



## Law Society of Saskatchewan

Continuing Professional Development

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# TRENDS & DEVELOPMENTS IN HUMAN RIGHTS

# Prohibited Grounds

- Religion
- Creed
- Marital Status
- Family Status
- Sex
- Sexual Orientation
- Disability
- Age
- Colour
- Ancestry
- Nationality
- Place of Origin
- Race or Perceived Race
- Receipt of Public Assistance
- Gender Identity

# Where are people **protected**?

**It is against the law for someone to be discriminated against in:**

- **Education**
- **Employment and occupations**
- **Housing**
- **Publications**
- **Public Services**
- **Contracts**
- **Purchase of property**
- **Professional associations and trade unions**

# Complaints by prohibited ground

## 2017-2018

• <b>Disability</b>	55%
• <b>Sex</b>	28%
– Pregnancy	(14.4%)
– Sexual Harassment	(11.0%)
– Other	(2.5%)
• <b>Family Status</b>	8.5%
• <b>Age</b>	7.6%
• <b>Ancestry</b>	11%
– (Indigenous)	(6%)
– Other	(5%)
• <b>Religion</b>	5.1%
• <b>Marital Status</b>	2.5%
• <b>Sexual Orientation</b>	1.7%
• <b>Public Assistance</b>	1.7%

# Complaints by protected area

## 2017-2018

# Complaint Trends

% Total Complaints on the ground of **Sex/Pregnancy** continues to increase:

- In 2015-2016, **9.5%** of formalized complaints involved Sex/Pregnancy.
- In 2016-2017, **11.3%** of formalized complaints involved Sex/Pregnancy.
- In 2017-2018, **14.4%** of formalized complaints involved Sex/Pregnancy.

# What is **discrimination**?

## ***Test for Prima Facie Discrimination:***

1. Proof of a characteristic protected under the Code;
2. The complainant experienced adverse treatment; and
3. The protected characteristic was a factor in the adverse treatment.

*Moore v. British Columbia (Education)*, 2012 SCC 61



# What is **discrimination**?

## ***Defences to Prima Facie Discrimination include:***

1. Rebut inference of discrimination with evidence;
2. Undue Hardship; and
3. *Bona Fide* Occupational Qualification or Requirement.

# Marijuana and Drug Testing

## *Safety sensitive workplaces:*

1. Rebut inference of discrimination with evidence;
2. Undue Hardship; and
3. *Bona Fide Occupational Qualification or Requirement.*

# Stewart and Elk Valley Coal Corp. (SCC)

1. Majority of Supreme Court upheld tribunal decision which found that employer had right to enforce policy requiring self-reporting for drug and alcohol addiction.
2. Grievor tested positive for cocaine and was deemed to be addicted.
3. Expert evidence established that grievor was not prevented from reporting addiction, so human rights not implicated.
4. Employer was justified in terminating grievor for breach of policy.

# I.B.E.W., Local 1620 v. LTC Employer's Assoc. (NLSC)

1. Court upheld arbitrator's decision that medical marijuana use by employee caused an undue hardship for this employer in a safety sensitive workplace.
2. Expert evidence on impairment ranged between two hours following use and a week.
3. Arbitrator recognized safety risk of possible impairment with marijuana use evening before shift.
4. Employer was not required to prove actual impairment in the workplace.
5. Arbitrator's decision was within reasonable range of outcomes.
6. Several other decisions say actual impairment must be shown.

# BC Human Rights Tribunal v. Schrenk. (SCC)

1. Supreme Court considered scope of employment discrimination for harassment complaint under B.C. Human Rights Code.
2. Non-employers can be held liable for discrimination against employees.
3. This case suggests that owners and prime contractors can be held liable for discrimination against employees of subcontractors.
4. Case has potential implications for drug and alcohol policies in construction, mining and oil and gas.

# Family Status

## *Canada v Johnstone 2014 FCA 110 (CanLII)*

Test to establish family status discrimination (in the context of childcare):

- a. The child is under his or her care and supervision;
- b. The childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to personal choice;
- c. The individual has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and
- d. The impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

# Family Status

- Criticisms of *Johnstone*:
  - » Creates different framework for family status claims than for claims of discrimination based on other grounds
  - » Places a burden of self-accommodation on the claimant; may conflate the test for discrimination and accommodation
  - » Requirement to engage the parent's legal responsibility may be overly restrictive and difficult to apply in complex situations
  - » Test is difficult to apply in the context of eldercare; there may be a different test for childcare and eldercare in the family status case law
  - » See: *Misetich v Value Village Stores Inc.*, 2016 HRTO 1229; *SMS Equipment Inc v Communications, Energy and Paperworkers Union, Local 707*, 2015 ABQB 162; *City of Yellowknife v A.B. et al*, 2018 NWTSC 50
- **Test varies across jurisdictions in Canada**
- All approaches agree – **contextual analysis**



# Gender Identity

- Added to the Code in 2014
- Identification decisions
  - Consent Order in ***Budd v Government of Saskatchewan (Ministry of Health and eHealth Saskatchewan)*** Q.B.G. No. 3005 of 2015
    - Removes Surgical Requirement to obtain change to Gender Marker on Birth Certificate
  - ***Saskatchewan Human Rights v Saskatchewan*** 2018 SKQB 159 (CanLII)
    - Change of Gender Marker on Birth Certificates for Minors
    - Allowing for Designation other than M or F
- Types of complaints (employment, services)





# Mental Health / Intellectual Impairment

- Duty to Inquire
  - Where an employer is aware, or reasonably ought to be aware, that a disability is negatively affecting work performance
- Examples



# THANK YOU