



Event	Alternative Dispute Resolution Institute – professional development series (live and webinar)
Location	ADR Institute Head Office 234 Eglinton Avenue East Ste. 405
Date / Time	April 30, 2014 5:40 pm – 6:45 pm Arrive: 5:30 pm
Contact	[REDACTED] [REDACTED]
Speech length/type	15-20 minutes + Q&A's
Topic	Human Rights at Work – balancing competing rights
Event format	Professional development presentation and webinar Informal evening program for members
Audience	Trainers, students, mediators, arbitrators, lawyers, conflict management professionals 10-15 in-person, 30-40 by webinar

Notes:

- [REDACTED]

****CHECK AGAINST DELIVERY****

Hello.

- Thank you for inviting me to come here this evening.
- I've spoken at some ADR Institute sessions in the past with other OHRC staff.
- We are pleased to be working with the ADR Institute on train-the-trainer workshops on balancing competing rights.
- There is a very clear role for mediators in resolving the kind of tension and conflict that can come up when issues of competing rights are at play.
- I'll talk more about competing rights in detail later on in my presentation...

First, let me tell you a bit about the *Ontario Human Rights Code* and Human Rights law here in Ontario...

- The Ontario *Code* was the first in Canada - introduced in 1962.
- It was a time when discrimination was very open and direct.
- There were signs in shop windows, people being told no Blacks or Jews allowed in many places.
- People organized and demanded change – and eventually succeeded in gaining protections based on religion and race.

- Since then other groups have advocated, marched and demanded protections.
- Now we have 17 protected grounds of protection in human rights law.
- We have protections around religion and race: creed, colour, ancestry, place of origin...
- And now for age, sex, disability, sexual orientation, family status, receipt of social assistance, citizenship...
- Gender identity and gender expression were the most recent additions in 2012...
- We just released a policy a couple of weeks ago to help make those rights a lived reality for trans persons who have been so vulnerable.

What the *Code* says is that all people should be treated with dignity and respect – and that all people should be able to reach their full potential.

- In Ontario, the human rights system has three parts...
- The Ontario Human Rights Tribunal. They accept human rights applications and hear cases like a court.
- The Human Rights Legal Support Centre helps people at every stage of the Tribunal process – filing applications, seeking resolution or attending hearings.

- At the OHRC we are about getting rid of systemic discrimination and harassment in all its forms...
- We educate the public, we work to advance human rights laws, and to remove discrimination and harassment at its roots...
- We also write policies and guidelines so that people understand their rights, duties and obligations under the law.

Why do all this work?

- First, there's the moral reason – everyone deserves to be treated equally, and no one should be made to feel lesser than others because they aren't part of the dominant culture, or because there's something about them that's different.
- When we include everyone, it's better for society – our communities are safer and healthier.
- It's also good for employers and the economy...
- When we create diverse work environments, we draw from a larger labour pool, there are more perspectives around the table, and morale and productivity go up.
- When there's mutual understanding and respect (the key principles of human rights), things generally run more smoothly.
- There's less tension and conflict.

- We've all seen first-hand how toxic environments can be created when there's a lack of understanding and an inability to accommodate other perspectives.
- If all of these weren't good enough reasons – it's also against the law.

We've come a long way since 50 years ago when the *Code* was first introduced, but discrimination is still a reality.

- Mostly what we see now is more subtle forms of discrimination and harassment.
- People generally know it's not alright to come right out and say "Sorry, we don't hire Blacks or Jews or women."
- And they know that it's not alright to make racist or sexist remarks.
- But it doesn't mean that barriers don't still exist.
- Before we did work around removing physical barriers, many of us didn't realize the impact that "step-up" had on people with disabilities.
- It affected whether they could work somewhere, live somewhere, or get a cup of coffee.
- Now we have legal requirements for physical upgrades like automatic doors and clear signage.
- Those things don't just help people with disabilities...

- It also helps parents with strollers or people that don't have English as a first language.
- And – it's good for business.
- We call these kinds of physical upgrades “inclusive design.”
- And we want to see that same forward-looking approach applied to policies, processes and procedures throughout society.
- What we're talking about is taking a hard look at how institutions all over society do what they do.
- Are there rules that prevent some people from equally participating?
- Often times, this type of discrimination isn't intentional – they are just a part of how things have always been done.
- But it's still against the law.

Let's look at employer duties and responsibilities...

- Employers have a legal duty to make sure their environments are free from discrimination and harassment...
- And that a “poisoned environment” is not allowed to take root.
- That means that at all stages of employment – hiring, advancement, training opportunities, how they deal with human rights issues as they

come up – everyone should be treated equally, fairly and with dignity and respect.

- One of the more complex issues that come up in workplaces is the duty to accommodate.
- In fact, making accommodations because of disability at work is the no.1 reason cited for applications at the Tribunal.

So what is the duty to accommodate?

- In workplaces, it's the duty an employer has to make adjustments when a human rights issue is at play.
- For example, someone needing a larger monitor because of a vision impairment, flexible work hours because of caregiving responsibilities, or time off to observe a religious holiday.
- Sometimes it could be because of another disability or health-related accommodation.
- The employers' obligation is to try to make accommodations to the point of undue hardship.
- Meaning that unless it's going to cause them to go bankrupt, or poses health and safety concerns for others, they've got to proactively look for solutions and implement them.

- If an employer sees something happening, or that an accommodation is needed, they have a legal duty take action...
- Even if no formal request is made.
- LANE
- Another key element is dignity and respect (including privacy).
- Sometimes issues come up around health and safety.
- For example, stereotypes about people with mental health issues sometimes trigger fear of a health and safety risk to other staff, and a reluctance to make workplace accommodations.
- But the risk must be real, not perceived.
- Unless an employer can prove there is a risk, it's discrimination.
- (*Our Policy on Human Rights at Work and Guidelines on the Duty to Accommodate* covers off much of what an employer needs to know about how to remove barriers and make accommodations at work.)

Employers generally want to be inclusive, but it takes hard work to get there.

- They need to be looking at how they do things and consider bias, and whether some groups of people are being disadvantaged – intentionally, or not.

- They need to be flexible and open to new ways of doing things.
- What about rules around work hours: could it really hurt to be more flexible with work hours?
- What about accommodating different religious practices and holidays?
- Are all groups of people able to access internal promotions, screening and interview processes equally?

We recently released a Policy on Canadian Experience Requirements.

- We did work on that because we were hearing a lot about how Canadian experience requirements were creating barriers for qualified people with professional experience from getting jobs or promotions.
- It's a really good example of an unnecessary rule or requirement that discriminated against a group of people.
- Some employers we heard from clearly didn't know that the practice was discriminatory.
- Others were using it as a guise for discrimination...
- We heard employers say things like...
- "Newcomers...are an absolute risk."

- “A newcomer...does not adapt well to the new workplace.”
- “(They) can make it uncomfortable for themselves and co-workers”
- All stereotypes. And no reason to not hire someone.
- The bottom line is: what does it matter where you got your training and experience – as long as you’ve got it?!
- We acknowledge in the policy that there may be such jobs that require Canadian experience – but we haven’t been able to think of one yet.

Competing rights is another big issue in workplaces...

- Mostly, it comes up when accommodations are being made by employers.
- Maybe an employee has severe allergies, and another needs to bring their service dog to work.
- Some people like to post religious messages in their workspaces because they find it inspirational. Agnostic or atheist employees might feel this infringes their rights.
- Sometimes issues that come up aren’t about rights coming into conflict – but about employees not understanding their duty to accommodate other staff members.

- Why does Dave get a bigger computer screen? Even though I'm not visually impaired, shouldn't I be entitled to the same thing?
- Why do we always have lower the lights when Dave's at a meeting – I can't see properly.
- These aren't competing rights – but they are still issues that require mutual respect and understanding.

So what are competing rights exactly?

- They might include a situation where a *Code* right comes up against:
 - Another *Code* right
 - A *Code* legal defence
 - Other legislated rights, *Charter* rights, or common law rights
 - Where an international treaty right comes up against a *Code* or *Charter* defence
 - Or where a *Charter* right is in conflict with another *Charter* right

If you establish that there is a competing rights situation – we want to see ADR professionals working towards balancing those rights.

- There are some key legal principles for you to consider...

- There is no hierarchy of rights or grounds – all are equally deserving of protection.
- However, every right is limited if exercising it interferes with the rights and freedoms of others.
- For example, people are free to hold religious beliefs...
- But where acting on them denies equality and respect to another marginalized group's, there are limits.
- And that's when rights need to be balanced.

Our Guidelines for Balancing Competing Rights provides a lot of details of how rights can be balanced – but here's the high-level summary of how these types of cases should be considered:

- Ask: what is the extent of interference?
- If it's trivial, then the one right will give way to the other.
- If both rights are substantially interfered with, the next question is: what harm would be caused by limiting each of the rights?
- This is where facts and context can sway the balance...
- In your role, this is where you might engage the parties in dialogue:
 - Are there ways to minimize impact?
 - Is each right affected at its core, or at its periphery?

- What are the underlying social and constitutional values and broader societal harms if either right is compromised?
- Is there a solution that allows the enjoyment of each right? If not, is there a next-best solution?

How ADR specifically can be helpful in dealing with competing rights objectives is through facilitating:

- Mutual dignity and respect;
 - A recognition of all the party's interests, and the scope of rights, and obligations;
 - An understanding of stigma and power imbalances – and giving voice to marginalized individuals and groups; and ensuring...
 - Cooperation and a shared responsibility for finding agreeable solutions that maximize the enjoyment of rights.
- In terms of what the courts have recognized in their decisions in competing rights cases, the broad strokes are:
 - Respect for dignity
 - Commitment to social justice and equality
 - Accommodation of a wide variety of beliefs
 - The negative stereotyping of minorities

- And gender equality.

Employers (service providers and housing providers) generally want to do the right thing and they want to make accommodations – and they definitely don't want to go to court.

- Sometimes it gets difficult to find solutions to issues.
- What I'm hoping, is that armed with a human rights perspective, and with some tools for addressing some of the subtler intricacies of human rights law and practice, you might be able to help us...
- Not only to settle cases, but to raise awareness about the principles of human rights...
- And the roles, responsibilities and legal obligations - on all sides - for protecting, advancing and promoting human rights.

I'd like to mention one more thing before I go to your questions...

I mentioned that the *Code* was most recently amended to include gender identity/expression.

- Our new policy makes clear the accommodation needs of trans persons.
- The Policy includes best-practices for employers in accommodating the many needs of trans people, as well as how employers can put

policies and procedures in place to accommodate issues such as transitioning in the workplace, uniforms, and washrooms and change rooms.

- That Policy – as well as all our other materials – are on our website.
- Now, I'm happy to answer questions...