

X. ACHIEVING THE CODE'S PURPOSE

Human rights legislation was first passed in Ontario in 1962 because of overwhelming evidence of racial and religious discrimination. The *Code* was expanded over the years to cover additional grounds - sex, disability, sexual orientation, etc. - as serious problems of discrimination against each particular group were documented and brought to public attention.

People of colour, people with disabilities, people on public assistance, women, and other minority groups lack social, legal, political, and economic power. It is precisely because of this imbalance of power that the *Code* was passed with the specific purpose of breaking down discriminatory barriers and bringing about the full and equal participation of these groups in all aspects of society.

It is contradictory that, while the *Code* exists, *because* of recognized, widespread discrimination against particular groups, it is worded as if the normal operations of society were fair and non-discriminatory. This is particularly true of the Preamble.

The Preamble to the *Code* guides the way the *Code* is to be interpreted and enforced. It is therefore important that the Preamble be up to date and properly reflect developments in human rights understanding and enforcement.

In the view of the Task Force, the Preamble fails to do this. It is out of date and incomplete. In particular, it does not reflect rulings by the Supreme Court on the near constitutional nature of the *Code* or rulings on the positive action that must be taken to overcome the historic and present discrimination experienced by particular groups.

The Preamble to the *Ontario Human Rights Code* makes the following two basic points:

- it is public policy in Ontario to recognize the dignity and worth of every person and
- the aim of the *Ontario Human Rights Code* is to create a climate of understanding and mutual respect for the dignity and worth of each person.

While these principles are important, they are also quite vague. The words ring more like worthy hopes than a purposive statement of practical intent to guide the enforcement of the *Code*.

The Task Force believes that effective enforcement of the *Code* requires a clear statement in the Preamble of the *Code's* purpose. The *Code's* Preamble should be revised to

- reflect the Supreme Court of Canada's rulings of the near constitutional nature of the rights to be enforced and
- clarify the *Code's* purpose of providing a practical and powerful proactive tool to enforce human rights.

Code Has Near Constitutional Status

The Supreme Court of Canada has said many times that human rights laws are special laws that must be treated with great seriousness and implemented effectively.

... the Act, we say, is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination. If this is to be done, then the remedies must be effective, consistent with the "almost constitutional" nature of the rights protected.¹³

[The adjudicator must be able] to strike at the heart of the problem, to prevent its reoccurrence to require that steps be taken to enhance the work environment.¹⁴

When the subject matter of the law is said to be the comprehensive statement of the 'human rights' of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others.¹⁵

Yet it is all too evident in Ontario that human rights laws are, in fact, being treated less seriously than other laws and are being weakly and inadequately implemented.

Proper justice is denied in the following ways:

- the unconscionable delays in handling claims,
- the denial of a hearing to all but the smallest number of claimants,
- the disempowerment of those who try to claim their rights under the *Code*, and
- an enforcement approach that continues to be out-of-date and out-of-touch with present day realities.

The Task Force believes that the near constitutional importance of the *Human Rights Code* should be clearly stated in the Preamble so that human rights enforcement is guided accordingly.

RECOMMENDATION (4):

The Preamble of the *Code* should be amended as follows to incorporate the almost constitutional importance of the *Code*.

- **Whereas the *Code* is special legislation that has primacy over other laws in Ontario except the Constitution and whereas this special status requires all Ontarians, including the Government and those who enforce and interpret the *Code*, to treat it with special seriousness so as to achieve its near constitutional purpose ...**

Systemic Discrimination Requires Positive Action

The Preamble to the *Code* should explicitly recognize that systemic discrimination exists and that positive action must be taken to overcome the historic and present discrimination.

Positive, constructive action against discrimination has already been ruled necessary in dealing with some particular issues. For example:

- court decisions have quite clearly ruled that employers have a positive duty to take measures to ensure their workplace is free of sexual and racial harassment. Neutrality as a response by employers to the recognized problem of sexual harassment in the workplace is no longer acceptable.

The Supreme Court of Canada, noting the systemic discrimination by protected groups, has ruled that equality rights carry with them a positive duty to overcome the historic and present discrimination experienced by certain groups in society so that members of these groups may achieve their right to equality.

... the purpose of anti-discrimination legislation is the removal of unfair disadvantages which have been imposed on individuals or groups in society.¹⁶

- In the area of pay discrimination against women, the *Pay Equity Act* recognizes systemic gender discrimination in compensation and requires employers to take positive action to achieve pay equity.
- Under Employment Equity legislation and Contract Compliance rules (for example, City of Toronto Employment Equity Program, the federal government Contract Compliance regulations), employers are required to take positive action to overcome discrimination. Indifference or "business as usual" approaches can be perpetuation of traditional discrimination. If an

employer does, in fact, have a workplace that is discrimination-free, then he or she will not need to take any positive action.

It would be more consistent and equitable if the positive requirement to overcome discrimination clearly applied to all groups and all areas covered by the *Code*.

The Task Force believes that an approach based on the assumption that normal, typical practices are fair will not achieve the purpose of the *Code*. The *Code* places large amounts of resources into proving whether or not a particular individual was discriminated against, and feeds into an adversarial climate where a respondent feels defensive and obliged to spend time and money to defeat an allegation of wrongdoing. The Task Force believes this approach is unproductive.

The federal *Employment Equity Act* states that its purpose is to achieve equality in the workplace and, "in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, Aboriginal peoples, persons with disabilities and persons who are, because of their race or colour, in a visible minority in Canada by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences."¹⁷

Accommodating differences means that the right to be equal may require different measures to achieve equality.

The Task Force believes the Preamble should be amended to require equality rights in the *Code* to be enforced in a more positive and remedial manner, in keeping with the rulings of the Supreme Court of Canada, in keeping with the positive obligation to achieve equality rights placed on all governments by section 15 of the *Canadian Charter of Rights and Freedoms*, and in keeping with the positive obligations to advance human rights in international human rights covenants that Canada has ratified.

RECOMMENDATION (5):

The Preamble to the *Code* should be amended to include the following:

- **Whereas historic systemic discrimination has been practised against members of certain groups in Ontario because of their race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status, disability or receipt of public assistance;**
- **Whereas at different times many of these groups have been denied the basic rights of citizens, such as the right to vote, the right to enter professions, the right to pursue an education, the right to purchase property, the right to immigrate, the right to rent accommodation, the right to obtain employment, the right to enter public places;**

- **Whereas these groups continue to experience discrimination, stereotyping and harassment *and/or* are disadvantaged through not being included or represented in a fair and equal way in the institutions, opportunities and activities of Ontario society;**
- **Whereas the *Ontario Human Rights Code* is positive remedial legislation enacted to achieve equality rights for members of these groups;**
- **Whereas right to equal treatment requires that positive measures be undertaken;**
- **Whereas persons involved in the provision of services, accommodation, employment, contracts, unions and vocational associations have a responsibility to take measures to overcome discrimination in these areas and provide these opportunities in a manner that accommodates differences and is inclusive and respectful to all groups who make up Ontario;**
- **Whereas the Province of Ontario and the Government of Canada have ratified and are bound by International Human Rights Covenants ...**