



# Discrimination & Human Rights

January 1, 2014

<http://www.dal.ca/faculty/law/dlas/public-legal-education.html>

## Acknowledgement

Dalhousie Legal Aid Service would like to gratefully acknowledge and thank the [Law Foundation of Ontario](#) for its financial support of LEAP.

## Disclaimer

This document contains general legal information and not legal advice. **If you need advice about a specific legal problem then you should contact a lawyer.** If you will have difficulty affording a lawyer then you should contact [Nova Scotia Legal Aid](#) or [the Legal Information Society of Nova Scotia's lawyer referral service](#).

Laws change frequently. We will try our best to make sure the information contained in all of our documents, as well as any other information you receive from Dalhousie Legal Aid Service, is reliable. However, **we cannot guarantee that the information in this document is completely accurate and up-to-date.** By accessing information from Dalhousie Legal Aid Service you assume any risks that arise from doing so.

## Contents

Discrimination .....	1
Legislative Framework.....	1
Application .....	1
Discrimination .....	1
Specific Circumstances .....	1
Prohibited Grounds.....	2
Exceptions.....	2
Undue Hardship.....	2
Affirmative Action.....	3
Human Rights Procedure .....	4
Making a Complaint.....	4
Dispute Resolution.....	4
Resolution Conference.....	5
Mediation .....	5
Investigation .....	5
Judicial Review.....	6
Human Rights Board of Inquiry.....	7
The Board Chair .....	7
Types of Hearing .....	7
Evidence .....	7
The Decision .....	8
Restorative Board of Inquiry .....	8
Remedies.....	8
Damages.....	9
Additional Resources .....	10
Government .....	10
Case Law .....	10
Nova Scotia Legal Aid.....	10

# Discrimination

## Legislative Framework

In Canada there are many legal sources of human rights, and legislation that prohibits discrimination on certain grounds.

On a national level there are the *Charter of Rights and Freedoms* and the *Canadian Human Rights Act*. This presentation will focus exclusively on Provincial legislation

In Nova Scotia protection against discrimination is governed by the *Nova Scotia Human Rights Act*:  
<http://nslegislature.ca/legc/statutes/human%20rights.pdf>

There are also a set of regulations governing Boards of Inquiry:  
<http://www.novascotia.ca/just/regulations/regs/hur22191.htm>

## Application

The *Human Rights Act* applies to all individuals in Nova Scotia.

The *Human Rights Act* applies to Municipal governments, and the Provincial government.

The *Human Rights Act* applies to private businesses and organizations that fall under the constitutional authority of the Provinces – i.e. universities, hospitals, etc...

The *Human Rights Act* does **not** apply to the Federal Government or private businesses and Crown corporations that fall under the constitutional authority of the Federal government (i.e. CBC, Canada Post, railways, airlines, etc...) – they are subject to the *Canadian Human Rights Act*.

## Discrimination

Discrimination is defined in the *Act* as the making of a distinction, either intentionally or unintentionally, based on a personal characteristic, or perceived characteristic, listed in the *Act*.

The distinction made must have the effect of imposing burdens, obligations or disadvantages on an individual, or group of individuals, not imposed upon others. Or the distinction must withhold or limit access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

The *Human Rights Act* prohibits discrimination in certain circumstances, and on the basis of a list of grounds contained in the *Act*.

### Specific Circumstances

The *Human Rights Act* prohibits discrimination in the following circumstances:

- The provision of or access to services or facilities (i.e. stores, restaurants or provincially funded programs);
- Accommodation (i.e. renting an apartment);
- The purchase or sale of property;
- Employment;
- Volunteer public service;
- A publication, broadcast or advertisement; **or**
- Membership in a professional association, business or trade association, employers' organization or employees' organization.

### Prohibited Grounds

The *Human Rights Act* prohibits discrimination on the following grounds:

- Age;
- Race;
- Colour;
- Religion;
- Creed;
- Sex (including pregnancy, the possibility of pregnancy or pregnancy-related illness);
- Sexual orientation;
- Gender identity;
- Gender expression;
- Physical disability or mental disability;
- An irrational fear of contracting an illness or disease;
- Ethnic, national or aboriginal origin;
- Family status (defined as being in a parent-child relationship);
- Marital status (including being single, engaged, married, separated, divorced, widowed or two people living common law);
- Source of income; **and**
- Political belief, affiliation or activity.

The Act also prohibits sexual harassment, or harassment based on any of the grounds listed above.

The *Human Rights Act* also prohibits discrimination on the basis of association with a person or group of people having a protected characteristic.

## **Exceptions**

There are certain exceptions to the general prohibition against discrimination contained in the *Human Rights Act*.

One of the most common exceptions arises in the employment context. It is commonly referred to as 'undue hardship'.

### Undue Hardship

Employers are allowed to establish what are known as '*bona fide* occupational requirements'.

A *bona fide* occupational requirement must meet the following criteria:

1. An employer must have adopted the requirement for a purpose rationally connected to the job;
2. The employer must have adopted the requirement in an honest and good faith belief that it was necessary for the fulfillment of a legitimate job related purpose (i.e. safety); **and**
3. The standard is reasonably necessary for the accomplishment of that legitimate job related purpose.

Once an employer establishes that the standard in question is a *bona fide* occupation requirement the law requires that they **must** accommodate an employee (i.e. modify workplace duties to accommodate an employee's disability) up to the point of undue hardship.

Undue hardship can include:

- Serious financial hardship to the employer;
- Significant risk to health or safety; and
- Unacceptable disruption to the employer's operation.

Whether a hardship is considered 'undue' may vary with the size and financial means of the employer in question.

### Affirmative Action

Another major exception contained in the *Human Rights Act* to be aware of is what is known as 'affirmative action'.

The *Human Rights Act* allows laws, programs and activities that have as a goal the improvement of conditions of people, or groups of people, including those who are disadvantaged because of a protected characteristic.

This exception means that for example a program created to hire women does not discriminate against men.

# Human Rights Procedure

## Making a Complaint

If someone believes that they have been discriminated against contrary to the *Human Rights Act* the first step is to make a human rights complaint.

A complaint is made to the Human Rights Commission. The Human Rights Commission is an independent government agency responsible for administering the *Human Rights Act*. The Commission has staff members who investigate complaints, provide human rights education, etc...

There are also Human Rights Commissioners. The Commissioners are appointed by the Provincial Government, and are responsible for determining the strategic direction of the Commission and making decisions on whether to refer complaints to Boards of Inquiry.

A human rights complaint **must** be made **within one year** of the action or conduct giving rise to the complaint, or within **one year** of the last instance of the action or conduct if it is ongoing.

In order to make a human rights complaint a complainant must contact the Human Rights Commission.

The Commission can be reached at **1-877-269-7699**. A potential complainant will speak with a Human Rights Officer employed with the Commission.

The Human Rights Officer will advise the potential complainant whether the conduct or action complained of is covered by the *Human Rights Act*.

If the matter is covered by the *Human Rights Act* the Human Rights Officer will fill out a complaint form with the assistance of the complainant. A complaint form **must** be completed by Commission staff or it will not be accepted. A sample completed complaint form can be found here:

<http://humanrights.gov.ns.ca/sites/default/files/files/Complaint%20form.pdf>

## Dispute Resolution

Once a complaint is filed staff from the Human Rights Commission will contact the Respondent (the person or organization alleged to have discriminated against the complainant) to review the complaint with them, ask them to think of ways the complaint could be resolved and to give them the opportunity to gather information and witnesses.

As of 2012 the Human Rights Commission has adopted a policy of offering restorative approaches as the first option to resolve complaints.

A restorative approach focuses on the possible harm done to relationships (i.e. employer/employee), and how to restore those relationships. Restorative approaches also recognize that people other than the complainant may have suffered harm from discrimination (i.e. family members, co-workers, other tenants, etc...).

## Resolution Conference

The first attempt to resolve a human rights complaint is via what is called a resolution conference.

A resolution conference is an opportunity for the complainant(s), and the respondent(s) to meet face to face to discuss the complaint.

The resolution conference is facilitated by Commission staff. Resolution conferences are 'on the record'. Commission staff will record information provided, and that information may become part of the investigation.

Should the parties reach a settlement during the resolution conference it will be binding on both parties.

The solutions agreed to by the parties to resolve a dispute can take any form the parties are agreeable to. Settlement summaries can be found here:

<http://humanrights.gov.ns.ca/settlement-summaries>

## Mediation

If a resolution conference is unsuccessful in resolving the complaint the next step is mediation.

Mediation is performed by an independent third party.

Mediation is 'off the record'. Just like with a resolution conference the parties may enter into a binding settlement agreement through the mediation process.

## Investigation

Should a complaint be unresolved by either a resolution conference or mediation it will go to the investigation stage.

During an investigation a Human Rights Commission staff member will investigate the complaint with the ultimate goal of making a recommendation to the Human Rights Commissioners as to whether the complaint should be dismissed, or referred to a Board of Inquiry.

The factors taken into account when deciding whether to recommend referring a complaint to a Board of Inquiry are:

- The reasonableness of any solutions already offered to resolve the issues;
- Whether the Commission has the jurisdiction to assist the parties; and
- Whether there appears to be discrimination on a ground protected by the *Human Rights Act*.

During an investigation parties will be interviewed, and further evidence will be gathered. You can review a sample investigation report here:

<http://humanrights.gov.ns.ca/sites/default/files/files/Investigation-Report.pdf>

Once completed the investigation report is referred to the Human Rights Commissioners.

The Commissioners will review the report and decide whether to dismiss the complaint, or refer it to a Board of Inquiry.

### Judicial Review

Should the Human Rights Commissioners decide not to refer a complaint to a Board of Inquiry that decision can be judicially reviewed.

Should someone wish to seek a judicial review of a decision of the Human Rights Commissioners they **should** consult with a lawyer as there are limited grounds upon which a decision can be judicially reviewed.

# Human Rights Board of Inquiry

## The Board Chair

Should a complaint proceed to a Board of Inquiry a chair will be appointed to oversee it. The Chair is responsible for conducting the Board of Inquiry as well as writing the decision. Their role is similar to that played by a judge.

Board of Inquiry chairs are appointed by the Chief Justice of the Nova Scotia Supreme Court from a roster established by an independent selection committee. The minimum requirements to be appointed as a Board Chair are:

- A law degree;
- At least 5 years of experience in their professional field;
- Demonstrated experience in weighing conflicting information/evidence to arrive at a fair decision;
- Demonstrated experience in chairing hearings, meetings, or consultations where there are conflicting interests;
- Experience with human rights legislation or human rights issues; and
- A resident of Nova Scotia.

## Types of Hearing

Once a complaint has been referred to a Board of Inquiry there are two types of hearings that can be held:

1. A traditional Board of Inquiry; or
2. A restorative Board of Inquiry.

A traditional Board of Inquiry resembles a civil (i.e. non-criminal) trial.

Often times before traditional Boards of Inquiry the complainant(s) and respondent(s) will be represented by legal counsel, although it is not strictly necessary.

## Evidence

The rules of evidence before a traditional Board of Inquiry are not strictly enforced like in court. The Chair will determine whether evidence can be introduced. The most basic criteria is that evidence must be relevant to the matter before the Board of Inquiry.

Evidence before a Board of Inquiry will usually always consist of oral testimony from the complainant(s), respondent(s) and any witnesses. It may also consist of documentary evidence relevant to the human rights complaint.

The Human Rights Commission is also represented by its lawyer at a Board of Inquiry. The role of the Commission's lawyer is to protect the public interest as well as the interests of the Human Rights Commission. They cannot provide legal advice to any of the other parties before the Board of Inquiry.

## The Decision

A Board of Inquiry is open to the public, and decisions are reported and available to the public.

Decisions, organized by topic, can be found here:

<http://humanrights.gov.ns.ca/board-of-inquiry-decisions>

Following the conclusion of a Board of Inquiry the Chair has 6 months to issue their decision.

A Board of Inquiry decision can be appealed to the Nova Scotia Court of Appeal. This is a complicated process, and anyone wishing to appeal a decision **should** consult with a lawyer.

## Restorative Board of Inquiry

Restorative Boards of Inquiry aim to create a safe non-adversarial space where parties can come together, and focus on sharing their perspectives on what occurred with the goal of understanding the harms done and to create a plan for repairing the harm, and preventing it from occurring in the future.

A restorative Board of Inquiry has two stages. The first stage is facilitated by a restorative facilitator who prepares the parties to meet one another and come up with an agreement to resolve the matter.

The second stage is facilitated by the Chair of the Board of Inquiry. The Chair will either confirm the settlement/plan reached between the parties, or will assist the parties to resolve any outstanding issues. If the parties cannot come to an agreement on an issue the Chair can make a finding of fact and issue a written decision on any outstanding issues.

The second stage of a restorative Board of Inquiry is open to the public.

Detailed information on the restorative Board of Inquiry model can be found here:

<http://humanrights.gov.ns.ca/sites/default/files/files/RestorativeBOI.pdf>

The restorative Board of Inquiry policy of the Nova Scotia Human Rights Commission can be found here:

[http://humanrights.gov.ns.ca/sites/default/files/files/Policy/RBOIPolicy\\_Dec\\_2012.pdf](http://humanrights.gov.ns.ca/sites/default/files/files/Policy/RBOIPolicy_Dec_2012.pdf)

## Remedies

Remedies for a violation of the *Human Rights Act* may be provided either via the terms of a settlement agreement, or in a decision issued by a Board of Inquiry.

Some of the more common remedies include:

- A cessation of the activity that was in contravention of the *Human Rights Act*;
- Development of policies/practices to ensure that further contraventions of the *Human Rights Act* do not occur;

- Training for the respondents' organization regarding its obligations pursuant to the *Human Rights Act*; and
- Monetary damages payable to the complainant.

### Damages

General damages are often awarded to successful human rights complainants.

General damages are meant to compensate complainants for emotional harm done to them. In Nova Scotia general damage awards in successful human rights' complaints which resulted in the loss of the complainant's employment generally range between \$2,500.00 to \$10,000.00 depending upon the severity of the emotional harm done to the complainant.

The other category of damages that can be ordered are what are known as 'special damages'. Special damages cover things such as out-of-pocket expenses, and if the discrimination resulted in job loss – lost wages due to termination.

The general goal of damage awards in the human rights context is to place the complainant in the same situation they would otherwise have been in had the discrimination not occurred in the first instance.

# Additional Resources

## Government

The Human Rights Commission of Nova Scotia maintains a website with useful information:

<http://humanrights.gov.ns.ca>

## Case Law

Appeals of Board of Inquiry decisions by the Nova Scotia Court of appeal can be found here:

<http://www.canlii.org/en/ns/>

## Nova Scotia Legal Aid

NSLA offices **may** provide summary advice to clients regarding human rights. Their contact information can be found here: <http://www.nslegalaid.ca/contact.php>