



Ontario
Human Rights Commission
Commission ontarienne des
droits de la personne

Policy on scholarships and awards

ISBN: 0-7778-7171-8

Approved by the Commission: July 8, 1997

(Please note: minor revisions were made in
December 2009 to address legislative amendments
resulting from the *Human Rights Code Amendment
Act, 2006*, which came into effect on June 30, 2008.)

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Purpose of OHRC Policies

Section 30 of the Ontario *Human Rights Code* (*Code*) authorizes the Ontario Human Rights Commission (OHRC) to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*.^{*} The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the *Code*. They are important because they represent the OHRC's interpretation of the *Code* at the time of publication.^{*} Also, they advance a progressive understanding of the rights set out in the *Code*.

Section 45.5 of the *Code* states that the Human Rights Tribunal of Ontario (the Tribunal) may consider policies approved by the OHRC in a human rights proceeding before the Tribunal. Where a party or an intervenor in a proceeding requests it, the Tribunal *shall* consider an OHRC policy. Where an OHRC policy is relevant to the subject-matter of a human rights application, parties and intervenors are encouraged to bring the policy to the Tribunal's attention for consideration.

Section 45.6 of the *Code* states that if a final decision or order of the Tribunal is not consistent with an OHRC policy, in a case where the OHRC was either a party or an intervenor, the OHRC may apply to the Tribunal to have the Tribunal state a case to the Divisional Court to address this inconsistency.

OHRC policies are subject to decisions of the Superior Courts interpreting the *Code*. OHRC policies have been given great deference by the courts and Tribunal,^{**} applied to the facts of the case before the court or Tribunal, and quoted in the decisions of these bodies.^{***}

Introduction

The *Code* states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and feels able to contribute to the community.

This policy deals with scholarships or other forms of awards or grants that are available only on a limited basis to individuals who are identified by a ground set out in the *Code*. These grounds include race, sex, colour, religion, age and ethnic origin, to name a few. These types of scholarships or awards are called "exclusionary" because only certain individuals can apply for them, while others, who do not share the same characteristics, are excluded.

This policy provides information to potential applicants, sponsoring organizations and educational institutions about how the *Code* applies to exclusionary scholarships and awards. It should be noted that this policy applies whether the organization

or body conferring the scholarship or award is public or private. It also applies to trusts and other entities that may be required to act on the instructions or directions of a third party, such as a trust settlor or other benefactor.

Equality

Section 1 of the *Code* provides that every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability. Education and access to educational facilities are "services" under *Code*. Obviously, the means to access those services are directly or indirectly related to education.¹ As well, scholarships and awards are significant for reasons other than monetary value alone. Recipients of scholarships or awards have benefits in employment and access to post-graduate training. If a person is unable even to compete for the assistance that leads to these benefits, he or she is placed at a significant disadvantage.

Criteria such as race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, disability, *etc.* should not be the basis for deciding who gets a scholarship, unless particular exceptions apply. As late as 1990, the Ontario Court of Appeal examined a scholarship based on explicitly racist criteria.

The *Canada Trust* case involved a scholarship that was restricted to Protestant "Christians of the White race." According to the trust document, the person who had set up the trust believed that "the White race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the world ..." The Court of Appeal's response to this trust is worth reproducing:

*To say that a trust premised on these notions of racism and religious superiority contravenes contemporary public policy is to [state] the obvious. The concept that any one race or any one religion is intrinsically better than any other is patently at variance with the democratic principles governing our pluralistic society, in which equality rights are constitutionally guaranteed, and in which the multicultural heritage of Canadians is preserved and enhanced.*²

Public awareness of human rights issues and sensitivity to their social impact has developed considerably in recent years: legitimate concerns are raised when one group is promoted at the expense of another, or when advantages for some simply reinforce disadvantages for others. Many universities and colleges refuse to administer awards that are restricted to persons of a particular ethnic origin. Benefactors have, in some cases, changed their eligibility criteria so that awards are now granted according to merit, ability or potential. For example, it is preferable for a scholarship or other award to be restricted to persons wishing to pursue Italian studies rather than to a person of Italian origin.

For these reasons, the OHRC takes the position that scholarships and awards should be based on factors such as merit, personal financial need, course specialization, or recognition for special contributions to academic or extracurricular life. Exclusionary scholarships or awards, on the other hand, use discriminatory criteria to assess eligibility. These criteria affect access to educational opportunities, directly or indirectly. Scholarships or awards that designate a specific minority or ethnic group infringe the *Code*, unless they qualify as a “special program” that is designed to relieve economic hardship or disadvantage, or designed to achieve equality of opportunity. Section 14 of the *Code* is discussed below.

Exceptions

”Discrimination“ in human rights law does not simply mean treating someone differently. In human rights law, it means treating someone differently because of personal characteristics that are based on the grounds set out in the *Code*. The *Code* will apply, therefore, where the treatment is based on these characteristics and has the effect of imposing burdens or disadvantages on one group that are not imposed on others, or that limits or withholds opportunities and benefits.³ Seen from this standpoint, equality of opportunity operates to permit certain forms of differential treatment if the impact and intent is to remove those burdens or disadvantages. Temporary measures therefore may be necessary or desirable to assist persons that have been subjected to disadvantage or hardship. These measures are called “special programs.”

Special programs

The *Code* allows for a special program that creates a preference or advantage, even though it is based on grounds that are set out in the *Code*. Section 14 allows programs designed to:

- relieve hardship or economic disadvantage
- assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity
- help eliminate the infringement of rights that are protected under the *Code*.

The OHRC is of the view that for section 14 to apply, the underlying basis for the program should be related to a ground set out in the *Code*.⁴ For example, section 14 will not apply to members of a group who share a political affiliation, even if they have been subject to hardship, because political views are not covered by the *Code*.

Scholarships or awards should only be exclusionary if hardship or economic disadvantage is linked to the ground selected as a criterion for eligibility. It should also be clear that the special program is designed to relieve that hardship or disadvantage. Some scholarships are restricted to members of particular groups on the erroneous assumption that the group's members are disadvantaged. For example, scholarships awarded to "mature students" are sometimes awarded to

persons more than 25 years of age, a group that does not share a pattern of economic hardship or historical disadvantage. Different levels of financial need may exist across a group that may not be demonstrably linked to age, marital status or other grounds that are assumed to apply.

The OHRC has *Guidelines on Special Programs* that should be referred to in the event that a person wishes to set up or administer a scholarship or award on an exclusionary basis. In brief, the special program should state clearly:

- why the identified persons or groups are considered to be experiencing hardship, economic disadvantage or discrimination
- how the proposed measures will relieve the hardship, economic disadvantage, or discrimination, that is, how the target groups will be assisted
- that the program is for a specific period of time and is of a temporary nature.

If a scholarship or award is a valid special program, that is, if it meets the criteria set out in the *Code* and in the OHRC's *Guidelines on Special Programs*, it will not be found to be contrary to the *Code*. Scholarships and awards are assessed on a case by case basis.

In the light of the direction from the Court of Appeal in the *Canada Trust* case, educational institutions may prefer to consider the impact of scholarship restrictions on overall equality. Universities that offer a number of scholarships are encouraged to attempt to achieve an overall balance so that disadvantaged groups have reasonable access to educational services.

Example: If a particular program has a number of scholarships for women, and none for persons with a disability, the university may wish to try to attract a benefactor for the latter group, or may establish an award from its own resources.

Canadian citizenship or permanent residence status (subsection 16(2))

Subsection 16(2) provides an exception to the *Code* by permitting a requirement, qualification or consideration to be adopted for the purpose of fostering and developing participation in cultural, educational, trade union or athletic activities by Canadian citizens or persons lawfully admitted to Canada for permanent residence. This means that citizenship or permanent residence may be a requirement for a scholarship or award. However, it must be adopted for the purpose of "fostering and developing participation" in educational and other activities that are set out in the *Code*. (see the *Code* sections listed at the end of this document).

Special interest organizations (section 18)

This section is in response to inquiries from universities as to whether section 18 of the *Code* applies and whether it allows exclusionary scholarships or awards.

Section 18 of the *Code* allows a religious, philanthropic, educational, fraternal or social institution or organization, which primarily serves the interests of a particular group, to restrict membership or participation to members of that group. Provided that an organization comes within section 18, it will be able to restrict eligibility for scholarships and awards only if the recipient is a member or a participant. Simply being awarded a scholarship does not mean that the recipient is necessarily a member of the special interest organization.

Example: A fraternal association that offers an open scholarship for boys would only be protected from a challenge under the *Code*, if the fraternity primarily serves the interests of boys and if membership and participation in the fraternity is linked to receipt of the scholarship.

Example: A Roman Catholic institution may seek to restrict awards for divinity studies to Roman Catholics who intend to study for the priesthood. Similarly, a Jewish Hebrew school may declare that only Jewish students are eligible for enrolment in that school which may also designate scholarships or other financial awards strictly for Jewish applicants.

Scholarships as an employment benefit (subsection 24(1)(d))

Financial assistance in the form of scholarships or awards offered by employers to employees and their families are a form of assistance that provides advancement or benefits to eligible individuals. The *Code* allows this form of assistance, although it is limited to persons who are identified by their family or marital status. It is the OHRC's view that educational subsidies offered to employees and their families are acceptable as a legitimate form of exclusionary benefit related to employment.

Summary

A scholarship or award is an advantage or benefit to persons seeking employment or access to further education and training. For this reason, scholarships and other academic awards result in a benefit to some students, while excluding others who may be historically disadvantaged. Therefore, scholarships that restrict eligibility on the basis of prohibited grounds in the *Code* are not permissible unless the award:

- qualifies as a special program pursuant to subsection 14(1), or
- is restricted to Canadian citizens or permanent residents if the scholarship is for the purpose of fostering and developing participating in educational or other activities set out in subsection 16(2) of the *Code*, or

- is awarded by a religious, philanthropic, educational, fraternal or social institution or organization, to a member (section 18), or
- is an employment benefit to employees and their families (section 24(1)(d)).

Relevant sections of the Code

1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.

9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

14.(1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

16.(2) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship or lawful admission to Canada for permanent residence is a requirement, qualification or consideration adopted for the purpose of fostering and developing participation in cultural, educational, trade union or athletic activities by Canadian citizens or persons lawfully admitted to Canada for permanent residence.

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.

24. (1) The right under section 5 to equal treatment with respect to employment is not infringed where,

(d) an employer grants or withholds employment or advancement in employment to a person who is the spouse, child or parent of the employer or an employee.

For more information

Please visit www.ontario.ca/humanrights for more information on the human rights system in Ontario.

The Human Rights System can also be accessed by telephone at:

Local: 416-326-9511

Toll Free: 1-800-387-9080

TTY (Local): 416-326-0603

TTY (Toll Free): 1-800-308-5561

To file a human rights claim, please contact the Human Rights Tribunal of Ontario at:

Toll Free: 1-866-598-0322

TTY (Local): 416-326-2027

TTY (Toll Free): 1-866-607-1240

Website: www.hrto.ca

To talk about your rights or if you need legal help with a human rights claim, contact the Human Rights Legal Support Centre at:

Toll Free: 1-866-625-5179

TTY (Local): 416-314-6651

TTY (Toll Free): 1-866-612-8627

Website: www.hrlsc.on.ca

* Note that case law developments, legislative amendments, and/or changes in the OHRC's own policy positions that took place after a document's publication date will not be reflected in that document. For more information, please contact the Ontario Human Rights Commission.

** In *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 at para. 53 (Ont. Bd. Inq.), the tribunal applied the United States Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (4th Cir. 1971) to conclude that OHRC policy statements should be given "great deference" if they are consistent with *Code* values and are formed in a way that is consistent with the legislative history of the *Code* itself. This latter requirement was interpreted to mean that they were formed through a process of public consultation.

*** Recently, the Ontario Superior Court of Justice quoted at length excerpts from the OHRC's published policy work in the area of mandatory retirement and stated that the OHRC's efforts led to a "sea change" in the attitude towards mandatory retirement in Ontario. The OHRC's policy work on mandatory retirement heightened public awareness of this issue and was at least partially responsible for the Ontario government's decision to pass legislation amending the *Code* to prohibit age discrimination in employment after age 65, subject to limited exceptions. This amendment, which became effective December 2006, made mandatory retirement policies illegal for most employers in Ontario: *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 16 at para. 45. See also *Eagleson Co-Operative Homes, Inc. v. Théberge*, [2006] O.J. No. 4584 (Sup.Ct. (Div.Ct.)) in which the Court applied the OHRC's *Policy and Guidelines on Disability and the Duty to Accommodate*, available at: www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2

¹ Section 9 provides that no person shall infringe or do, directly or indirectly, anything that infringes a right to equal treatment.

² *Canada Trust Co. v. Ontario (Human Rights Commission)*, (1987) 12 C.H.R.R.D/184 at D/191.

³ See generally *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

⁴ Race, ancestry, colour, place of origin, ethnic origin, citizenship, nationality, creed, sex, family status, marital status, age, disability, receipt of public assistance (in accommodation only), record of offences (in employment only).