

# **DIGGING INTO PROHIBITED GROUNDS: AN UPDATE ON WORKPLACE ACCOMMODATION**

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## INTRODUCTION

Over the last decade, courts, tribunals and other adjudicators in Canada have broadened the application of human rights legislation to circumstances that may not, on their face, appear to engage an individual's human rights. For an individual's protection under human rights law to be triggered, the action alleged to constitute discrimination must be based on a prohibited ground. In Ontario, the *Human Rights Code* (the "Code") enumerates 14 prohibited grounds of discrimination. In most cases, it may be obvious as to what prohibited ground an individual will base his or her claim or potential claim of discrimination on. However, sometimes it may be less clear.

This paper will focus on three prohibited grounds of discrimination that have posed challenges in human rights and accommodation in the workplace. Those three prohibited grounds are disability, religion and sex. With respect to disability and religion, this paper will illustrate how it may not always be obvious that an employee's right to be free from discrimination on the basis of a prohibited ground has been triggered. With respect to sex as a prohibited ground of discrimination, this paper will focus on the unique circumstances relating to the employment of transgendered/transsexual individuals in positions that, for *bona fide* reasons, require employees to belong to a specific gender.

## PROHIBITED GROUNDS AND THE DUTY TO ACCOMMODATE

Under the Ontario *Human Rights Code*, a person's right to be free from discrimination in employment is set out in section 5:

### Employment

**5. (1)** Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.

## Harassment in employment

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability.

Accordingly, employers are prohibited from discriminating against employees based on any of the 14 prohibited grounds of discrimination enumerated in section 5 of the *Code*. Employers must generally ensure that workplace standards, including, but not limited to, workplace rules, policies and position qualifications, do not result in an employee or group of employees being treated differently on the basis of a prohibited ground. If workplace standards result in adverse treatment of employees on the basis of a prohibited ground, employers are obligated to accommodate those employees to the point of undue hardship.

An employer's duty to accommodate to the point of undue hardship is one of the requirements that must be met in order to defend a workplace standard as a *bona fide* occupational requirement ("BFOR"). A workplace standard that is otherwise discriminatory may be permissible if that standard is a BFOR. To qualify as a BFOR, the workplace standard must meet all of the following three requirements that have been established by the Supreme Court of Canada in the seminal 1999 decision commonly known as "*Meiorin*":

- (1) The employer adopted the standard for a purpose rationally connected to the performance of the job;
- (2) The employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and

(3) The standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that the employer cannot accommodate individual employees sharing the characteristics of the employee claiming discrimination without imposing undue hardship upon the employer.

*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

Various issues often arise for employers in the course of fulfilling their duty to accommodate. These may include issues such as the proper form or type of accommodation the employer is obligated to provide, the length of time that an employer is required to accommodate an employee, whether an employer's accommodation efforts have crossed the threshold of undue hardship, and whether an employee's circumstances even trigger the employer's duty to accommodate.

Indeed, and as discussed herein, in some circumstances it is unclear or debatable as to whether an individual's request for accommodation stems from a prohibited ground of discrimination.

## **DIGGING DEEPER TO FIND A PROHIBITED GROUND**

### **Perceived and Past Disabilities**

"Disability" is broadly defined in the *Code* and the case law.

Subsection 10(1) of the *Code* provides the following definition of "disability":

(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical

reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,

(b) a condition of mental impairment or a developmental disability,

(c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

(d) a mental disorder, or

(e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*

Furthermore, subsection 10(3) states that “disability” includes past or perceived disabilities:

### **Past and presumed disabilities**

[\(3\)](#) The right to equal treatment without discrimination because of disability includes the right to equal treatment without discrimination because a person has or has had a disability or is believed to have or to have had a disability.

In addition, the Supreme Court of Canada has adopted an expansive definition of disability. In *Quebec v. Montreal (City)*; *Quebec v. Boisbriand (City)*, [2000] 1 S.C.R. 665, the Supreme Court stated as follows:

Whatever the wording of the definitions used in human rights legislation, Canadian courts tend to consider not only the objective basis for certain exclusionary practices (i.e. the actual existence of functional limitations), but also the subjective and erroneous perceptions regarding the existence of such limitations. Thus, tribunals and courts have recognized that even though they do not result in functional limitations, various ailments such as congenital physical malformations, asthma, speech

impediments, obesity, acne and, more recently, being HIV positive, may constitute grounds of discrimination. ...

...

It is important to note that a “handicap” may exist even without proof of physical limitations or the presence of an ailment. The “handicap” may be actual or perceived and, because the emphasis is on the effects of the distinction, exclusion or preference rather than the precise nature of the handicap, the cause and origin of the handicap are immaterial. ...

Based on the definitions of “disability” provided under the *Code* and the case law, an employer could potentially discriminate against an employee on the basis of disability, even if the employee is not actually disabled. Specifically, an employer could be found to have discriminated against a non-disabled employee if the employee is subject to differential treatment on the basis of a perceived disability or a past disability.

In *JM v. DY 4 Systems Inc.*, 2010 HRTO 1107 (Keene), the Human Rights Tribunal of Ontario (the “Tribunal”) found that an employer violated the *Code* when it terminated the complainant’s employment, even though the complainant was not actually disabled at the time of her termination. At the time of the termination, however, the employer knew the complainant had previously taken a leave of absence due to an illness and that this absence and illness occurred during a busy period for the employer. The employer also believed there was a possibility that the complainant might require additional time off in the future to deal with potential disability-related needs during an upcoming busy period for the employer. The Tribunal found that the employer’s concern that the complainant might potentially need time off work for disability-related reasons was a factor in the employer’s decision to terminate her employment. Accordingly, the Tribunal concluded that the employer had discriminated against the complainant. The Tribunal ordered the employer to pay to the complainant damages representing 13.5 months of lost salary and \$20,000 in damages for injury to dignity, feelings and self-respect.

In light of this decision of the Tribunal, employers should be cognizant of the broad definition of “disability” that has been provided under the *Code* and the case law. An employee who is not actually “disabled” could potentially have a claim of discrimination if an employer

treats the employee differently because of that employee's past disability or because the employer perceives the employee to be disabled.

### **Non-mainstream Religions**

“Creed” or, in other words, religion, is a prohibited ground of discrimination under the *Code*. The *Code* does not provide a definition of “creed” or religion. In *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, the Supreme Court of Canada provided the following definition of religion:

In order to define religious freedom, we must first ask ourselves what we mean by "religion". While it is perhaps not possible to define religion precisely, some outer definition is useful 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. Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.

...

This understanding is consistent with a personal or subjective conception of freedom of religion, one that is integrally linked with an individual's self-definition and fulfilment and is a function of personal autonomy and choice, elements which undergird the right.

Given its definition of religion, the Supreme Court stated that it is neither necessary nor appropriate to require individuals to establish that their religious beliefs or practices are “objectively recognized as valid by

other members of the same religion.” However, the Supreme Court stated that it is necessary for an individual to hold a sincere belief in his or her religious belief or practice. To determine whether an individual is sincere in his or her religious belief or practice, the Supreme Court adopted the following analysis:

Assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant’s testimony (see *Woehrling, supra*, at p. 394), as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices. It is important to underscore, however, that it 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.

A claimant may choose to adduce expert evidence to demonstrate that his or her belief is consistent with the practices and beliefs of other adherents of the faith. While such evidence may be relevant to a demonstration of sincerity, it is not necessary. Since the focus of the inquiry is not on what others view the claimant's religious obligations as being, but rather what the claimant views these personal religious "obligations" to be, it is inappropriate to require expert opinions to show sincerity of belief. An "expert" or an authority on religious law is not the surrogate for an individual's affirmation of what his or her religious beliefs are. Religious belief is intensely personal and can easily vary from one individual to another. Requiring proof of the established practices of a religion to gauge the sincerity of belief diminishes the very freedom we seek to protect.

Accordingly, an individual may rely on the evidence of his or her faith leader to assist him or her in establishing sincerity. However, it is not necessary to do so.

The above comments of the Supreme Court were made in the context of a decision concerning whether certain restraints imposed by a by-law violated certain individuals' right to freedom of conscience and religion under the Canadian *Charter of Rights and Freedoms*. The Supreme Court's definition of religion, however, has been followed and applied by courts, tribunals and arbitrators in determining whether an individual has been discriminated because of religion under the *Code* or other human rights legislation in Canada.

For example, in *Huang v. 1233065 Ontario*, 2011 HRTO 826 (Flaherty), the Tribunal held that an elderly Chinese-Canadian woman was discriminated on the basis of creed when a seniors' social organization terminated her membership because of her association with and practice of Falun Gong. The parties did not dispute that Falun Gong was a belief system consisting of a series of meditative exercises and reading of scriptures that practitioners believed would enhance their physical and mental well-being and would assist them in their pursuit towards the tenets of truth, compassion and forbearance. However, the social organization urged the Tribunal to find that Falun Gong was more akin to a movement or

cult, rather than a religion. In support of its position, the organization focused on certain aspects of Falun Gong beliefs that would generally be viewed by others as unreasonable. These included the belief that the founder of Falun Gong possessed paranormal abilities, the idea that homosexuality should be condemned in the same manner as how bad haircuts and violence in soccer should be condemned, and that people may be possessed by animals. The Tribunal noted, however, that it was not the Tribunal's role to determine whether a belief system was reasonable, whether a belief system would withstand scientific scrutiny, or whether it espoused beliefs that might be inconsistent with the values of others in society. The Tribunal therefore concluded that Falun Gong was a "creed" within the meaning of the *Code*. As such, the organization discriminated against the elderly woman when it terminated her membership on the basis of her belief and practice in Falun Gong.

The broad definition of "religion" applied by courts and other adjudicators has allowed obscure and unusual practices or belief systems to fall within the meaning of "creed." In *Global Communications Ltd. (Global Television News) v. C.E.P., Local 722-M (Anderson Grievance)*, [2010] C.L.A.D. No. 298 (Levinson), an arbitral decision concerning a unionized, federally-regulated employer, Arbitrator Levinson held that the employer, Global Television News, discriminated against the grievor, a news editor employee, when it denied the grievor's request to take six days of leave to fly to Japan for a once-in-a-lifetime religious pilgrimage. The grievor was a member of the Rock Mountain Mystery School ("RMMS,"), which trains and teaches multi-denominational faiths and religions. The Mission Statement of the RMMS is as follows:

**Our Mission:**

The Rocky Mountain Mystery School is in service to all of humanity to assist in the ascension of the human consciousness on this planet. The purpose of the school is to help people achieve their highest spiritual potential to become Adam Kadmon; god-like beings in the physical. The school provides people with the tools and teachings they need in order to empower themselves and realize that they are their own greatest teacher, that they may remember who they truly are.

The school carries out the work of the HIERARCHY OF LIGHT on this planet and is charged with honouring, preserving and handing down the tools and teachings in the lineage of King Solomon. This is done through initiation and the handing-down the sacred tradition [sic], the Rocky Mountain Mystery School works to bridge the spiritual and physical worlds by anchoring and flowing the energy of abundance.

Practitioners of the RMMS go through various levels of initiation. The grievor had previously been initiated as a Second Step Ritual Master. Subsequently, the grievor received an unexpected telephone call from the Canadian Headquarters of the RMMS, which informed her that she had been selected to take the next step to become a Third Step Ritual Master. The grievor was told that the initiation would take place in Japan during a six-day period set by the RMMS. The grievor considered this once-in-a-life time opportunity to be a great honour and privilege that would allow her to make her commitment to God more devout. The grievor therefore asked her employer if she could take six days of leave in order to attend the initiation.

Not surprisingly, the employer did not quite understand why the grievor required time off to go to Japan. After discussing the matter further with the grievor, the employer at least understood that the grievor wished to go to Japan for a religious pilgrimage that was similar to a Muslim going to Mecca. Nonetheless, the employer denied the grievor's request to take a leave of six days. The employer explained that there were other news editors who had already been granted vacation requests during the period that the grievor wanted to take time off and that there were no other employees available to cover off for the grievor.

Shortly thereafter, and before the grievor's initiation event was to commence in Japan, the grievor broke her wrist while playing soccer. Upon learning of the grievor's injury, the employer offered modified work to the grievor. Since it had denied the grievor's request for leave to go to Japan, the employer expected the grievor to attend at work to perform modified duties. However, the grievor did not attend at work and instead flew to Japan to participate in the initiation.

Arbitrator Levinson described the grievor's participation in the initiation in Japan as follows:

...The next day, she boarded a bus with others. They had a bowl of rice as their last meal. They then walked a short distance on sacred lands. Ms. Anderson was given a litre of water. ... There, she began what she described as her three-day communion with God. On the third day, she was brought off the mountain and placed in a shallow grave. When Ms. Anderson was buried, she was given a hat to use along with her left hand to cover her face for protection. Her right wrist was out of the ground. As I understand it, she was to live until her last breath, when she was pulled from the ground and resurrected as a new human in service to God and humanity with all the powers to act as God's representative. After being pulled from the grave, she and others were given a ceremonial bath. After that, they were cleaned and fed a traditional home style Japanese meal. They boarded a bus and returned to the hotel...

When the grievor attended at work after she returned from Japan, the employer dismissed her from employment. A grievance was subsequently filed pursuant to the collective agreement.

Arbitrator Levinson found that the employer did not breach its duty to accommodate the grievor's disability, namely her wrist injury, when it discharged the grievor. The employer had fulfilled its duty to accommodate her disability by offering modified work that met the grievor's physical restriction.

Arbitrator Levinson did find, however, that by discharging the grievor, the employer violated its duty to accommodate the grievor's religious observance. The parties disputed whether the grievor's participation in the event held in Japan was a religious observance that triggered the protection of the *Canadian Human Rights Act*. Arbitrator Levinson, however, was satisfied from the evidence that the grievor sincerely believed in the practice she undertook in Japan and that the practice was linked with her religion. Although the employer had indicated to the grievor that it did not have any employees to cover off for the grievor during the period of her six-day leave, there was no evidence to suggest that the grievor's leave would have caused undue hardship to the employer.

Arbitrator Levinson therefore reinstated the grievor back to her position. However, the Arbitrator refused to award any back pay due to the fact that the grievor failed to explain to her employer with sufficiency and clarity that her trip to Japan was not only a religious pilgrimage, but also a once-in-a-lifetime opportunity that could not be postponed or rescheduled.

Based on the developments in the case law, employers should not rush to refuse employees' requests for religious accommodation even if the need for accommodation arises from non-mainstream religions that are obscure, unusual or unheard of. If employers are doubtful that an employee's religion is an actual religion that is a "creed" under the *Code*, employers may provide the employee with an opportunity to explain or give information that shows the employee's claimed religion is a system of beliefs relating to the employee's spiritual faith and worship. The determination of whether a belief system is a creed, however, does not depend on the employer's view or other people's view on the reasonableness of the religion's belief system. What matters is whether the belief system is connected to that employee's spiritual faith and integrally linked to the employee's self-definition and spiritual fulfilment.

Similarly, if an employer is doubtful that an employee's need for accommodation relates to a practice or observance required by the employee's religion, the employer may ask the employee to provide information to demonstrate that the employee sincerely believes that the practice or observance is required by his or her religion. While employees may wish to provide objective evidence, perhaps from a spiritual leader, to show the necessity of the practice or observance, they are not required to do so. Ultimately, the issue to be determined is whether the employee holds a sincere belief in the required practice or observance.

### **Sex or Disability: Transgendered/Transsexual Employees**

Although sex is a prohibited ground of discrimination, gender identity is not enumerated as a prohibited ground of discrimination under the *Code* or other human rights legislation of Canadian jurisdictions. The Ontario Human Rights Commission provides the following comments regarding gender identity:

Gender identity is linked to a person's sense of self, and the sense of being male or female. A person's gender identity is different from their sexual orientation, which is also protected under the *Code*. People's gender identity may be different from their birth-assigned sex, and may include:

**Transgender:** People whose life experience includes existing in more than one gender. This may include people who identify as transsexual, and people who describe themselves as being on a "gender spectrum" or as living outside the categories of "man" or "woman."

**Transsexual:** People who were identified at birth as one sex, but who identify themselves differently. They may seek or undergo one or more medical treatments to align their bodies with their internally felt identity, such as hormone therapy, sex-reassignment surgery or other procedures.

Some adjudicators have held that discrimination against transgendered or transsexual people can be characterized as discrimination due to disability. For example, in *Hogan v. Ontario (Minister of Health and Long-Term Care)*, 2006 HRTO 32 (Hendricks), the Tribunal held that Gender Identity Disorder, or "GID," constituted a disability under the *Code*. The complainants had alleged discrimination in the province's provision of services on the basis of *disability* and on no other grounds. The Tribunal heard from expert witnesses who testified about the diagnostic criteria for GID. The Tribunal described GID as follows:

According to the DSM-IV<sup>i</sup>, GID is a conflict between one's physical or apparent gender identification in which one has persistent feelings of discomfort or inappropriateness concerning one's birth-assigned anatomic sex, or about filling its usual gender role. That person may have an overwhelming desire to change their anatomic sex or insist that they are of the opposite sex. According to Dr. Dickey, the main issue is not sexual orientation, but the feelings of discomfort with one's own body and gender role: Dr. Dickey, Transcript, Vol. II, at p. 55. GID is the psychological diagnosis used to describe a male or female who self-identifies with the criteria set by the DSM-IV. "Transsexualism" is the term used by the general public to describe one with GID.

Other adjudicators, however, have characterized discrimination against transgendered or transsexual people as discrimination on the basis of *sex*. In *Forrester v. Peel (Regional Municipality) Police Services Board*, [2006] O.H.R.T.D. No. 13 (Hendricks), the Tribunal held that transsexuality falls within the meaning of "sex" under the *Code*. The complainant in that case was a transsexual who alleged that the police's strip search process discriminated against her on the basis of sex, rather than disability. Although the Tribunal found that GID, including transsexuality, was a medical condition, the Tribunal went on to conclude that transsexuality also fell within the meaning of "sex" under the *Code*. The Tribunal reviewed the following dictionary definitions of "transsexual":

While the Code does not offer a definition of "transsexual", the Oxford Dictionary does:

transsexual (also transsexual). noun

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<sup>i</sup> It is noteworthy that the long awaited DSM-V is expected to be released in May 2013. Only time will tell what new and varied disabilities will be enshrined in this updated version of the "bible" of mental illness.

a person born with the physical characteristics of one sex who emotionally and psychologically feels that they belong to the opposite sex.

The Webster Dictionary also defines it:

Transsexual n 1. somebody who has undergone treatment to change his or her anatomical sex 2. somebody who identifies himself or herself as a member of the opposite sex.

The Tribunal then reached the following conclusion:

The Tribunal finds that based on both dictionary definitions of "transsexual," that this term clearly falls within the lexical meaning of its base word, "sex."

Accordingly, most employers likely will be found to be in breach of the *Code* if they discriminate against employees on the basis of employees' transgendered identities or transsexualism. Transgendered or transsexual employees may claim discrimination on the basis of sex, disability, or both. It would seem, to catch up with the times, that a 15<sup>th</sup> protected ground of "gender identity" should soon be added to the *Code* such that this issue will no longer have to be shoohorned into ill-fitting protected grounds.

The protection afforded to transgendered/transsexual employees under the *Code* may raise some challenges for employers that require certain positions to be filled by a specific gender, for *bona fide* reasons. These types of employers may include organizations such as fraternal organizations, organizations that promote the interests of women generally, and organizations that provide services, assistance and other support to marginalized members of a specific gender, such as battered women.

Section 18 of the *Code* provides the following exemption for these kinds of special interest organizations:

Special interest organizations

**18.** 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.

Accordingly, employers that are special interest organizations, as defined above in section 18, could potentially rely on section 18 to support their decisions to refuse a position to a transgendered/transsexual individual.

Some guidance on the application of the above exemption for special interest organizations may be found in *Vancouver Rape Relief Society v. Nixon*, [2005] B.C.J. No. 2647 (B.C.C.A.). Although *Nixon* is a decision of the British Columbia Court of Appeal dealing with British Columbia's *Human Rights Code*, this decision concerned the application of a similar exemption for special interest organizations found in the B.C. *Human Rights Code*.

In *Nixon*, the complainant was a transsexual individual who was born as a male but underwent sex reassignment surgery to become a female. Following her sex reassignment, the complainant applied to volunteer with the Vancouver Rape Relief Society (the "Society"), which was described as a "non-profit, feminist organization whose mandate is to provide services to women victims of male violence and to fight violence against women." The complainant applied for a volunteer position as a peer counsellor for female victims of male violence. Although the complainant successfully passed the pre-screening stage and was offered the opportunity to attend training sessions, the Society asked the complainant to leave the training once it learned that the complainant had not always lived as a female. The complainant was also denied a volunteer position. It was the Society's policy that all volunteers for counsellor positions had to be oppressed since birth in order to be eligible to volunteer. In the Society's view, since the Complainant had previously lived as a man, she had not been oppressed since birth and therefore was not eligible to volunteer.

Thereafter, the complainant filed a human rights complaint with the British Columbia Human Rights Tribunal. The B.C. Tribunal allowed the complaint and found that the Society had discriminated against the complainant on the basis of sex with respect to employment, even though the position denied to the complainant was a volunteer position, and with respect to the provision of a service, namely the training opportunity

provided to prospective volunteers. The Tribunal awarded her \$7,500 in damages.

The Society filed an application for judicial review of the Tribunal's decision with the British Columbia Supreme Court (the "B.C.S.C."). The B.C.S.C. allowed the application and set aside the Tribunal's decision. The complainant then appealed the B.C.S.C.'s decision to the B.C. Court of Appeal.

The B.C. Court of Appeal confirmed the Tribunal's finding that the Society had discriminated against the complainant on the basis of sex. The Court of Appeal also confirmed that the discrimination occurred with respect to the Society's provision of a service and with respect to the complainant's employment. The B.C. Court of Appeal then stated that as a result of the discrimination, the complainant would be entitled to an order in her favour unless the Society could establish that an exemption in section 41 of the B.C. *Human Rights Code* for certain special interest organizations applied to the Society. The section 41 exemption states as follows:

If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.

The B.C. Court of Appeal found that the above exemption applied to the Society. The Society's primary purpose was to promote the interests of women who met the Society's political definition of what it means to be a woman. In particular, the B.C. Court of Appeal ruled that the Society was entitled under section 41 to prefer a sub-group of those whose interests it was created to serve, provided that the Society acted in good faith and provided there was a rational connection between the preference and the organization's work or purpose. As the Tribunal had found that the Society had acted in good faith and that its preference for a specific group of women was rationally connected to the Society's work and purpose, the Court concluded that the Society "was entitled to exercise an internal

preference in the group served, [and] to prefer to train women who had never been treated as anything but female.” Notably, for the purpose of the section 41 exemption, it was not necessary for the Society to prove that it could not accommodate the complainant without imposing undue hardship.

The complainant applied for leave to appeal this decision to the Supreme Court of Canada, but the Supreme Court denied the complainant’s leave to appeal: [2006] S.C.C.A. No. 365.

Accordingly, and depending on the specific facts of each case, employers that are special interest organizations primarily engaged in serving the interests of a specific gender, including a sub-group within that gender, might be able to defend a decision not to hire, transfer or promote a transgendered or transsexual individual into certain positions pursuant to section 18 of the Ontario *Code* or pursuant to similar statutory exemptions found in the human rights legislation of other Canadian jurisdictions. In order to rely on these statutory exemptions, it appears at a minimum that a special interest employer must demonstrate that a decision not to offer a position to a transgendered/transsexual individual was made in good faith and was rationally connected to the work or purpose of the organization.

## CONCLUSION

As a result of the broad definition given by human rights legislation and the case law to certain prohibited grounds, an employee who does not appear, at first glance, to fall within a prohibited ground may very well be able to establish that he or she is in fact protected against discrimination on the basis of a prohibited ground. Where it is questionable that an employee’s circumstances fall within a prohibited ground of discrimination, an employer should be cautious about denying requests for accommodation without asking for further information or clarification from the employee requesting accommodation. Similarly, even where certain actions resulting in differential treatment of employees do not appear to be based on a prohibited ground, employers should be cautious about assuming that this differential treatment cannot support a claim of discrimination under human rights legislation.