276</sup> *Qureshi v. G4S Security Services*, 2009 HRTO 409 (CanLII) [*Qureshi v. G4S*].

<sup>277</sup> In *Gourley v. Hamilton Health Sciences*, 2010 HRTO 2168 (CanLII), the adjudicator stated: "The substantive component of the analysis considers the reasonableness of the accommodation offered or the respondent's reasons for not providing accommodation. It is the respondent who bears the onus of demonstrating what considerations, assessments, and steps were undertaken to accommodate the employee to the point of undue hardship..." (at para. 8).

<sup>278</sup> *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241.

<sup>279</sup> *Ibid.* The Supreme Court stated that "integration should be recognized as the norm of general application because of the benefits it generally provides" (at para. 69). However, the Court found that in Emily Eaton's circumstances, segregated accommodation was in her best interests and a more appropriate accommodation.

<sup>280</sup> This example is taken from York Region District School Board (YRDSB). (2014). *Program Accommodations for Faith Purposes: A Guideline for Religious Accommodations*. Retrieved July 21, 2015 from [www.yrdsb.ca/Programs/equity/Documents/ReligiousAccommodation.pdf](http://www.yrdsb.ca/Programs/equity/Documents/ReligiousAccommodation.pdf). This guide provides diverse "sample accommodations" (including the ones cited here). These generally range along a continuum from full integration and participation – the ideal wherever possible – to full exemption, where appropriate, depending on the nature of the restriction involved.

<sup>281</sup> *Quesnel v. London Educational Health Centre*, (1995) 28 C.H.R.R. D/474 at para. 16 (Ont. Bd. of Inq.).

<sup>282</sup> See section 11(1) of the *Code*, *supra* note 281.

<sup>283</sup> *O'Malley*, *supra* note 74. See also *Moore*, *supra* note 116 concerning the general test for prima facie discrimination.

<sup>284</sup> For example, in *Clipperton-Boyer v. RedFlagDeals.com*, the HRTO states: "As the jurisprudence makes clear, not every personal manifestation of an individual's creed...is capable of engaging the *Code's* protection. Rather, the *Code's* protection against religious discrimination is circumscribed to cover only certain significant aspects of an individual's religious beliefs or practices" (2014 HRTO 1796 (CanLII) [*Clipperton-Boyer*] at para. 15).

<sup>285</sup> In *Eldary v. Songbirds Montessori School Inc.*, 2011 HRTO 1026 (CanLII), the HRTO found that a woman was unable to establish that managing a children's day camp put on by her church as a fundraiser was of a sufficiently religious nature to fall within the ground of creed under the *Code*.

<sup>286</sup> *Hendrickson Spring v. United Steelworkers of America, Local 8773 (Kaiser Grievances)*, [2005] O.L.A. no. 382, 142 L.A.C. (4<sup>th</sup>) 159. This case was later cited in another decision that found that giving out religious gifts (e.g. pens with religious inscriptions) in the workplace is not a protected right, even though the ability to do so was extremely important to the grievor. There was no evidence that this activity formed any part of her religion as a Born-again Christian; *Ontario Public Service Employees Union v. Ontario (Ministry of Community and Social Services) (Barillari Grievance)*, [2006] O.G.S.B.A. No. 176, 155 L.A.C. (4<sup>th</sup>) 292.

<sup>287</sup> *Assal v. Halifax Condominium Corp. No. 4* (2007), 60 C.H.R.R. D/101 (N.S. Bd. Inq.). A Nova Scotia Board of Inquiry rejected a claim that a condominium was required to accommodate a request to install a satellite dish, contrary to its bylaws, to receive Muslim religious and cultural programming from international sources. The Board stated that being able to establish discrimination requires something more than being able to draw some connection to religion. There was nothing to suggest that accessing the satellite service was a religious practice, belief, requirement, custom, or was part of the tenets of the family's faith or culture. While the complainant wanted access to the technology to allow his family greater exposure to their culture, language and religion, there was nothing to suggest that its absence would in any way compromise the practice of their faith.

<sup>288</sup> *Whitehouse v. Yukon* (2001), 48 C.H.R.R. D/497 (Y.T.Bd.Adj.). In this case, the Yukon Board of Adjudication did not accept that a First Nations man was entitled to special leave to attend land claim selection meetings because of his ancestral and religious duties.

<sup>289</sup> *Clipperton-Boyer, supra* note 284. See paragraph 16 in particular, drawing on *Amselem, supra* note 5 at para. 69.

<sup>290</sup> In most cases, this will be fairly straightforward to show. For example, it is easy to show that a scheduling requirement interferes with a time-sensitive religious holiday or observance. However, sometimes the infringement of a creed right is not so self-evident and may require an objective analysis of the rules, events or acts at issue to determine whether or to what degree they infringe a person's human rights based on creed. This may involve any legal form of proof but must be based on facts that can be proven objectively (*S.L., supra* note 153 at paras. 22-24). For example, in *McAteer v. Canada (Attorney General)* (2014), 121 O.R. (3d) 1 (C.A.), the Ontario Court of Appeal dismissed the claim of three permanent residents that requiring them to swear an oath to be "faithful and bear true allegiance to Queen Elizabeth the Second, Queen of Canada, her heirs and successors" to gain citizenship violated their freedom of conscience and religion under section 2(a) of the *Charter*. They asserted that the requirement that the Queen be Anglican makes the oath supportive of one religion to the exclusion of all others, and that they are constrained by their religious or conscientious beliefs from swearing an oath to any person or to a foreign monarch. In its ruling against the appellants, the Court held that the oath required under the *Citizenship Act* was "secular." The Court upheld the decision of the Superior Court of Justice, which found that the test for an infringement of freedom of religion has both a subjective and an objective component (at paras. 113, 120). For a similar decision, see also *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FCR 406.

<sup>291</sup> *Ontario Public Service Employees Union, Local 560 v Seneca College*, 2014 CanLII 39592 (ON LA).

<sup>292</sup> Section 11(2) of the *Code* states:

The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the *needs of the group* of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

<sup>293</sup> *Meiorin, supra* note 241 at para. 54.

<sup>294</sup> See *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000*, [2008] 2 S.C.R. 561 for the Supreme Court of Canada's comments on what the third part of this test means, in a practical sense, in the context of a disability accommodation in the workplace.

<sup>295</sup> The test for undue hardship is set out in section 9.9 as well as more fully in the OHRC's *Policy and guidelines on disability and the duty to accommodate*. The same standard applies to all grounds of the *Code*, including creed.

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<sup>296</sup> As a result of this test, the rule or standard itself must be as inclusive as possible and must seek to accommodate individual differences up to the point of undue hardship rather than maintaining discriminatory standards supplemented by accommodation for people who cannot meet them.

<sup>297</sup> *Meoirin*, *supra* note 241 at para. 65.

<sup>298</sup> The focus on a person's subjective understanding of their religion is not unique to Canadian law – it can also be found in international human rights law and resolutions. For example, the UN General Assembly (2009) *Interim Report of the Special Rapporteur on freedom of religion and belief* [A/64/159] has affirmed that the “contents of a religion or belief should be defined by worshippers themselves.”

<sup>299</sup> See section 9.6 for more on the permissibility of “objective inquiry,” where appropriate, into the nexus between a belief and a religion or creed.

<sup>300</sup> *Singh v. Workmen's Compensation Board Hospital & Rehabilitation Centre* (1981), 2 C.H.R.R. D/549 (Ontario Board of Inquiry).

<sup>301</sup> *Amselem*, *supra* note 5 at para. 66 further states: “[F]reedom of religion under the Quebec (and the Canadian) *Charter* does not require a person to prove that his or her religious practices are supported by any mandatory doctrine of faith.”

<sup>302</sup> Courts and tribunals have indicated that they will not enter into theological debates about the validity or official standing of creed beliefs or practices (*Amselem*, *supra* note 5 at para. 50; *Cybulski v Canadian Corps of Commissioners, Ottawa Division*, 2014 HRTO 312 (CanLII)). Nor should organizations seek to do so. The focus, rather, is on sincerity of belief, and not whether others of the same faith see the belief or practice as valid (*Amselem* at para. 43; *R. v. Jones*, [1986] 2 S.C.R. 284 at para. 20; *Multani*, *supra* note 183 at para 35).

<sup>303</sup> *Amselem*, *ibid.* at para 47.

<sup>304</sup> A succah is a small enclosed temporary hut or booth that some Jewish persons hold they are commanded to “dwell” in temporarily during the nine-day festival of Succot, which commemorates the Israelites’ 40-year wandering in the desert after their exodus from Egypt.

<sup>305</sup> *Amselem*, *supra* note 5 at para. 72.

<sup>306</sup> *Ibid* at para. 51.

<sup>307</sup> *N.S.* at para. 87. Also see *Edwards Books*, *supra* note 5 at para. 142 and *Amselem*, *ibid* at para. 52.

<sup>308</sup> *Amselem*, *ibid.*

<sup>309</sup> See section 9.6.

<sup>310</sup> *Amselem*, *supra* note 5 at para. 53. For example, in *Bothwell v. Ontario (Minister of Transportation)*, 2005 CanLII 1066 (ON SCDC), a man said that he objected to having a digital driver’s license photo taken based on his creed beliefs. However, he was unable to show that his objection was related to his sincerely held religious beliefs. The Court found many inconsistencies in his actions that called into question his sincerity. For example, he had posted his photo on his own website, and had been digitally photographed in several other contexts. As well, in several letters to the Ministry and others, he raised privacy concerns, and not religious objections, about a digital driver’s licence photo being stored in a government database.

<sup>311</sup> *Amselem*, *ibid.*

<sup>312</sup> *N.S.*, SCC decision, *supra* note 197 at para. 13. As similarly stated by the Ontario Court of Appeal in *R. v. N.S.*: “Past perfection is not a prerequisite to the exercise of one’s constitutional right to religious freedom” (at para. 68). In *Amselem*, the Supreme Court stated:

[I]t is inappropriate for courts rigorously to study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held. Over the course of a lifetime, individuals change and so can their beliefs. Religious beliefs, by their very nature, are fluid and rarely static. A person’s connection to or relationship with the divine or with the subject or object of his or her spiritual faith, or his or her perceptions of religious obligation emanating from such a relationship, may well change and evolve over time. Because of the vacillating nature of religious belief, a court’s inquiry into sincerity, if anything, should focus not on past practice or past belief but on a person’s belief at the time of the alleged interference with his or her religious freedom (at para. 53; also see para. 71).

However, evidence of past consistent practice may help to support a finding that the claimant’s belief is sincere, by strengthening the credibility of the claim overall.

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<sup>313</sup> *N.S., ibid.*

<sup>314</sup> See *R. v. N.S.*, 2009 CanLII 21203 (ON SC) for discussion of the order Judge Weisman made during a preliminary inquiry, requiring the applicant to remove her veil during her testimony.

<sup>315</sup> *N.S.*, SCC decision, *supra* note 197 at para 13.

<sup>316</sup> *Forer*, *supra* note 79.

<sup>317</sup> A growing number of people of all faiths are practicing and combining more than one religious or creed belief system, without this necessarily diminishing their sincerity. See the OHRC's *Human rights and creed research and consultation report*.

<sup>318</sup> *Yeats v. Commissionaires Great Lakes*, 2010 HRTO 906 (CanLII) at paras. 47-8.

<sup>319</sup> *Amselem* *supra* note 5 at para. 52

<sup>320</sup> *Amselem*, *ibid.*

<sup>321</sup> As the Supreme Court stated in *N.S., ibid.*: “[I]nconsistent adherence to a religious practice may suggest lack of sincere belief, but it does not necessarily do so. A sincere believer may occasionally lapse, her beliefs may change over time or her belief may permit exceptions to the practice in particular situations.” (at para. 13).

<sup>322</sup> See section 9.5 for more on the appropriate legal test of sincerity of belief, which does not require a belief or practice to be shown to be "essential" or "obligatory" to merit protection under the *Code* or *Charter*.

<sup>323</sup> While an expert opinion should neither be required nor used to "second-guess" a person's request for accommodation, objective evidence from an expert concerning the nature and existence of a creed belief may nevertheless help to establish a nexus between a belief and a creed (see *Huang supra* note 79) and *Forer (supra* note 79). It may also help support a positive finding of sincerity of belief by strengthening the credibility of a claim overall (see *Amselem supra* note 5 at para. 73).

<sup>324</sup> As the Federal Court has stated in *Bennett* in the context of freedom of religion: "The court in *Amselem*...held that courts need not accept that a practice is religious (as opposed to non-religious or secular) just because a claimant says so. To the contrary, Justice Iacobucci suggested that an objective inquiry into it is appropriate 'since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion'" (*Bennett, supra* note 71 at para 8, citing *Amselem* at para 39).

<sup>325</sup> *Meiorin, supra* note 241 at para. 54.

<sup>326</sup> See *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000*, [2008] 2 S.C.R. 561 for the Supreme Court of Canada's comments on what the third part of this test means, in a practical sense, in the context of a disability accommodation in the workplace.

<sup>327</sup> The test for undue hardship is set out in Section 9.9 as well as more fully in the OHRC's *Policy and guidelines on disability and the duty to accommodate*. The same standard applies to all grounds of the *Code*, including creed.

<sup>328</sup> As a result of this test, the rule or standard itself must be as inclusive as possible and must seek to accommodate individual differences up to the point of undue hardship rather than maintaining discriminatory standards supplemented by accommodation for people who cannot meet them.

<sup>329</sup> The need for more information from the person seeking accommodation may be greater in accommodation requests involving lesser-known creeds (see *York Region District School Board v. Ontario Secondary School Teachers' Federation, District 16* (Faith Day Grievance), [2008] O.L.A.A. No. 442, 176 L.A.C. (4th) 97. This case is discussed in an example in section 10.1.

<sup>330</sup> *Amselem, supra* note 5.

<sup>331</sup> *R v. N.S.* (2010), 102 O.R. (3d) 161 (C.A.) at para. 69. In *Audmax Inc. v. Ontario Human Rights Tribunal*, 2011 ONSC 315 (CanLII), the Ontario Divisional Court, on judicial review, disagreed with the HRTO's conclusion that an employer's questioning of certain aspects of a Muslim employee's clothing and hijab was discrimination based on sex and creed. The Divisional Court found that the HRTO should have considered whether Ms. Saadi could have complied with the dress code without compromising her religious beliefs around appropriate religious attire (at para. 86). The decision, in effect, permitted the employer to inquire into and distinguish between aspects of the religious observance (in this case relating to the *form* of the religious attire) that were based on creed versus the rights claimant's subjective "style"



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preferences. As a result, the HRTO decision was set aside and the case was sent back to the HRTO for a new hearing before a different adjudicator.

<sup>332</sup> For an example related to disability, see *Baber v. York Region Dist. School Board*, 2011 HRTO 213 (CanLII) [*Baber*]. See also section 9.10.1 for more.

<sup>333</sup> More information about privacy laws and how they apply to public and private housing providers, employers and service providers can be found at the Office of the Information and Privacy Commissioner of Ontario and the Office of the Privacy Commissioner of Canada. See: [www.priv.gc.ca/index\\_e.asp](http://www.priv.gc.ca/index_e.asp) and [www.ipc.on.ca/english/Home-Page/](http://www.ipc.on.ca/english/Home-Page/). Different privacy laws apply to different organizations – for example, private housing providers are covered by *Personal Information Protection and Electronic Documents Act (PIPEDA)*, and are only permitted to disclose personal health information under certain circumstances (see section 7(3)(e)).

<sup>334</sup> *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 [*Renaud*].

<sup>335</sup> Some accommodation needs may not always allow for much advance notice, including in service contexts, involving the coming and going of different clients. Also, some creed practices do not always lend themselves to such advance notice. For example, the Indigenous Spiritual practice of smudging can sometimes be required by its practitioners at times of distress to help re-establish a state of spiritual equilibrium, and this may not always be predictable in advance. In such cases, inclusive design can be a best practice to enable smudging when needed, particularly in environments where this can be regularly anticipated.

<sup>336</sup> For example, in *Daginawala v. SCM Supply Chain Management Inc.*, 2010 HRTO 205 (CanLII) [*Daginawala*], the HRTO found that the applicant did not give sufficient notice of his need for four hours of unpaid leave to allow the employer to find a replacement. The employee gave approximately 72 hours notice and the employer typically had provided time off in the past when sufficient notice was given.

<sup>337</sup> In *Baber*, *supra* note 332 the HRTO found that even if the duty to accommodate was triggered, the employer had fulfilled its duty to accommodate because Ms. Baber failed to co-operate in the process because she refused reasonable requests for information that would confirm her needs. She consistently refused to provide the necessary medical information. The HRTO found that the employer did not breach its duty to accommodate her when it terminated her employment.

<sup>338</sup> See section 9.6.

<sup>339</sup> *Meiorin*, *supra* note 241 at paras. 65-66.

<sup>340</sup> *Conte v. Rogers Cable systems Ltd.*, (1999) 36 C.H.R.R. D/403 (C.H.R.T.); *Mazuelos v. Clark* (2000) C.H.R.R. Doc. 00-011 (B.C.H.R.T.); *Lane v. ADGA Group Consultants Inc.*, *supra* note 93; *Krieger v. Toronto Police Services Board*, 2010 HRTO 1361 (CanLII).

<sup>341</sup> Generally, if the accommodation is required to allow the person to be able to take part in the organization without impediment due to creed, the organization must arrange and cover the cost of the accommodation needed, unless this would cause undue hardship. See *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

<sup>342</sup> *Renaud*, *supra* note 334.

<sup>343</sup> The Supreme Court of Canada's decision in *Renaud, ibid* sets out the obligations of unions.

<sup>344</sup> *Renaud, ibid*.

<sup>345</sup> See also section 7.1 on indirect discrimination, and section 12 on preventing and responding to discrimination.

<sup>346</sup> In *McDonald v. Mid-Huron Roofing*, 2009 HRTO 1306 (CanLII) at para. 42 [*McDonald v. Mid-Huron*] the HRTO said the following about undue hardship factors that may be applied under the Ontario Code: "The factors to be assessed are spelled out in section 11, and the applicable principles of statutory interpretation suggest that nothing other than those factors and any regulatory provisions be considered." Accordingly, the HRTO rejected employee morale as a basis for arguing undue hardship.

<sup>347</sup> Note that in rare cases, the HRTO has indirectly considered other factors as part of costs or health and safety. See, for example, *Espey v. London (City)*, 2009 HRTO 271 (CanLII); *Munroe v. Padulo Integrated Inc.*, 2011 HRTO 1410 (CanLII); and *Wozenilek v. City of Guelph*, 2010 HRTO 1652 (CanLII). Also, in *Bubb-Clarke v. Toronto Transit Commission*, 2002 CanLII 46503 (HRTO), the HRTO speculated in *obiter* that an accommodation that could result in bumping another employee from a job may result in undue hardship. But see also *Fair v. Hamilton-Wentworth District School Board*, 2012 HRTO 350 (CanLII).

<sup>348</sup> *Grismer*, *supra* note 274 at para. 42.

<sup>349</sup> *Meiorin*, *supra* note 241 at para. 78-79 and *Grismer*, *supra* note 274 at para. 41. Cases since *Meiorin* and *Grismer* have also applied this stringent requirement for objective evidence; see, for example, *Miele v. Famous Players Inc.* (2000), 37 C.H.R.R. D/1 (B.C.H.R.T.).

<sup>350</sup> *Qureshi v. G4S*, *supra* note 276.

<sup>351</sup> *Moore*, *supra* note 116.

<sup>352</sup> R.S.O. 1990, c. 0-1. *Occupational Health and Safety Act* (OHS) regulations have equivalency clauses that allow for the use of alternative measures to those specified in its regulations, provided the alternative measures afford equal or better protection to workers. This requires an employer to show an objective assessment of the risk and show how the alternative measure provides equal opportunity to the person with a creed. The employer might be able to claim undue hardship after these measures were undertaken and a significant risk still remains. Fulfilling an OHS provision, however, does not necessarily mean that the test for undue hardship or *bona fide* requirements under the *Code* has been satisfied. The *Code* has primacy over the OHS and may sometimes prevail where these conflict with one another.

<sup>353</sup> See *Buttar v. Halton Regional Police Services Board*, 2013 HRTO 1578 (CanLII). See also, *R.B. v. Keewatin-Patricia District School Board*, 2013 HRTO 1436 (CanLII).

<sup>354</sup> *Lane v. ADGA Group Consultants Inc.*, *supra* note 93; *ADGA v. Lane*, *supra* note 93. See also *Bobyk-Huys v. Canadian Mental Health Assn.*, [1994] O.J. No. 1347.

<sup>355</sup> See *Dhillon v. British Columbia* (Ministry of Transportation and Highways), (1999), 35 C.H.R.R. D/293 (B.C.H.R.T.); *R. v. Badesha*, 2008 ONCJ 94 (CanLII); *R. v. Badesha*, 2011 ONCJ 284 (CanLII) for an example of diverging analyses of the safety risk posed by allowing religion-based exemptions from mandatory motorcycle helmet laws in British Columbia and Ontario, and its weighing in the balance against religious freedom and equality rights.

<sup>356</sup> *Buttar v. Halton Regional Police Services Board*, *supra* note 353.

<sup>357</sup> See *Hydro-Québec*, *supra* note 294; *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal [McGill]*, [2007] 1 S.C.R. 16.

<sup>358</sup> *Daginawala*, *supra* note 336. Note however that in a case where there is evidence that the employer is able to deal with unexpected absences or find a replacement on short notice (for example for sickness), it may still be discriminatory not to do so for creed-related absences requested on short notice.

<sup>359</sup> In *Big M*, *supra* note 5, the Supreme Court of Canada explained why s. 2(a) rights relating to religion and conscience are “fundamental” under the Canadian *Charter of Rights and Freedoms*, including because “[t]hey are the *sine qua non* of the political tradition underlying the *Charter*” (para. 122). Many scholars similarly argue that rights based on religion and creed not only empirically predate but have also historically supplied, and continue to supply, a crucial foundation for other fundamental democratic rights. See for example Van der Vyver, J. D. and Witte, J. (Eds.). (1996). *Religious Human Rights in Global Perspective: Legal Perspectives*. The Hague: Martinus Nijhoff Publishers. See also Grim and Finke, *supra* note 4.

<sup>360</sup> *Friesen v. Fisher Bay Seafood Ltd.* (2008), 65 C.H.R.R. D/400, 2009 BCHRT 1.

<sup>361</sup> Available online at: [www.ohrc.on.ca/en/policy-competing-human-rights](http://www.ohrc.on.ca/en/policy-competing-human-rights).

<sup>362</sup> The employer might try to argue undue hardship based on financial impact for its business, which could limit its duty to accommodate. However, a competing human rights analysis would not be appropriate in this case.

<sup>363</sup> See the OHRC's *Policy on competing human rights* for a more comprehensive discussion.

<sup>364</sup> *Reference re Same-Sex Marriage*, *supra* note 253; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at p. 877; *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 61.

<sup>365</sup> *Mills*, *ibid.*; *Trinity Western*, *supra* note 229 at para. 29. *S.L.*, *supra* note 153.

<sup>366</sup> *Mills*, *ibid.*; *Dagenais*, *supra* note 364.

<sup>367</sup> As noted by the Court of Appeal for Ontario in *N.S.*, *supra* note 197

<sup>368</sup> *Mills*, *supra* note 364 at paras. 17, 21 and 61; *Reference re Same-Sex Marriage*, *supra* note 253 at paras. 50 and 52; The Honourable Justice Franck Iacobucci, “Reconciling Rights: the Supreme Court of Canada’s Approach to Competing *Charter* Rights” (2003) 20 S.C.L.R. (2d) 137 at pages 140, 141 and 159; *R. v. N.S.*, *supra* note 197 at para. 48.

<sup>369</sup> In *Bothwell v. Ontario (Minister of Transportation)*, *supra* note 310, the Court concluded that the claimant had failed to show that his objection to a digital driver's licence photo was related to his religious beliefs. The evidence indicated that the claimant had raised a number of privacy, rather than religious, concerns and that his actions were inconsistent with his asserted religious beliefs.

<sup>370</sup> *Reference re Same-Sex Marriage*, *supra* note 253.

<sup>371</sup> With respect to concerns about potential conflicts of rights situations that could arise from legalizing same-sex marriage, the Court refused to make decisions about hypothetical scenarios. The Court confirmed that actual facts are needed to properly apply the contextual approach that must be used in reconciling rights.

<sup>372</sup> *Dallaire v. Les Chevaliers de Colomb*, *supra* note 124.

<sup>373</sup> As the Supreme Court has stated: "the freedom to hold beliefs is broader than the freedom to act on them" (*Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772).

<sup>374</sup> *R. v. Big M*, *supra* note 5 at para. 123.

<sup>375</sup> See for instance *Same-sex Marriage Reference*, *supra* note 253; *Trinity Western*, *ibid.*; *S.L.*, *supra* note 153.

<sup>376</sup> *Trinity Western*, *supra* note 229.

<sup>377</sup> See Shipley, H. (2012). Human rights, sexuality and religion: Between policy and identity. *Canadian Diversity*, 9(3), 52- 55. Retrieved from [www.ohrc.on.ca/en/creed-freedom-religion-and-human-rights-special-issue-diversity-magazine-volume-93-summer-2012/human-rights-sexuality-and-religion-between-policy-and-identity](http://www.ohrc.on.ca/en/creed-freedom-religion-and-human-rights-special-issue-diversity-magazine-volume-93-summer-2012/human-rights-sexuality-and-religion-between-policy-and-identity)

<sup>378</sup> The Board of Inquiry ordered Mr. Brockie to provide printing services to gays and lesbians and gay and lesbian organizations and to pay \$5,000 in damages.

<sup>379</sup> *Brockie v. Brillinger (No. 2)* (2002), 43 C.H.R.R. D/90 (Ont. Sup.Ct.).

<sup>380</sup> The Court modified the Board's order to reflect this by adding the following to the Board's order that Mr. Brockie must provide printing services to gays and lesbians, and their organizations: "Provided that this order shall not require Mr. Brockie or Imaging Excellence to print material of a nature which could reasonably be considered to be in direct conflict with the core elements of his religious beliefs or creed."

<sup>381</sup> *R. v. N.S.*, 2010 ONCA 670 at para 84.

<sup>382</sup> Ontario Court of Appeal Decision, *ibid.*; *N.S.*, Supreme Court of Canada, *supra* note 197.

<sup>383</sup> Supreme Court of Canada, *ibid.*, at para 31. The Supreme Court of Canada ruled that a balance must be found between the two sets of competing rights that neither bans religious accommodation in the court room, nor absolutely protects the right to wear a niqab if it would compromise the competing right to a fair trial. Striking the right balance was left to trial judges to decide, depending on the circumstances. The case was thus remitted to the preliminary inquiry judge to be decided in accordance with the balancing of rights principles expounded in the decision. The following year, Judge Weisman of the Ontario Court of Justice decided that the potential negative consequences for the accused if N.S. didn't remove her niqab weighed heavier in the balance than any potential infringement of her competing right. Though N.S. thus decided to "compromise" in early 2014, testifying without her niqab with the public excluded from the courtroom, the Crown later dropped the sexual assault charges against the defendants due to the lack of reasonable prospect of conviction.

<sup>384</sup> *B. (R.) v. Children's Aid Society*, [1995] 1 S.C.R. 315.

<sup>385</sup> In *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181 the Supreme Court considered the right of a 14-year-old Jehovah's Witness to refuse a potentially life-saving blood transfusion. The provisions of the Manitoba *Child and Family Services Act*, which had been relied on by the Director of Child and Family Services to apprehend the girl as a child in need of protection and to seek a court order to authorize the blood transfusions, were constitutional. The "best interests" of the child test in the legislation should be interpreted in a way that grants increasing deference to a child's religious wishes as the child's maturity increases. This is a proportionate response to balancing religious rights against the state's objectives in protecting children.

<sup>386</sup> See *Hamilton Health Sciences Corp. v. D.H.*, 2014 ONCJ 603 (CanLII); *Hamilton Health Sciences Corp. v. D.H.*, 2015 ONCJ 229 (CanLII).

<sup>387</sup> Available online at: [www.ohrc.on.ca/en/policy-competing-human-rights](http://www.ohrc.on.ca/en/policy-competing-human-rights).

<sup>388</sup> *McDonald v. Mid-Huron*, *supra* note 346.

<sup>389</sup> The issue of customer, third-party and employee preference is discussed in J. Keene, *Human Rights in Ontario*, 2nd ed. (Toronto: Carswell, 1992) at 204-5. See also *Qureshi v. G4S*, *supra* note 276.

<sup>390</sup> See for example: *Giguere v. Popeye Restaurant*, 2008 HRTO 2 (CanLII) citing several other human rights decisions. In *Giguere* the HRTO stated: “Economic interests and rights do not trump human rights, unless there is a specific exemption in the legislation” (at para. 77). Courts and tribunals have also firmly rejected the notion that individuals have the liberty to discriminate and not accommodate in the use or sale of personal private property (e.g. housing or contracts). For example, see *Grant v. Willcock* (1990), 13 C.H.R.R. D/22 (Ont. Bd.Inq.) where an Ontario Board of Inquiry found that liberty rights guaranteed by s.7 of the *Charter* did not extend to the liberty to discriminate based on a prohibited ground in the public sale of private property.

<sup>391</sup> *Amselem*, *supra* note 5.

<sup>392</sup> *Renaud*, *supra*, note 334.

<sup>393</sup> *Meiorin*, *supra* note 241 at para. 68. Those setting standards and rules must be aware of the differences between individuals and groups of individuals. Standards and rules should not just be based on the “mainstream”. For more on the role of unions in the accommodation process, see section 9.8.

<sup>394</sup> *Renaud*, *supra* note 334. The Court held that unions may be liable for discrimination in two situations. First, the union may cause or contribute to the discrimination by taking part in creating a work rule that has a discriminatory effect. Second, a union may be liable if it blocks the reasonable efforts of an employer to accommodate.

<sup>395</sup> Supreme Court of Canada in *Trinity Western*, *supra* note 229 at para. 36.

<sup>396</sup> The onus, rather, is on the party limiting the religious or creed right to prove that it is necessary and reasonable to do so, whether because of a “reasonable and *bona fide*” rule, requirement or factor, or some other justification permitted under the *Code*, including balancing competing rights.

<sup>397</sup> Supreme Court of Canada in *Chamberlain*, *supra* note 168 at para. 66.

<sup>398</sup> This is consistent with case law in which decision-makers refrain from entering into internal creed group doctrinal debates, and deciding what adherents of a religion or creed should or should not believe (see for example *Amselem*, *supra* note 5 at para. 50).

<sup>399</sup> See section 4.2 for more on practices excluded from protection under the *Code*.

<sup>400</sup> See section 9.10.2.

<sup>401</sup> *S.L.*, *supra* note 153 at para. 32; see also Supreme Court of Canada decision in *Loyola*, *supra* note 8 and *Saguenay*, *supra* note 41.

<sup>402</sup> *Saguenay*, *ibid* at para. 83.

<sup>403</sup> *S.L.*, *supra* note 153 at para. 32.

<sup>404</sup> In *Saguenay*, *supra* note 41, the Supreme Court of Canada explicitly links the duty of state neutrality to the requirement of the state, under section 2(a) of the *Charter*, “to act in a manner that is respectful of every person’s freedom of conscience and religion” (at para.1). The Court further states: “I would add that, in addition to its role in promoting diversity and multiculturalism, the state’s duty of religious neutrality is based on a democratic imperative. The rights and freedoms set out in ... the *Canadian Charter* reflect the pursuit of an ideal: a free and democratic society. This pursuit requires the state to encourage everyone to participate freely in public life regardless of their beliefs” (at para. 75).

In *Loyola*, *supra* note 8, the Court connects state neutrality to pluralism and democracy (at para. 45) and the religious freedom and equality rights of individuals (at para. 44). The Court cites Professor Richard Moon in support of the latter point (*ibid.*):

Underlying the [state] neutrality requirement, and the insulation of religious beliefs and practices from political decision making, is a conception of religious beliefs or commitment as deeply rooted, or commitment as an element of the individual’s identity, rather than simply a choice or judgment she or he has made...If religion is an aspect of the individual’s identity, then when the state treats his or her religious practices or beliefs as less important or less true than the practices of others, or when it marginalizes her or his religious community in some way, it is not simply rejecting the individual’s views and values, it is denying her or his equal worth (also cited in *Saguenay*, *supra* note 41).

<sup>405</sup> Courts and tribunals have rejected the idea that “secularism” or “neutrality” requires banning all forms of religious expression in public organizational life, which they have held in fact runs counter to these ideals. See the OHRC’s *Human rights and creed research and consultation report* for further discussion of

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Supreme Court decisions on the meaning of the secular, which overwhelmingly reflect an understanding of the secular that is “open” and “inclusive” of religion and its accommodation in public life. See also Janet Epp Buckingham (2012) “The relationship between religions and a secular society,” in *Canadian Diversity*, 9(3), 12-15, produced for the OHRC during its creed policy consultation process.

<sup>406</sup> *In N.S.*, *supra* note 197, at para. 2, where the Court re-affirmed a religiously inclusive understanding of the “secular” in Canadian law.

<sup>407</sup> *Loyola*, *supra* note 8 at para. 43.

<sup>408</sup> *R.C. v. District School Board of Niagara*, *supra* note 67. In this case, an atheist parent and student objected to their school board’s policy of allowing the distribution of only “globally recognized religious texts” within schools. The HRTO affirmed a legitimate place for the expression of diverse religious ideas and practices within public schools and institutions: “Creed-based activities outside the classroom need not be eliminated, so long as participation is optional, no pressure is applied on students to participate, the school is neutral and it makes clear that it is facilitating such optional activities for all creeds, not promoting any particular creed.”

<sup>409</sup> The distinction between the public and private sphere is largely irrelevant to *Code* considerations of whether a duty to accommodate religion or creed exists in the five social areas governed by the *Code*.

<sup>410</sup> *Gilliard v. Pictou (Town) (No. 2)*, (2005), 53 C.H.R.R. D.213 (N.S. Bd.Inq.).

<sup>411</sup> See *Saguenay*, *supra* note 41, at paras. 84 and 119.

<sup>412</sup> *O’Malley*, *supra* note 74.

<sup>413</sup> The employer’s duty to accommodate religious time off work, without loss of regular work hours and associated wages, was explained in *Smith v. Network Technical Services Inc.*, 2013 HRTO 1880 (CanLII) at para. 19:

The Tribunal in *Markovic v. Autocom Manufacturing Ltd.*, 2008 HRTO 64 (CanLII), states: Sometimes the requirements of employment conflict with the ability of employees to practice their religion, often through the establishment of work schedules which, although adopted for valid business reasons, unintentionally impinge on religious practices. There is a significant body of court and tribunal decisions which have dealt with resolving the conflict between the demands of employment and the freedom to practice religion. Many years ago the Supreme Court of Canada, in *Ontario Human Rights Commission v. Simpsons-Sears*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536 (*Simpsons-Sears*), established that an employer has a duty to take reasonable steps to accommodate an employee who is unable, because of religious beliefs, to work in accordance with the established work schedule. The duty to accommodate requires an employer to look for ways to accommodate the applicant’s need to absent himself from work for religious purposes. The duty to accommodate may thus require the employer to rearrange the applicant’s work so as to enable him to work the hours that would otherwise be available to him, absent his need for religious leave. Whether accommodation up to the point of undue hardship takes the form of make-up assignments or other adjustments to the applicant’s schedule, the goal must be to facilitate an opportunity for the applicant to work his full complement of hours, without encroaching on his religious beliefs.

<sup>414</sup> In Ontario, the *Employment Standards Act*, S.O 2000 c. 41 outlines various options relating to work and entitlements on a public holiday. It requires premium pay for work done on a public holiday. Should any provisions of the *Code* and the *Employment Standards Act* conflict, however, the *Code* should prevail, owing to its quasi-constitutional status.

<sup>415</sup> *Shapiro v. Peel (Regional Municipality)(No. 2)* (1997), 30 C.H.R.R. D/172 (Ont. Bd. Inq.). The employer’s insistence that Ms. Shapiro use vacation time, lieu time or take unpaid leave for Jewish holidays was discriminatory. Ms. Shapiro’s proposal to work overtime to make up the time was a reasonable one and could have been accommodated without undue hardship. The fact that overtime was not available to every employee was not relevant as accommodation is an individualized assessment and not every employee needs to be accommodated in the same way.

<sup>416</sup> This helps to ensure that people from creed minority communities are not adversely affected or unfairly disadvantaged based on their religion or creed, by having to use additional employee benefits such as vacation days to observe their holy days, in comparison to members of dominant religious groups whose needs are accommodated by the statutory holiday calendar.

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<sup>417</sup> *Chambly (Commission scolaire régionale) v. Bergevin*, [1994] 2 S.C.R. 525.

<sup>418</sup> For example, in *Koroll v. Automodular Corp.*, 2011 HRTO 774 (CanLII), a member of the Living Church of God alleged that his employer infringed his rights by not giving him time off with pay to observe High Sabbaths. The HRTO followed an earlier (2008) decision in *Markovic v. Autocom Manufacturing Ltd.*, *supra* note 413 and dismissed his claim that he was automatically entitled to paid leave for holy days. In *Markovic*, the HRTO considered a situation where the employer did not provide two days off with pay to correspond to the number of Christian religious days that are statutory holidays. Rather, the employer's policy provided a "menu of options" for accommodation which included making up the time, switching shifts with another employee, working on a secular holiday when the facility is in operation (subject to the *Employment Standards Act*), adjusting shift schedules, using vacation days and taking an unpaid leave of absence. Mr. Markovic complained that Autocom's failure to provide him with a paid day off to celebrate Serbian Orthodox Christmas was discriminatory. The HRTO concluded that by providing a process for employees to arrange for time off for religious observances through options for scheduling changes, without loss of pay, the policy was appropriate and not discriminatory. The HRTO stated:

[T]he obligation on the employer is to design its workplace standards in a way that recognizes differences in religion amongst its individual employees, and accommodates those differences.

The task is to mesh its workplace rules with the needs of a diverse workforce, with the goal of enhancing participation and inclusion. In the case of religious observances, those goals can be met through the provision of options for scheduling changes that do not result in loss of pay (at para 47).

The HRTO distinguished the Supreme Court of Canada's decision in *Chambly*, because scheduling changes were not available in that situation due to the nature of the workplace, and although the collective agreement allowed for three days of special leave with pay, the employer took the position that they could not be used for religious observances. However, the HRTO did note that there may be individuals for whom none of the scheduling options in the policy would be suitable and in such cases other accommodations must be explored.

<sup>419</sup> *Ontario (Ministry of Community and Social Services) v. Grievance Settlement Board* (2000), 50 O.R. (3d) 560 (C.A.).

<sup>420</sup> *Ibid.* The scheduling options provided for in the policy were deemed: "a viable means of accommodation for employees requiring extra days off over and above the two paid leave days already provided for. It enabled them to schedule their required hours of work in a way that relieved them from having to choose between losing wages or encroaching on pre-existing earned entitlements [i.e. vacation days] and observing their religious holy days." The Court further noted that in *Chambly* the Supreme Court found that it was significant that it would be impossible for a teacher to make up the religious holiday by working an extra day. Therefore, the Court concluded that employers can fulfill their duty to accommodate by offering appropriate scheduling changes, without first having to show that granting a leave of absence with pay would result in undue economic or other hardship.

<sup>421</sup> *Koroll v. Automodular Corp.*, *supra* note 418. The HRTO awarded \$2,000 for injury to dignity and self-respect and directed the respondent to review its Attendance Management Program to remove the discriminatory effect on employees whose religious beliefs require them to be absent from work.

<sup>422</sup> *Janssen v. Ontario (Milk Marketing Bd.)* (1990), 13 C.H.R.R. D/397 (Ont. Bd. Inq.).

<sup>423</sup> See section 9.5.1.

<sup>424</sup> See section 9.3.2 for more on the need to take an individual approach. See section 9.5.3. for more on the need to accommodate sincerely held individual beliefs.

<sup>425</sup> See section 9.6 for more on what information may be requested, and appropriate forms of inquiry.

<sup>426</sup> See section 9.6. The need for more information from the person seeking accommodation may be greater in accommodation requests involving lesser-known creeds (see *York Region District School Board v. Ontario Secondary School Teachers' Federation, District 16 (Faith Day Grievance)*, *supra* note 329. This case is discussed in an example in section 10.1).

<sup>427</sup> *Ibid.* In this case, the OSSTF District 16 union filed a policy grievance on behalf of one of its members alleging the employer's implementation of "faith day" provisions in the collective agreement contravened, among other things, the *Code*. The labour arbitrator held that if an employee has a sincerely held belief that has a connection to religion and honestly believes it is obligatory or customary to observe a religious holiday, then the employee should be considered entitled to religious leave, whether or not they are on

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the Board's list of known faith days. Also, the employee's belief does not need to be supported by official religious dogma or the position of religious officials for the request for leave to be legitimate. At the same time, the arbitrator agreed that an employer is not required to "blindly accept" requests for religious leave for days when members of the employee's faith are not generally required to refrain from working. The arbitrator noted that a claimant still had to prove his/her claim even though the religious beliefs of individuals may be personal or private.

<sup>428</sup> For more information, see *The Multifaith Information Manual*, Ontario Multifaith Council on Spiritual and Religious Care, 2000.

<sup>429</sup> Source: York Region District School Board's (2014) religious accommodation guidelines, *supra* note 280, developed in consultation with the Ontario Multifaith Council on Spiritual and Religious Care.

<sup>430</sup> This example is based on the (2014) religious accommodation guidelines of the York Region District School Board, *supra* note 280.

<sup>431</sup> See section 10.1 for more on dealing with situations where significant amounts of time are required for a creed observance.

<sup>432</sup> Where fulfilling a *Code* right conflicts with a provincial law or regulation, such as the *Employment Standards Act*, S.O. 2000, the *Code* has primacy and will prevail, unless the law says otherwise (*Code* section 47).

<sup>433</sup> See section 9.10.2 and the OHRC's *Policy on competing human rights* for more details.

Considerations include (but are not limited to) an assessment of the extent to which a creed belief or practice may be adversely affected, if at all, whether it connects with a *Code* right, and whether the right is infringed at its core or periphery. Organizations may also consider the extent that a creed practice may allow for flexibility in its practice (e.g. extent that a creed practice is time sensitive).

<sup>434</sup> As discussed above, the Supreme Court of Canada has recognized the communal and collective aspects of religious expression in several decisions (most recently, see *Loyola*, *supra* note 8 at para. 60).

<sup>435</sup> See section 9.1 for more on the principle of inclusive design.

<sup>436</sup> In some circumstances, other accommodation arrangements may equally fulfill the religious needs of persons in a way that is not overly burdensome on either party, and does not create undue hardship. If there is a choice between two accommodations that respond equally to a person's or group's accommodation needs in an equally dignified way, then the accommodation provider is entitled to select the one that is less expensive or less disruptive to the organization.

<sup>437</sup> This is in keeping with principles of state neutrality and non-interference in matters of religious belief, doctrine and practice. The Supreme Court of Canada stated in *Amselem*, *supra* note 5 "[J]udicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion" (at para. 50). Organizations must also avoid becoming entangled in religious affairs. However, organizations must not extend *Code* protections to practices and observances that are hateful or incite hatred or violence against other individuals or groups, or contravene criminal law (see section 4.2).

<sup>438</sup> *Singh (Ishar) v. Security and Investigation Services Ltd.*, Ontario Human Rights Board of Inquiry, unreported decision of May 31, 1977.

<sup>439</sup> See section 9.9.3 for more on health and safety considerations.

<sup>440</sup> York Region District School Board religious accommodation guidelines (Sample Curricular Accommodations Chart), *supra* note 280.

<sup>441</sup> See *Saadi v. Audmax*, *supra* note 331.

<sup>442</sup> See section 9.9.3 for more on health and safety considerations.

<sup>443</sup> *Supra* note 352.

<sup>444</sup> *Pannu v. British Columbia (Worker's Compensation Board)* (No. 2) [2000], 38 C.H.R.R. D/494, 2000 BCHRT 56. Note, however, that the employer in this case had actively sought alternative work for the complainant. The issue was whether he was entitled to be accommodated in his particular (recaust operator) position.

<sup>445</sup> *Loomba v. Home Depot Canada* 2010 HRTO 1434 (CanLII). The HRTO bifurcated the case but ultimately did not decide a second aspect of the case: the relationship between the *Code's* duty to accommodate and the safety requirements of the *Occupational Health and Safety Act*.

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<sup>446</sup> The word Kirpan means mercy or grace. Information provided here is adapted from [www.worldsikh.org/what\\_is\\_the\\_kirpan](http://www.worldsikh.org/what_is_the_kirpan) (Retrieved June 30, 2015).

<sup>447</sup> See *Pandori v. Peel Board of Education* (1990), 12 C.H.R.R. D/364, aff'd (1991), 3 O.R. (3d) 531 (Ont. Div. Ct.), leave to Ont. C.A. refused.

<sup>448</sup> *Ibid.*

<sup>449</sup> *Multani, supra* note 183.

<sup>450</sup> *Ibid.* See section 10.2.1 for more on the duty to accommodate wearing kirpans.

<sup>451</sup> *Ibid.*

<sup>452</sup> (1999), 36 C.H.R.R. D/76 (Can. Trib.). In this case, a Sikh man testified that wearing one particular type of Kirpan rather than another was a matter of personal preference, not of religious belief.

<sup>453</sup> Note that this case was decided before even more stringent safety requirements on airplanes have been implemented as a result of the events of 9/11.

<sup>454</sup> In *R. v. Hothi* (1985), [1985] 3 W.W.R. 256 (Man. Q.B.), aff'd [1986] 3 W.W.R. 671 (Man. C.A.), a Manitoba Court upheld a judge's decision prohibiting wearing a Kirpan in the courtroom. However, the judge in this case was hearing the case of an accused charged with assault. More recent developments have made this decision an exception versus the rule. For example, a 2012 settlement between the Ontario Human Rights Commission, The Toronto Police Service, Toronto Police Services Board and the Ministry of the Attorney General permits persons of the Sikh faith to wear Kirpans in all public areas of Toronto's courthouses. The new court security procedure, however, does allow for some discretion to ensure public safety. This involves individualized risk assessment of such factors as why a person is there, the kind of case being heard, and notable patterns of previous behaviour that could lead to a threat of violence. Other police services and court-justice agencies have followed suit with policies allowing people to enter courtrooms wearing a Kirpan, including in Windsor and British Columbia.

<sup>455</sup> See section 9.11.6.

<sup>456</sup> This is particularly the case where such an individual display results from an organization's duty to accommodate an individual.

<sup>457</sup> *Grant v. Canada (Attorney General)*, [1995] 1 CF 158.

<sup>458</sup> *Clipperton-Boyer, supra* note 284. In this decision, the HRTO held (drawing on the Supreme Court decision in *Amselem, supra* note 5, at para. 69) that "to engage the protection of the Ontario Code against discrimination because of creed, an applicant must demonstrate that he or she sincerely believes that a certain practice or belief is experientially religious in nature in that it is either:

- a. objectively required by the religion, or
- b. that he or she subjectively believes that it is required by the religion, or
- c. that he or she sincerely believes that the practice engenders a personal, subjective connection to the divine or to the subject or object of his or her spiritual faith, and as long as that practice has a nexus with religion" (at para. 16).

<sup>459</sup> For example, there is a difference between the organization displaying a creed-based symbol because of a preference, or an individual, in a personal capacity, because of his or her accommodation need.

<sup>460</sup> For example, a creed symbol that is conspicuously displayed in an area where there is frequent public interaction, such as an organization's front lobby, boardroom or front desk reception area, may give rise to different issues and concerns than if it were displayed in a more private area, such as in an individual's private workspace, where it is less likely to be associated with the organization as a whole.

<sup>461</sup> For example, there is a duty of neutrality for state organizations under section 2(a) of the *Charter*, which may be breached where an organization professes, adopts, or favours one belief to the exclusion of others, without an exemption for this in law (*Saguenay, supra* note 41 at para. 83).

<sup>462</sup> For example, a symbol may poison the environment for other Code-protected groups, or be excluded from Code protections altogether on account of its hateful message (per section 4.2).

<sup>463</sup> While the Supreme Court of Canada in *Saguenay* recognized that "the Canadian cultural landscape includes many traditional and heritage practices that are religious in nature... [and that] not all of these cultural expressions are in breach of the state's duty of neutrality," it also cautioned against taking this principle too far. Religious heritage cannot justify the state engaging in a discriminatory practice for religious purposes, which is what happened in the case of the City's prayer (*supra* note 41 at para. 116).



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<sup>464</sup> Merely being exposed to creed symbols in the workplace, service, facility or housing will generally not be sufficient to amount to religious pressure (see section 7.4).

<sup>465</sup> *Jones v. C.H.E. Pharmacy Inc.* (2001), 39 C.H.R.R. D/93, 2001 BCHRT 1. The respondent was ordered to pay the employee damages for lost wages and benefits and for injury to his dignity and self-respect.

<sup>466</sup> *407 ETR Concession Company v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, CAW-Canada*, 2007 CanLII 1857 (ON LA).

<sup>467</sup> See section 9.5.2.

<sup>468</sup> While some Mennonites do not object to photographs, many orthodox and old order Mennonites do. They receive a blanket exemption and do not have to go through the OHIP eligibility review process. A letter from their community's religious authority is sufficient to qualify them for this exemption.

<sup>469</sup> For example, Muslim women requiring accommodation may take the photo in a private setting at the end of the day when few people are around, or be guided to a private room with a female staff member to take the picture, where this fulfills their accommodation needs.

<sup>470</sup> *Hutterian Brethren*, *supra* note 106.

<sup>471</sup> *Warford v. Carbonear General Hospital* (1988), 9 C.H.R.R. D/4947 (Nfld. Comm. Inq.).

<sup>472</sup> See section 9.3.3.

<sup>473</sup> Example adapted from York Region District School Board's (2014) religious accommodation guidelines (Sample Curricular Accommodations Chart), *supra* note 280.

<sup>474</sup> This includes making sure that information related to a person's creed accommodation is shared only with people who need the information for their role in implementing the accommodation, and providing an appropriate accommodation (see section 9.4).

<sup>475</sup> *Re Peterborough Civic Hospital and Ontario Nurses' Association*, [1981] O.L.A.A. No. 97, 3 L.A.C. (3d) 21 [QL].

<sup>476</sup> She was willing to perform many other aspects of the procedure: record the patient's vital signs, insert the transfusion needle, run saline into the vein, requisition the blood from the laboratory and bring it to the patient's room, and do the necessary paperwork and verification. She was not willing to "hang the blood" which consisted of opening the blood bag, sticking the transfusion tube into the bag, closing the saline solution valve, opening the blood valve and hooking the bag to the transfusion stand.

<sup>477</sup> The board found that it was not necessary that every nurse in the hospital be able to hang blood (in fact about 15% were not qualified to do so). As it was a requirement that two nurses attend a patient who required blood, there was always someone else present who could hang the blood.

<sup>478</sup> Article 26 of the *United Nations Declaration of Human Rights*, to which Canada is a party, also states:

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall *promote understanding, tolerance and friendship among all nations, racial or religious groups*, and shall further the activities of the United Nations for the maintenance of peace.

(3) *Parents have a prior right to choose the kind of education that shall be given to their children* [emphasis added].

<sup>479</sup> See Supreme Court decisions in *Loyola* (*supra* note 8) and *S.L.* (*supra* note 153). Also see the Supreme Court decision in *B. (R.) v. Children's Aid Society*, *supra* note 384, in which Court found that freedom of religion extends to the right of parents to rear their children according to their religious beliefs.

<sup>480</sup> See Supreme Court decisions in *Loyola*, *ibid.* and *S.L.*, *ibid.* and *Chamberlain*, *supra* note 168.

<sup>481</sup> *Chamberlain*, *ibid.* at paras. 65-66; cited in *S.L.*, *ibid.* at para. 39.

<sup>482</sup> *S.L.*, *ibid.*

<sup>483</sup> For example, an organization inquires about creed dietary restrictions and other accommodation needs when sending out event invitations, so it can make appropriate accommodation arrangements in advance. If meat is being offered, the organization strives to provide meat options that also fulfill religious dietary restrictions (when these are raised in advance). An equivalent nutritious meal is provided for people who are vegetarians for creed-based reasons. This enables all interested persons to take part in organizational events in an inclusive and equitable way.

<sup>484</sup> For example, the management of a high tech company requires staff to attend weekly lunch meetings, paid for by management. They provide suitable food options to staff members with food allergies (e.g.

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gluten-free and vegan) but refuse to accommodate religious dietary restrictions. They contend that unlike food allergies, religion is a choice. Even though the staff members of religious faith may fulfill their dietary needs through their own means (e.g. by bringing appropriate food from home), the organization may still be found to have discriminated by failing to accommodate, and treating employees unequally based on an inappropriate hierarchy of human rights grounds (i.e. accommodating based on disability but not creed).

<sup>485</sup> For example, a creed may allow people to make exceptions to required fasting practices, for instance in situations where a person must perform heavy manual labour as part of their regular job. If the person's sincerely held belief allows for such an exception to be made, which would less negatively affect their performance, they could be requested to refrain from or alter their fasting practice, as long as this does not violate their sincerely held creed beliefs.

<sup>486</sup> Adapted from York Region District School Board's (2014) religious accommodation guidelines, *supra* note 280, in this latter respect.

<sup>487</sup> According to the 2011 National Household Survey, 62% (or 185,655) of Aboriginal respondents in Ontario identified as being Christian (Catholic was the largest single denomination –35% of Aboriginal respondents in Ontario). The next largest groupings of Aboriginal persons by religion in Ontario self-identified as having “No religious affiliation” (32% or 96,800), followed by “Traditional (Aboriginal Spirituality)” (5% or 15,285) (Statistics Canada. 2013. Ontario (Code 35) (table). National Household Survey (NHS) Aboriginal Population Profile. 2011 National Household Survey. Statistics Canada Catalogue no. 99-011-X2011007. Ottawa. Released November 13, 2013. Retrieved September 9, 2014 from [www12.statcan.gc.ca/nhs-enm/2011/dp-pd/aprof/index.cfm?Lang=E](http://www12.statcan.gc.ca/nhs-enm/2011/dp-pd/aprof/index.cfm?Lang=E)).

While the religion question on the 2011 National Household Survey lists “Traditional (Aboriginal Spirituality)” as an example, Statistics Canada does not define this term. Nationally, just over 64,900 people reported in this survey that they were affiliated with traditional Aboriginal Spirituality, representing 4.5% of the national Aboriginal population and 0.2% of the population as a whole. Most of the people who affiliated with traditional Aboriginal Spirituality lived in Ontario (24.5%) and the Western provinces of Alberta (23.3%), Saskatchewan (18.9%) and British Columbia (15.9%) (Statistics Canada. 2013. “Immigration and Ethnocultural Diversity in Canada,” Catalogue no. 99-010-X2011001, ISBN: 978-1-100-22197-7; [www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.cfm](http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.cfm)).

<sup>488</sup> According to the 2011 National Household Survey, the largest First Nations population in Canada was in Ontario (201,100 or 23.6% of all First Nations people) ([www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm#a5](http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm#a5); retrieved March 10, 2015). Ontario has the second largest population of persons identified as Métis among provinces (86,015), representing 19.0% of all Métis in Canada ([www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm#a5](http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm#a5); retrieved March 10, 2015). Inuit people make up about 1% of Aboriginal People in Ontario (2,035), with the majority – 82%– living in urban areas ([www.aboriginalaffairs.gov.on.ca/english/services/datasheets/Inuit.pdf](http://www.aboriginalaffairs.gov.on.ca/english/services/datasheets/Inuit.pdf); retrieved March 10, 2015).

In addition to Inuit and Métis Peoples, there are 126 First Nation communities in Ontario recognized by the Federal Department of Aboriginal Affairs and Northern Development (AAND) as a “band,” and over 207 reserves and settlements (AAND, [www.aadnc-aandc.gc.ca/eng/1100100020284/1100100020288#ft2a](http://www.aadnc-aandc.gc.ca/eng/1100100020284/1100100020288#ft2a) [retrieved September 9, 2014]). First Nation peoples living in Ontario include the Anishinaabek, Mushkegowuk, Onkwehonwe, and Lenape Peoples (Chiefs of Ontario website at [www.chiefs-of-ontario.org/faq](http://www.chiefs-of-ontario.org/faq); retrieved March 10, 2015). These Peoples make up 14 Nations: the Mushkegowuk (Cree), Mohawk, Tuscarora, Seneca, Cayuga, Oneida, Onondaga (the Haudenosaunee – Onkwehonwe Peoples), Delaware, Mississauga, Chippewa, Pottawotami, Algonquin, Odawa, and Anishinabe (the Anishinaabek Peoples) (*ibid.*).

<sup>489</sup> Indigenous Spirituality includes many diverse practices, but only some of these are discussed in this policy, in the context of accommodation issues that may arise under the *Code*.

<sup>490</sup> United Nations Declaration on the Rights of Indigenous Peoples, Article 34.

<sup>491</sup> See *supra* note 15 and accompanying side bar in section 3.1 for more discussion of this term.

<sup>492</sup> Many of the people we consulted cautioned against defining or limiting terms relating to Indigenous peoples, given the government's history of imposing definitions from without, including through policy

development. As one focus group participant said: “It is strange to sit in a circle on policy given our history, and the history of policies telling us what to do.”

<sup>493</sup> For example, some people may integrate Christianity or other religious or philosophical orientations into an Indigenous worldview and perspective. Others may identify with Indigenous Spirituality as a cultural identity or perspective, without necessarily believing in a Creator or spiritual realm.

<sup>494</sup> OHRC focus group participant, citing statement by plaintiff Harry Daniels Jr. as quoted in *Daniels v. Canada*, 2013 FC 6 (CanLII) at para. 568.

<sup>495</sup> Source: OHRC focus group participant.

<sup>496</sup> The OHRC held six focus groups over 2014-15 in Waterloo, Toronto, Ottawa and Thunder Bay with a total of 23 First Nation, 10 Métis and 14 Inuit participants.

<sup>497</sup> For example, legal scholar John Burrows (2008, p.168) observes: “Aboriginal peoples have a long and tragic history of severe persecution in the name of European religions”. Burrows, J. (2008). *Living Law on a Living Earth: Aboriginal Religion, Law, and the Constitution*. In R. Moon (Ed.), *Law and Religious Pluralism in Canada* (pp.161-191). Toronto: UBC Press.

<sup>498</sup> OHRC focus group participant – slightly modified from verbatim to retain anonymity.

<sup>499</sup> The key role of Indigenous Spirituality, culture and tradition in enhancing health and well-being, in the context of such histories of displacement and oppression, are well recognized in the social scientific literature. See Fleming, J. and Ledogar, R.J. (2008). Resilience and Indigenous Spirituality: A Literature Review. *Pimatisiwin: A Journal of Aboriginal and Indigenous Community Health*, 6(2). See also Waldram, J.B. (1997). *The Way of the Pipe: Aboriginal Spirituality and Symbolic Healing in Canadian Prisons* (First edition). Toronto: University of Toronto Press, Higher Education Division.

<sup>500</sup> OHRC focus group participant.

<sup>501</sup> Jock, Christopher Ronwaien:te. (2000). Native American Spirituality for Sale: Sacred Knowledge in the Consumer Age. In L. Irwin (Ed.), *Native American Spirituality – A Critical Reader*. Lincoln: University of Nebraska Press. Cited in Dr. Karen Martin-Hill's paper “*Traditional Medicine in Contemporary Contexts – Protecting and Respecting Indigenous Knowledge and Medicine*” (Ottawa: National Aboriginal Health Organization, 2003), as cited by Justice Gethin B. Edward in *Hamilton Health Sciences Corp. v. D.H.*, 2014 ONCJ 603 at para.78; additional reasons for judgment *Hamilton Health Sciences Corp. v. D.H.*, 2015 ONCJ 229 (CanLII). Dr. Hill, who testified during the hearing in *D.H.*, is a Six Nations medical doctor schooled in “western medicine” but who also operates a medical practice on Six Nations with Alba Jamieson, who practices traditional medicine.

<sup>502</sup> In addition to conducting six focus groups in 2014-15 (one in Waterloo, one in Toronto, three in Ottawa and one in Thunder Bay) with a total of 23 First Nation, 10 Métis and 14 Inuit participants, Indigenous people also took part in the OHRC’s 2012 Policy Dialogue on creed and 2013 online survey on creed human rights, which had 33 Indigenous respondents.

<sup>503</sup> Illustrating the holistic nature of Indigenous Spirituality, the Aboriginal Education Directorate (of Manitoba) explains: “Many First Nations share the concept of ‘mino-pimatisiwin,’ which means ‘good life’ in both Cree and Ojibwe. Implicit in this is the understanding that all of life is a ceremony; that the sacred and the secular are parts of the whole; that people are whole beings (body, mind, spirit, emotion); and that ‘mino- pimatisiwin’ is achieved by taking care of all aspects of one’s self.” Manitoba Education and Advanced Learning. (2014). *Smudging Protocol and Guidelines For School Divisions*. Aboriginal Education Directorate. Retrieved July 24, 2015 from [www.edu.gov.mb.ca/aed/publications/pdf/smudging\\_guidelines.pdf](http://www.edu.gov.mb.ca/aed/publications/pdf/smudging_guidelines.pdf).

<sup>504</sup> For instance, we heard that for many people, Indigenous Spirituality is as much about language and culture, ways of knowing and a kinship to the land, as it is about traditional ceremonial practices such as smudging or the sacred pipe. Yet organizations tend only to view the latter as being protected under the Code ground of creed. For a review of legal approaches to Indigenous Spirituality, see Burrows, *supra* note 497; Ross, M.L. (2005). *First Nations Sacred Sites in Canada's Courts*. University of British Columbia Press; Beaman, L. (2006). Aboriginal spirituality and the construction of freedom of religion. In Beaman, L. (Ed.). *Religion and Canadian Society: Traditions, Transitions, and Innovations* (pp. 229-241). Toronto: Canadian Scholars Press Inc. These scholars show how religious freedom and equality laws have often been interpreted to protect only a narrow range of what is considered sacred and spiritual from an Indigenous perspective. They further highlight how the very categories of “creed” and “religion” – produced primarily out of a Christian historical experience and tradition – in effect position western

European conceptions of religion as “the norm against which Aboriginal spirituality is measured” or “accommodated” (Beaman, 2006, *ibid.*, p. 237; see also Burrows, *ibid.*, and Beaman, L. (2012). The missing link: tolerance, acceptance, accommodation and...equality. *Canadian Diversity*, 9(3), 16-19. Retrieved from [www.ohrc.on.ca/en/creed-freedom-religion-and-human-rights-special-issue-diversity-magazine-volume-93-summer-2012/missing-link-tolerance-accommodation-and-equality](http://www.ohrc.on.ca/en/creed-freedom-religion-and-human-rights-special-issue-diversity-magazine-volume-93-summer-2012/missing-link-tolerance-accommodation-and-equality).

<sup>505</sup> OHRC focus group participant. This viewpoint was heard repeatedly during OHRC engagements with Indigenous peoples. Another participant stated: “Within our school...we’re trying to be proactive by creating [a religious accommodation resource]. When that came up I knew there had to be a part for an Aboriginal perspective. But we’re not a religion, or a faith. So how do we fit in there?”

<sup>506</sup> Fleming and Ledogar, 2008, *supra* note 499, p. 47.

<sup>507</sup> John Burrows, University of Victoria Faculty of Law professor and member of the Chippewas of Nawash First Nation, 2008, *supra* note 497.

<sup>508</sup> 2002, p. 136-137. Beaman, L. (2002). Aboriginal Spirituality and the Legal Construction of Freedom of Religion. *Journal of Church and State*, 44 (1).

<sup>509</sup> For example, see *Huang v. 1233065 Ontario*, *supra* note 79.

<sup>510</sup> Most businesses and services in Ontario fall under provincial law (for a list of private-sector employers under federal jurisdiction see [www.hrsdc.gc.ca/eng/labour/equality/employment\\_equity/private\\_crown/list/index.shtml](http://www.hrsdc.gc.ca/eng/labour/equality/employment_equity/private_crown/list/index.shtml)). Jurisdiction can be complex when it comes to Indigenous organizations, and is determined on a case-by-case basis. Generally, the question to ask is not so much *the location* of the service or employment (e.g. on or off reserve) but rather *the nature or kind* of employment/service provided, i.e. whether it is the kind of service or employment otherwise generally considered to fall under provincial jurisdiction (See *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, [2010] 2 SCR 696, 2010 SCC 45 (CanLII)). However, if the housing, employment or service is provided by a First Nations government or band or its agencies, or if the claim is related to federal funding, it may fall under federal jurisdiction. Organizations under federal jurisdiction may still have a duty to accommodate the religious and spiritual practices of Indigenous peoples under the *Canadian Human Rights Act* and the *Canadian Constitution*. For more on appropriate jurisdiction and the rights of Indigenous peoples under the *Canadian Human Rights Act*, see the Canadian Human Rights Commission's (2010) “Your Guide to Understanding the Canadian Human Rights Act,” Retrieved June 22, 2015 at [www.doyouknowyourrights.ca/sites/nai-ina/files/pdf/guidechra\\_ojibwe.pdf](http://www.doyouknowyourrights.ca/sites/nai-ina/files/pdf/guidechra_ojibwe.pdf).

<sup>511</sup> See section 9.5 for legal test for the duty to accommodate and 10.9 for more on undue hardship.

There may also be a duty to accommodate a person’s belief or practice on other intersecting grounds (e.g. ancestry, ethnic origin, etc.).

<sup>512</sup> See for instance *Kelly* BCHRT *supra* note 79. See also *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568 at para. 275 (CanLII) [*Ktunaxa Nation*] which found Indigenous beliefs to be a religion under s. 2(a) of the *Charter*. On appeal, the British Columbia Court of Appeal agreed with this determination; 2015 BCCA 352 (CanLII) at para. 57.

<sup>513</sup> See section 9.6 for more on legitimate reasons for not accepting an accommodation request in good faith.

<sup>514</sup> In *Forer* (*supra* note 79), the Court of Appeal for Ontario noted the variety of religions and religious practices in Canada and stressed that what may be regarded as a religious belief or practice by one religion may be regarded as secular by another. Religion should not be determined from the perspective of the “majority” or “mainstream” in society. At the same time, the Supreme Court of Canada has stated that there are objective elements to the analysis of whether a practice is creed-based; *Bennett*, *supra* note 71 at para 7, citing Supreme Court decision in *Amselem* (*supra* note 5) at para. 39. For more about determining if a belief is in fact religious or creed-based, see section 9.5. See also section 9.6 for more on appropriate forms of inquiry.

<sup>515</sup> For more on when it is appropriate to inquire further about an accommodation need or request, and the appropriate scope and nature of this inquiry, see section 9.6.

<sup>516</sup> For more on the procedural and substantive components of the duty to accommodate, see section 9.2.

<sup>517</sup> Section 25 of the *Charter* states:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

<sup>518</sup> Section 35 of the *Constitution Act, 1982* states:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of “aboriginal peoples of Canada”

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada. Marginal note: Land claims agreements

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

Marginal note: Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Section 35 applies to Aboriginal or treaty rights that existed as of 1982 when the *Constitution Act, 1982* came into effect and is subject to the test set out in *R. v. Van der Peet*. [1996] 2 S.C.R. 507, 1996 CanLII 216 (SCC).

<sup>519</sup> *Ibid.* at para. 30.

<sup>520</sup> *Ibid.* at paras. 46 and 63.

<sup>521</sup> The *Code* right to be free from discrimination based on creed extends to Indigenous practices, customs and traditions that are not protected by Section 25 or 35 of the *Constitution Act*. The duty to accommodate under the *Code* may be triggered where it can be shown that there is a negative (adverse) impact of a rule, practice, standard or requirement on an Indigenous person's sincerely held creed belief, whether or not this is continuous with or integral to a pre-contact Indigenous tradition.

<sup>522</sup> The United Nations General Assembly adopted the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) on September 13, 2007 by an affirmative vote of 143 states. While Canada was originally one of four countries (along with the US, Australia and New Zealand) to vote against its adoption in 2007, on March 3, 2010, Canada declared that it “will take steps to endorse this aspirational document in a manner fully consistent with Canada’s Constitution and laws” (Canada, Speech from the Throne, 3 March 2010, Retrieved June 24, 2010 at [www.sft-ddt.gc.ca/eng/media.asp?id=1388](http://www.sft-ddt.gc.ca/eng/media.asp?id=1388)).

<sup>523</sup> UN declarations provide internationally recognized “standards” for measuring countries’ compliance with international human rights law (including norms, covenants and conventions). According to UN Special Rapporteur S. James Anaya – who announced in August 2008 that he will measure state conduct *vis-à-vis* Indigenous peoples by the yardstick of UNDRIP – UNDRIP represents:

an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law [...] The principles and rights affirmed in the Declaration constitute or add to the normative frameworks for the activities of United Nations human rights institutions, mechanisms and specialized agencies as they relate to indigenous peoples.

(Human Rights Council, 2008. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya, UN Doc. A/HRC/9/9 of 11 August 2008, paras. 85 and 88. fn 30, p5-6: 30).

“While it is not in itself, technically, and under the positive law of the United Nations Charter, legally binding, ...[a] declaration may be or become binding to the extent its various provisions, key parts or principles embedded in it, are backed up by conforming state practice and *opinio juris*” (International Law Association, 2010, *supra* note 17, pp.1,6).

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UNDRIP, moreover, reflects legal commitments that are already enshrined in existing international treaty commitments and may be considered international “customary law” and have legal effect as such (*ibid.*; see *ibid.* for more on the legal status of UNDRIP in international law). This is reflected in part in the first preamble paragraph of the Declaration which states that in adopting UNDRIP, the General Assembly was “[g]uided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter” (emphasis added). According to the International Law Association’s (2010) Conference Report (*ibid.*, p.5), “this text clearly implies that respect of the UNDRIP represents an essential prerequisite in order for States to comply with some of the obligations provided for by the UN Charter.”

<sup>524</sup> UNDRIP, *ibid.* Article 43.

<sup>525</sup> Also see for example Articles 8, 10, 11, 12(2), 13, 18.

<sup>526</sup> Kelly BCHRT *supra* note 79.

<sup>527</sup> Meiorin, SCC, 1999, *supra* note 241 at para. 68.

<sup>528</sup> See section 9.4 for more on appropriate accommodation.

<sup>529</sup> For more on handling health and safety risks and accommodating up to the point of undue hardship, see section 9.9.

<sup>530</sup> Meiorin, SCC, *supra* note 241.

<sup>531</sup> See section 9.1 for more on inclusive design and section 12 on preventing and responding to discrimination.

<sup>532</sup> Meno Ya Win derives from the Oji-Cree word “miinoyawin,” which means health, wellness, wellbeing and the wholeness of the individual. The name reflects the health centre’s approach to care which is “achieved when all aspects of a person – physical, emotional, mental and spiritual – are whole and in balance.” (SLMHC brochure, Points of Interest – Stories and Traditions, p. 3).

<sup>533</sup> The health centre serves residents of Sioux Lookout and the surrounding area, the Nishnawbe-Aski northern communities, the Treaty #3 community of Lac Seul First Nation, as well as Hudson, Pickle Lake, Savant Lake. Eighty-five percent of SLMHC’s patients live in communities with no road access and must fly to Sioux Lookout to receive care. The catchment area serves approximately 30,000 people annually and covers the largest health care area in Ontario, serving some 28 northern Anishinaabe communities and four southern communities.

<sup>534</sup> The Sioux Lookout Four Party Hospital Services Agreement establishing the hospital was drawn up by members of the Sioux Lookout Hospital Negotiating Committee after four years of research and negotiations. Parties to the agreement included representatives from: the 28 First Nations Chiefs of the Sioux Lookout Zone; the Town of Sioux Lookout; and the Governments of Canada and Ontario.

<sup>535</sup> SLMHC is run by a volunteer Board of Directors composed of members representing First Nations communities and the communities of Sioux Lookout, Hudson, Pickle Lake, Savant Lake and their surrounding areas. There is proportional representation on the Board, with First Nations appointing 10 members, and southern communities appointing five members, as well as two doctors and a First Nations traditional healer. The Board is accountable to the communities served and is charged with providing regular information to those communities in culturally appropriate ways.

<sup>536</sup> Indigenous design elements are pervasive and include: a circular perimeter around the property to represent the Medicine Wheel and Anishnaabe philosophy of life; the orienting of wards and units in accordance with the cardinal directions of the Medicine Wheel and Circle of Life teachings (e.g. maternity ward on the east of the property and palliative care unit on the west of the property, in accordance with Anishinaabe beliefs about the seven stages of life as represented by the cardinal directions of the medicine wheel, beginning in the east and moving across the wheel to the west); a main hallway shaped in the form of an upturned canoe lit from above by a skylight; two courtyards designed to resemble a winding river bed; and four large Grandfather Rocks in the four cardinal directions near the main entrance of the building, with a fire pit in the centre for special and sacred ceremonies.

<sup>537</sup> For more on cultural competency, including its definition, see section 12.1.

<sup>538</sup> See section 12.

<sup>539</sup> Some Cree view goose food as “medicine” that has an important healing function.

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<sup>540</sup> The OHRC heard about such activities during its focus groups. For more information on the significance of the goose hunt and Cree walk-out ceremony, see the AANISCHAAUKAMIKW Cree Cultural Institute website at [www.creeculture.ca](http://www.creeculture.ca) March 12, 2015).

<sup>541</sup> There may also be a duty to accommodate people on the grounds of family status and ancestry.

<sup>542</sup> We heard that names may establish spiritual relations and connections between people and a person may take on the namesake's characteristics.

<sup>543</sup> See section 5.1. for more about the *Code's* primacy and sections 9.8 and 9.11.4 for more on the relationship between the *Code* and collective agreement provisions in unionized environments.

<sup>544</sup> Chiefs of Ontario Part 2 submission para.76, as cited on p.135 of the *Ipperwash Inquiry Report*. (2007). Report of the Ipperwash Inquiry, The Honorable Sidney B. Linden, Commissioner. Volume 2, Chapter 6, Aboriginal Burial and Heritage Sites. Toronto: Publications Ontario (web: [www.ipperwashinquiry.ca](http://www.ipperwashinquiry.ca)). The Government of Ontario established the Ipperwash Inquiry under the *Public Inquiries Act* to inquire and report on events surrounding the death of Dudley George, who was shot in 1995 during a protest by First Nations representatives at Ipperwash Provincial Park and later died. The Inquiry was also mandated to make recommendations that would avoid violence in similar circumstances in the future. The hearings began in Forest, Ontario in July 2004 and ended in August 2006, under the direction of an appointed Commissioner, the Honourable Sidney B. Linden. The report, made public on May 31, 2007, is available at [www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/](http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/) (Last retrieved June 22, 2015).

<sup>545</sup> *Ibid.* "The European presence is relatively recent, dating back about 400 years. Thus, the 'post-contact' period represents less than 4% of the human history of this province" (*ibid.*).

<sup>546</sup> "Today, the provincial government owns approximately 87% of the land in Ontario. Approximately 12% is privately owned. First Nations reserve land and federally owned lands such as national parks make up the remaining 1%. Not surprisingly, most Aboriginal burial and heritage sites are located on lands outside reserve boundaries" (*ibid.*, referencing Darlene Johnston's "Respecting and Protecting the Sacred" [Ipperwash Inquiry research paper]).

<sup>547</sup> According to the *Ipperwash Inquiry Report* findings:

It is possible that 8,000 heritage sites were destroyed in the Regional Municipalities of Halton, Durham, Peel, and York between 1951 and 1991, most of them before 1971. It has been reported that approximately 25% of these sites represented significant archaeological resources, which merited some degree of archaeological investigation because they could have contributed meaningfully to our understanding of the past, or warranted outright protection because they were culturally significant places for the First Nation descendants of the people who created them. There has been a "marked reduction" in the rate of destruction of archaeological sites throughout much of the province...Yet the potential for loss in the future remains great because of "continued growth and development" particularly in Southern Ontario, where there is the most development (*ibid.*, pp. 136-7 citing figures from Archaeological Services Inc., "Legislation," [www.archaeologicalservices.on.ca/legislation.htm](http://www.archaeologicalservices.on.ca/legislation.htm) [retrieved January 24, 2007]).

The report further states: "It appears that pressure related to this issue may be building. More confrontations are foreseeable if we do not act quickly and thoughtfully" (*ibid.*, p. 129). See also Ross, *supra* note 504 and Burrows, *supra* note 497 for more on the nature of threats to Indigenous sacred sites and the role of Canadian law in relation to this.

<sup>548</sup> For example, see *R. v. Sioui*, [1990] 1 S.C.R. 1025. Four Huron men from the Lorette Indian Reserve in Quebec who entered Jacques-Cartier Park (a provincial park near the reserve) to practise certain ancestral customs and religious rites were convicted of cutting down trees, camping, and making fires in areas not designated for such purposes. The Quebec Court of Appeal overturned the conviction. The Attorney General of Quebec appealed. The Supreme Court of Canada, in a unanimous decision, dismissed the appeal. The Court found that the Hurons at Lorette had entered into a treaty with the British in 1760 that guaranteed their right to carry on their customs and religious rites at places within the "entire territory frequented by the Hurons at the time, so long as the carrying on of the customs and rites is not incompatible with the particular use made by the Crown of this territory." [at p. 1070] The Court held that the Attorney General of Quebec had failed to establish that the exercise of Huron rites and customs was incompatible with the Crown's occupation of the land in the form of a park. See also *Kelly Lake Cree Nation v. Canada (Ministry of Energy and Mines)*, [1998] B.C.J. No. 2471, [1999] 3 C.N.L.R. 126 at para.

23 (B.C.S.C.) (QL) [*Kelly Lake Cree*] in which the Court accepted that the Twin Sisters Peaks area in British Columbia had significant spiritual importance to the Kelly Lake Cree Nation and the Sauteau First Nation. On the connection between the land and the exercise of religious rights, the Court stated (at paras. 189-190): “the area of the Twin Sisters is a territorial aspect of the exercise of religious rights and customs even though there is a dearth of evidence of actual physical exercise of the religious customs. The religious rights and customs lie in the prophesy and the intellectual stewardship with which First Nations people view the area of the Twin Sisters. I accept that there is a territorial aspect to the KLCN members' religious practices that involves the Twin Sisters mountains even though there is no actual use in current or recent history of this area for such purposes.”

<sup>549</sup> These are primarily well-known due to the highly publicized and dramatic conflicts that have surrounded Indigenous efforts to protect ancestral burial grounds from desecration and destruction, such as at Oka and Ipperwash.

<sup>550</sup> “Anishnaabeg’ is the term for people who speak Anishinaabemowin, so it would include Odawa, Potawatomi, Ojibway, Mississauga, and some other tribes in the US” (Darlene Johnston, “Respecting and Protecting the Sacred,” Ipperwash Inquiry research paper, as cited in Ipperwash Inquiry Report, *ibid.*, at p. 148.

<sup>551</sup> *Ibid.* at p. 130. For another detailed account of the sacred nature of ancestral burial sites to the Anishnaabeg, see the affidavit of Professor Darlene Johnston, Assistant Professor at the University of Toronto's Faculty of Law, as cited at para. 45 of *Hiawatha First Nation v. Ontario (Minister of the Environment)*, 2007 CanLII 3485 (ON SCDC). This case involved a land dispute in the Pickering area.

<sup>552</sup> Ipperwash Inquiry Submission by the Estate of Dudley George and Members of Dudley George's Family, p. 46, as cited in the *Ipperwash Inquiry Report*, *supra* note 546 p. 133. The submission went on to state: “This explains why the Chief and council made a point of asking that the burial ground in Ipperwash Park be fenced off and preserved when it was discovered in 1937. It is also half the reason why the Stony Pointers occupied the Park in September 1995 – to reclaim the burial grounds of their ancestors that had been desecrated.”

<sup>553</sup> “Under Siege: How the People of the Chippewas of Nawash Unceded First Nation Asserted their Rights and Claims and Dealt with the Backlash” (inquiry project), p.21, as cited in p. 131 of *Ipperwash Inquiry Report (ibid.)*.

<sup>554</sup> *Ipperwash Inquiry Report*, *supra* note 544 p. 148, referencing the Canada Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, vol. 2: Restructuring the Relationship* (Ottawa: Supply and Services Canada, 1996), ch. 4, “Lands and Resources,” recommendations 2.4.58, 3.6.1, and 3.6. Note, however, that the Chiefs of Ontario rejected the “creation of an ‘inventory’ of sacred sites” as recommended by RCAP, stating in their submission to the Ipperwash Inquiry (at para.77): “Any attempt to do so would in our view, not only serve to draw attention to areas that ought not be exposed and brought to the attention of the larger public and thereby put these areas at real risk of exploitation, but may have the illusory effect of placing limits on the number of areas to be included in such an inventory” (p.135).

<sup>555</sup> Recommendation #22, *ibid.*, pp. 146, 138-139, and 130. See pp. 146-147 for further recommendations. The report further states: “In my view, the best way to avoid Aboriginal occupations regarding Aboriginal burial and heritage sites is to engage Aboriginal peoples in the decision-making process. This kind of participation is consistent with the honour of the Crown and with the general themes of this report.” (p. 129).

<sup>556</sup> Truth and Reconciliation Commission of Canada (2015). *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation*, p.312 Retrieved June 24, 2015 at [www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec\\_Summary\\_2015\\_05\\_31\\_web\\_o.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf)

<sup>557</sup> See the *Ipperwash Inquiry Report (supra* note 544) for a review of the complex provincial legal regime governing Indigenous heritage (including sacred) sites and burial grounds, and the strengths and limitations of existing legislation and regulations; for example: the *Cemeteries Act*; *Funeral, Burial and Cremation Services Act, 2002*; *Public Lands Act*; *Environmental Assessment Act*; *Ontario Heritage Act*; *Planning Act*; *Ontario Planning and Development Act, 1994*; and since 2011 Standards and Guidelines for Consultant Archaeologists, etc.

<sup>558</sup> See OHRC submission regarding Ministry of Municipal Affairs and Housing proposed amendments to the Provincial Policy Statement on land use planning, November 23, 2012, online: [www.ohrc.on.ca/en/mmah-provincial-policy-statement-review-land-use-planning-ohrc-submission](http://www.ohrc.on.ca/en/mmah-provincial-policy-statement-review-land-use-planning-ohrc-submission).



<sup>559</sup> Available online at [www.mah.gov.on.ca/AssetFactory.aspx?did=10463](http://www.mah.gov.on.ca/AssetFactory.aspx?did=10463) (retrieved June 24, 2015).

<sup>560</sup> See Provincial Policy Statement 2014: Key Changes by Policy Area, online: [www.mah.gov.on.ca/AssetFactory.aspx?did=10546](http://www.mah.gov.on.ca/AssetFactory.aspx?did=10546)

<sup>561</sup> For example, see Supreme Court decisions in *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 S.C.R. 511; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* 2004 SCC 74, [2004] 3 S.C.R. 550; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 SCC 69, [2005] 3 S.C.R. 388. See also the more recent SCC decisions of *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 and *Beckman v. Little Salmon/Carmacks First Nation* 2010 SCC 53, [2010] 3 S.C.R. 103 where the Supreme Court further explained that the duty to consult is a constitutional duty that involves the honour of the Crown and must be met.

<sup>562</sup> However, in *Kelly Lake Cree*, *supra* note 548 and *Ktunaxa Nation*, *supra* note 512, while the courts acknowledged s. 2(a) could apply, they found, on the facts before them, that the projects at issue (a gas well and ski resort) would not violate Indigenous religious rights under the *Charter*. The courts stated that s. 2(a) does not “protect a concept of stewardship of a place of worship under the protection of religious freedom” (*Kelly Lake Cree* at para. 195) or restrain and restrict the behaviour of others who do not share a group’s religious beliefs in order to preserve subjective religious meaning associated with a place (*Ktunaxa Nation*, BCCA at paras. 73-74).

For an overview of how Canadian courts have dealt with Indigenous rights claims relating to sacred sites, see Ross (*supra* note 504) and Burrows (*supra* note 497). For an overview of how the religious freedom claims of Indigenous peoples relating to sacred sites have fared in Australia, Canada, New Zealand and the United States, see Collins, Richard B. (2003). Sacred Sites and Religious Freedom on Government Land. 5 U. Pa. J. Const. L. 241.

<sup>563</sup> There are several UNDRIP articles that should be considered, such as:

**Article 8**

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
  - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
  - (b) Any action which has the aim or effect of *dispossessing them of their lands, territories or resources*;

...

**Article 11**

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

**Article 12**

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; *the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.*
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with Indigenous peoples concerned.

**Article 18**

Indigenous peoples have the *right to participate in decision-making in matters which would affect their rights*, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

**Article 25**

Indigenous peoples have the *right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources* and to uphold their responsibilities to future generations in this regard (emphasis added).

<sup>564</sup> *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* [31 Aug 2001], Inter-Am. Ct. H.R. (Ser.C) No 79, online: The Organization of American States [www.oas.org](http://www.oas.org) at para 149; cited in Ross, *supra* note 504, p. 1.

<sup>565</sup> Ross *ibid.*, p. 1. For more on the significance of this decision, see also the International Law Association's (2010) Interim Conference Report, *supra* note 17.

<sup>566</sup> IACHR in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *supra* note 564 at para. 149; cited in Ross *ibid.* According to the International Law Association (*supra* note 17, p.47), the IACHR has since "proclaimed a number of other significant principles concerning land rights and cultural rights of indigenous peoples, particularly: the fact of indigenous peoples being precluded to performing their rituals according to their own traditions (namely the exercise of their customary practices aimed at properly honouring the deceased) and of being separated from their traditional lands amounts to 'emotional, psychological, spiritual and economic hardship-suffering to such a degree as to result in the state's violation of Art 5(1)' [American Convention on Human Rights] (which prescribes the right of every person 'to have his physical, mental, and moral integrity respected')[Endnote 311: See *Case of the Moiwana Community v. Suriname*, Series C No. 124, Judgment of 15 June 2005 para. 98 ff[...]." The IACHR has also ruled in support of the principle of "establish[ing] memorials to keep the memory of the wrong suffered by indigenous peoples" (International Law Association, *supra* note 17, p. 48, paraphrasing IACHR, *ibid.* at para. 218) – a principle affirmed by the Truth and Reconciliation Commission of Canada, including in its 2015 Final Report (Retrieved June 24, 2015 from [www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec\\_Summary\\_2015\\_05\\_31\\_web\\_o.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf)).

<sup>567</sup> OHRC focus group participant.

<sup>568</sup> The hospital also took measures to comply with such regulations where possible, short of undue hardship. This included creating a separate kitchen and freezer to store wild game captured by local First Nations hunters, to comply with regulations restricting the use and storage of such foods in hospital settings.

<sup>569</sup> For example, one ceremony we heard about involved burning a small amount of traditional food in a ceremonial birch bark spirit bowl, where it may be served as an offering or put beside a tree, as an offering to the tree.

<sup>570</sup> This example is based on the (2014) religious accommodation guidelines of the York Region District School Board, *supra* note 280.

<sup>571</sup> *Olarte v. DeFilippis and Commodore Business Machines Ltd. (No. 2)* (1983), 4 C.H.R.R. D/1705 (Ont. Bd. Of Inq.), *aff'd* (1984), 49 O.R. (2d) 17 (Div. Ct.).

<sup>572</sup> See *Payne v. Otsuka Pharmaceutical Co. (No. 3)* (2002), 44 C.H.R.R. D/203 (Ont. Bd. Inq.) at para. 63: "The nature of when a third party or collateral person would be drawn into the chain of discrimination is fact specific. However, general principles can be determined. The key is the control or power that the collateral or indirect respondent had over the claimant and the principal respondent. The greater the control or power over the situation and the parties, the greater the legal obligation not to condone or further the discriminatory action. The power or control is important because it implies an ability to correct the situation or do something to ameliorate the conditions."

<sup>573</sup> See *Wamsley v. Ed Green Blueprinting*, 2010 HRTO 1491 (CanLII).

<sup>574</sup> *Kinexus Bioinformatics Corp. v. Asad*, 2008 BCHRT 293; applications for judicial review dismissed *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33 (CanLII). See also *Dastghib v. Richmond Auto Body Ltd. (No. 2)*, *supra* note 134.

<sup>575</sup> *Wall v. University of Waterloo* (1995), 27 C.H.R.R. D/44 at paras. 162-67 (Ont. Bd. Inq.). These factors help to assess the reasonableness of an organization's response to harassment, which can affect the

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legal consequences that flow from the harassment. See also *Laskowska v. Marineland of Canada Inc.*, 2005 HRTO 30 (CanLII).

<sup>576</sup> Ensuring full accessibility means making sure that barriers to employment, services and housing for people with diverse religions and creeds are not embedded into new organizations, facilities, services or programs. It also means identifying and removing barriers where they already exist. A barrier removal process should include reviewing an organization's accessibility, policies, practices, decision-making processes and overall culture. When designing inclusively and removing barriers, organizations should consult with people of diverse creed faiths to gain a greater understanding of people's diverse needs, and how to most effectively meet them.

<sup>577</sup> Education on human rights works best when accompanied by a strong proactive strategy to prevent and remove barriers to equal participation, and effective policies and procedures for addressing human rights issues that do arise. Education on creed accommodation needs is not necessarily enough to change the behaviour of individuals or organizational culture. Programs that focus on education, raising awareness and changing attitudes should also include evaluating whether behavioural change has resulted in the short and long term, and if discriminatory barriers in the organization or system have changed as a result.

<sup>578</sup> The stigma and stereotypes associated with some creeds, lack of knowledge about one's rights, and fear of reprisal are factors that may contribute to people not knowing how to complain or avoiding making a complaint, even if they feel their human rights are being violated. Organizations should make sure that they provide adequate information and training about complaint procedures, and clearly outline that people will not experience reprisal for making a complaint.

<sup>579</sup> Developing anti-harassment and anti-discrimination policies, an internal human rights procedure, and an accommodation policy and procedure are part of an overall human rights strategy, but these should also be developed with the specific needs of people of diverse religions and creeds in mind. This may require developing a separate policy and/or guideline dealing specifically with human rights and creed and accommodating creed observances.

<sup>580</sup> Available online at: [www.ohrc.on.ca/en/policy-primer-guide-developing-human-rights-policies-and-procedures](http://www.ohrc.on.ca/en/policy-primer-guide-developing-human-rights-policies-and-procedures).

<sup>581</sup> Cross, T. L., Bazron, B. J., Dennis, K. W., & Isaacs, M. R. (1989). *Towards a culturally competent system of care*. Washington, DC: CAASP Technical Assistance Center. Cultural competence, in this view, includes not only attitudes, awareness, knowledge, and skills at the interpersonal level, but also policies and structures at the institutional and systemic level which enable people and organizations to work effectively in cross-cultural situations. Cross *et al.* define culture as "the integrated pattern of human behavior that includes thoughts, communication styles, actions, customs, beliefs, values, and institutions of a racial, ethnic, religious or social group" (1989:13). More recent literature also refers to LGBTQ "cultures," among other sub-cultural communities.

<sup>582</sup> *Streeter, supra* note 154, see para. 38 in particular.

<sup>583</sup> *Widdis v. Desjardins Group/Desjardins General Insurance*, 2013 HRTO 1367 (CanLII).

<sup>584</sup> *Qureshi v. G4S, supra* note 276.

<sup>585</sup> For more on *Code* exemptions, see section 8. For more on special program hiring, see the OHRC's *Your guide to special programs and the Human Rights Code*.

<sup>586</sup> Note that case law developments, legislative amendments and/or changes in the OHRC's own policy positions that take place after a document's publication date will not be reflected in that document. For more information, contact the Ontario Human Rights Commission.

<sup>587</sup> In *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 at para. 53 (Ont. Bd. Inq.), the Board applied the United States Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (4<sup>th</sup> Cir. 1971) to conclude that OHRC policy statements should be given "great deference" if they are consistent with *Code* values and are formed in a way that is consistent with the legislative history of the *Code* itself. This latter requirement was interpreted to mean that they were formed through a process of public consultation.

<sup>588</sup> For example, the Ontario Superior Court of Justice quoted at length excerpts from the OHRC's published policy work in the area of mandatory retirement and stated that the OHRC's efforts led to a "sea change" in the attitude to mandatory retirement in Ontario. The OHRC's work heightened public

awareness of this issue and was at least partially responsible for the Ontario government's decision to pass legislation amending the *Code* to prohibit age discrimination in employment after age 65, subject to limited exceptions. This amendment, which became effective December 2006, made mandatory retirement policies illegal for most employers in *Ontario: Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 16 at para. 45 (Sup.Ct.). See also *Krieger v. Toronto Police Services Board*, *supra* note 340 and *Eagleson Co-Operative Homes, Inc. v. Théberge*, [2006] O.J. No. 4584 (Sup.Ct. (Div.Ct.)) in which both the HRTO and the Court applied the OHRC's *Policy and guidelines on disability and the duty to accommodate*, available at: [www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2](http://www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2).



