

What are “human rights”? As you learned in Chapter 4, a “right” is a legal, moral, and social claim that people are entitled to, primarily from their government. **Human rights** include the right to receive equal treatment, to be free from prohibited discrimination and harassment, and to have equal access to places, services, and opportunities. **Discrimination** occurs when an individual is treated unfairly because he or she is a member of a certain group.

Even at the dawn of the twenty-first century, Canada’s struggle for equal rights continues. In spite of enormous gains and the fact that Canada has one of the strongest human rights records in the world, several groups continue to experience discrimination. Disabled persons are still fighting for accommodation in the workplace; the gay community is striving for equal rights to marry or adopt children; and Aboriginal peoples and ethnic minorities continue to challenge the law to live up to its mandate of a just society.

Canadians’ rights are protected at a number of levels. At the federal or national level, Canadians are protected from abuses by government or its agencies through the *Canadian Charter of Rights and Freedoms*. As you learned in Chapter 4, the Charter is Canada’s most important rights document; however, it does not provide legal protection for citizens if they are discriminated against by other individuals or by private organizations. Remedies for such acts are found in provincial **human rights codes**, which protect individuals from prohibited discrimination. What is considered “prohibited” differs from province to province; however, it generally includes discrimination based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, mental or physical disability, and family or marital status.

human rights: the right to receive equal treatment, to be free from prohibited discrimination and harassment, and to have access to places, services, and opportunities

discrimination: making a distinction between people and treating them differently on a basis other than individual merit

human rights codes: legal documents that protect people from prohibited discrimination



Figure 5.1 In 1998, the Raging Grannies, a national social action group, protested in Fredericton, New Brunswick, because the mayor had refused gays and lesbians the right to organize a parade.

HUMAN RIGHTS LEGISLATION

Canadians like to think of themselves as tolerant people. Canada is, after all, a nation of immigrants; immigrants and refugees have arrived from all over the world to be part of Canadian society. Every person has the right to be treated equally, yet discrimination is still a fact of life in Canada.

stereotyping: having an oversimplified, standardized, or fixed judgment of a group of people

Discrimination is often based on **stereotyping**. Stereotyping can be defined as creating an oversimplified, false, or generalized portrayal of a group of people. Stereotyping involves taking a characteristic of one member of a group and applying it to all members of that group. Stereotypes are often the basis of many ethnic or gender jokes. The statement “all teenage males are reckless drivers” is an example of stereotyping.

prejudice: a preconceived opinion based on a stereotype or inadequate information

A belief in stereotypes can lead to **prejudice**, which is a preconceived opinion. Someone who is prejudiced judges an individual according to the group to which he or she belongs without taking into account individual qualities or abilities. For example, assuming that an individual is a reckless driver simply because he is a teenage male is a prejudice. There is no way of knowing whether the person is a good or bad driver if opinions are based on the stereotype that all teenage males are reckless drivers.

When someone’s behaviour toward another person is based on stereotypes and prejudices, the result is discrimination. In other words, discrimination involves putting prejudice into action. For example, if Angela owned a courier company and refused to hire Taylor simply because she believed that all teenage males are reckless drivers, this behaviour would constitute discrimination. There is little that the law can do to stop people from developing and holding negative opinions based on stereotyping and prejudice; however, the law can prevent someone from acting on these views. Human rights legislation is used to correct and prevent the injustice of discrimination.

Canadian Human Rights Act

The opening paragraph of the *Canadian Human Rights Act* (CHRA) sums up the purpose of the Act:

“Human rights are your rights. Seize them. Defend them. Promote them. Understand them and insist on them. Nourish and enrich them.... They are the best in us. Give them life.

— Kofi Annan, secretary general of the United Nations

The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

The *Canadian Human Rights Act* was passed in 1977 and applies to federal government departments, Crown corporations, and business and industries that are under the jurisdiction of the federal government. For example, people

who work in post offices, chartered banks, or airlines can seek a remedy under the CHRA if they believe they are victims of discrimination.

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

- race
- colour
- national or ethnic origin
- religion
- age
- sex or gender (including pregnancy and childbearing)
- marital status, family status
- physical or mental disability (including dependence on alcohol or drugs)
- pardoned criminal conviction
- sexual orientation

The CHRA also covers matters such as hate messages and pay equity.

Section 67 of the *Canadian Human Rights Act* provides that nothing in the CHRA affects any provision of the *Indian Act* or any provision made under or pursuant to the *Indian Act*. The purpose of s. 67 is to ensure that the *Canadian Human Rights Act* does not conflict with the application of the *Indian Act*. This means that those who work for Indian bands or those who are discriminated against by Indian bands may not be able to seek a remedy under the CHRA if the discrimination is a result of a provision in the *Indian Act*.

Rose Desjarlais, a Band Council employee who was subject to discrimination by the Piapot Band on the basis of her age, challenged this umbrella protection afforded to Indian bands by s. 67. In *Desjarlais v. Piapot Band* (1989), the Canadian Human Rights Commission held that s. 67 did not prevent it from ruling on the matter. Since the Piapot Band did not have a registered band bylaw dealing with employment, and because there was no policy section of the *Indian Act* that gave implied authority to the band to dismiss Desjarlais, the band did not fall within the protection of s. 67.

Provincial Human Rights Codes

All provinces have enacted human rights codes. As acts of provincial Legislatures, the codes are amended periodically and are also subject to the *Canadian Charter of Rights and Freedoms*. In other words, if the courts find that a provision of a provincial human rights code violates the Charter, the provision could be struck down. For example, in 1986, the Ontario Court of Appeal struck down s. 19(2) of the Ontario *Human Rights Code*, which permitted athletic organizations to deny membership based on gender. Justine Blainey had been denied the right to play on a boys' hockey team, but the court found that this policy violated her equality rights under s. 15(1) of the Charter. Other examples have arisen in recent years. For instance, most provinces have been forced to amend their human rights codes so that they do not violate the rights provided to gays and lesbians under the Charter.

Fast Fact

In 2001, anti-terrorist legislation replaced s. 13(2) of the *Canadian Human Rights Act*. The new legislation makes the communication of hate messages by means of a computer, a group of interconnected computers, or the Internet a prohibited ground of discrimination.

Legal Link

You will find all provincial human rights codes at www.pearsoned.ca/law.

Law in Your Life

Identify some facilities that you are restricted from because of your age or gender. Do you think these restrictions would be supported by human rights codes? Why or why not?

Figure 5.2 Justine Blainey raises her hockey skates in victory after the Supreme Court of Canada rejected an Ontario Hockey Association (OHA) bid to keep her from playing on a boys' team. How do you think the OHA justified its position?



Is Forced Retirement Discriminatory?

Forcing Ontario residents to retire at 65 is wrong and the human rights code should be changed to reflect that, Chief Commissioner Keith Norton says.

"It is discriminatory, just as discriminatory to require people at 35 to retire arbitrarily," Norton said yesterday after handing down his annual report. "If they want to continue to work, why shouldn't they have a choice as opposed to being arbitrarily dismissed at 65?"

Both employer and seniors groups agreed yesterday [that] it's time to make a change.

Norton said the way the Ontario *Human Rights Code* is worded, any individual older than 65 who is still

working can be discriminated against on the basis of age and they simply have no recourse...

The province needs to amend its human rights code to target age discrimination, which is cited in 7 per cent of complaints to the commission, Norton said.

Norton said [that] often mandatory retirement has a disproportionate impact on women, particularly those who get back into the work force after raising a family. He cited a case where a woman who went back to teaching was the victim of a new retirement policy.

"She was then hired back on a contract by the same college to teach except she had no benefits ... and

she was paid less than half of what she had been previously making for performing the same job. Those kinds of things because somebody happens to turn 65 ... [are] clearly discriminatory," he said...

The federal government allows employees to work until they turn 70 and four other provinces have eliminated a legal retirement age altogether.

Doug Robson, president of the Ontario Chamber of Commerce, said the time is right to revisit the mandatory retirement age.

SOURCE: Adapted from Richard Brennan, "Put an end to retirement at 65, rights chief says," *The Toronto Star*, May 18, 2001, A1.

1. Why does Norton believe that forcing people to retire at age 65 is wrong?
2. According to this article, how has this policy had a "disproportionate impact on women"?
3. a) Do you agree that retirement at age 65 is discriminatory and should be eliminated? Why or why not?
b) What are the pros and cons of eliminating mandatory retirement altogether?

Building Your Understanding

1. Distinguish between the protection provided by the *Charter of Rights and Freedoms* and provincial human rights codes.
2. Define these terms and provide an example of each: discrimination, stereotyping, and prejudice.
3. What is the purpose of the *Canadian Human Rights Act*?
4. What happens when there is an inconsistency between the *Charter of Rights and Freedoms* and federal or provincial human rights legislation?
5. Explain the ripple effect of the precedent-making decision in the Justine Blainey case.

ADMINISTERING HUMAN RIGHTS LEGISLATION

To administer and enforce various human rights codes, provincial governments have appointed commissions. Most complaints are settled by commissions, but the 4 percent that cannot be resolved at this point must go on to boards of inquiry or tribunals, which have the power to make the ultimate decision about a complaint.

Filing a Complaint

Those who feel they have been victims of discrimination must follow the procedures established by their province's human rights code. Some provinces have a Commission's Inquiry Services Unit; in other provinces, individuals can contact a complaints analyst at the provincial Human Rights Commission. Individuals do not need a lawyer to file a complaint, and they can choose to withdraw their complaints at any time after the file is opened. All inquiries made to the Human Rights Commission are completely confidential. Using the province of Alberta as an example, Figure 5.3 shows a chart outlining the stages of a complaint process.

If you are the **complainant**—the person making the allegation of discrimination—you will be provided with a package of information to assist you in filing your complaint. You will probably be asked to fill out a “complaints form” describing the events and circumstances you considered discriminatory. As the accuser, it is up to you to prove your case.

Using employment discrimination as an example, in order to establish a **prima facie** case (a case whose first impression is legally convincing), you must prove that

- 1) you were qualified for the particular employment;
- 2) you were not hired; and
- 3) someone no better qualified subsequently obtained that position—someone who lacked the distinguishing feature that represents the **gravamen** (significant part) of the human rights complaint (e.g., race, colour, etc.).

Legal Link

To find out how to file a human rights complaint in your province go to www.pearsoned.ca/law. Click on the link for your province's Human Rights Commission.

complainant: the person making an allegation of discrimination

prima facie: legally convincing unless disproved by contrary evidence

gravamen: the most serious part of an accusation

Fast Facts

The words *prima facie* are Latin, meaning “at first sight”; the word *gravamen* comes from the Latin word *gravis*, meaning “heavy”—the part that bears most heavily on the accused.

COMPLAINT PROCESS

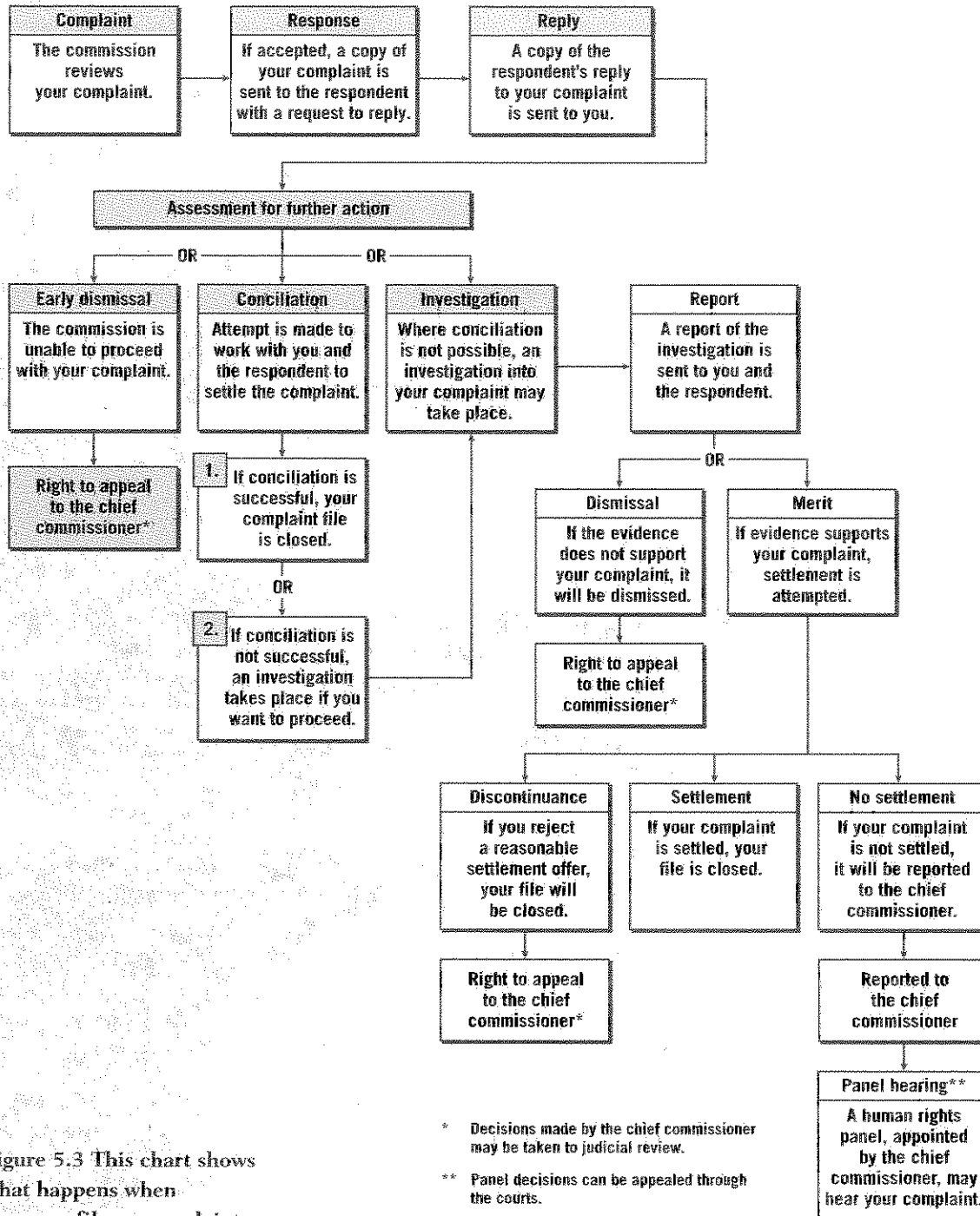


Figure 5.3 This chart shows what happens when someone files a complaint alleging discrimination.

Dismissing a Complaint

At this stage, the Human Rights Commission may dismiss the complaint for a variety of reasons (see Figure 5.3). For instance, in the Ontario *Human Rights Code*, the reasons for dismissal are set out in s. 34:

34. (1)(a) where there is another legislative act that can more appropriately deal with the issues raised in the complaint;
- (b) where the complaint is trivial, frivolous, vexatious, or made in bad faith;
- (c) where the complaint is not within the jurisdiction of the Commission; and
- (d) where the complaint was filed more than six months from the last incident of discrimination, and it appears the delay was not incurred in good faith, and there is evidence of substantial prejudice to the parties because of the delay.



Figure 5.4 Why is discrimination sometimes difficult to prove?

The final section dealing with time limits varies from province to province, and in some jurisdictions the time period is one year. Check your province's human rights code to determine the time limit for filing a complaint.

The response to your inquiry will inform you whether your complaint is covered by your provincial code. If so, the Commission will serve your complaint upon the **respondent** (the organization or persons you are alleging discriminated against you). The respondent is asked to formally respond to the allegations of discrimination (see Figure 5.3).

respondent: the person or organization that the complainant alleges committed discrimination

Role of the Commission

If your complaint is not dismissed, you move on to the next step. The Commission will ask you and the respondent to enter into **mediation**. A mediation process was introduced as a means of settling disputes prior to a formal investigation. The parties are assisted by a mediation officer in an attempt to resolve the problem themselves.

mediation: intervention between conflicting parties that promotes compromise or settlement of the dispute

If the parties do not agree to mediation, or if no settlement is reached in mediation, the complaint is referred to investigation services for a formal investigation by a human rights officer (see Figure 5.3). This process involves gathering evidence relevant to the complaint; inspecting documents, records, and correspondence related to the case; examining the facilities; and interviewing witnesses.

Fast Fact

Mediation occurs in about 70% of the complaints filed, and almost 75% of these complaints end with a settlement at this point.

After the investigation, the human rights officer writes a report to inform the parties of the results of the investigation. The officer may also try to resolve the complaint through **conciliation**—bringing the parties to a

conciliation: bringing conflicting parties to a resolution of their differences

resolution of their differences. If no resolution is reached, the case is referred to the commissioners. The commissioners are a group of people who oversee the Human Rights Commission and make decisions about cases.

If the commissioners do not believe that there is enough evidence to prove discrimination, they will dismiss the complaint. The complainant has 15 days to appeal this decision by formally requesting a review in writing. If the commissioners turn down the review, then the decision is final (see Figure 5.3).

However, if the commissioners believe that there is evidence of discrimination, the complaint is referred to a board of inquiry or human rights tribunal—formal bodies that will hear the case and make a decision based on the evidence. The hearing is similar to a trial in that witnesses are called to testify under oath and are cross-examined by lawyers for both the Commission and the respondent. The decision of a board of inquiry may be appealed and sent for judicial review. In Ontario, for example, a decision can be appealed to the Divisional Court of the Ontario Court of Justice and, ultimately, to the Supreme Court of Ontario.

Fast Fact

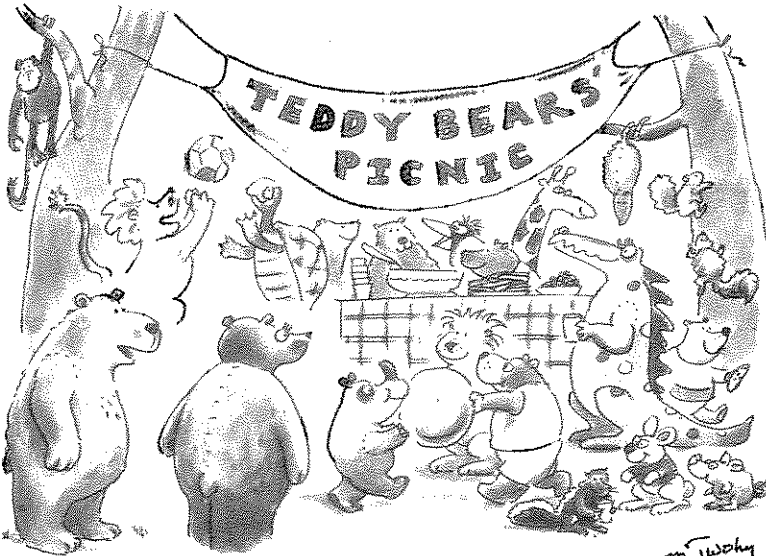
The Ontario Human Rights Commission receives about 2000 complaints each year; of these, approximately 4% are sent to a board of inquiry for resolution.

Remedies

A number of remedies are available when discrimination has occurred. Generally, the remedies are intended to put complainants in the same position they would have been in had the discrimination not occurred. For this reason, the remedy will depend on the circumstances of the case. Possible remedies include the following:

- ordering the person or organization who contravened the human rights code to stop the practice
- compelling the respondent to issue a letter of apology
- ordering the respondent to pay the complainant for mental anguish or for any losses suffered in pay or benefits

- compelling an employer to give the complainant back his or her job or to grant the promotion that was denied
- ordering an organization to adopt programs designed to relieve hardship or economic disadvantage, or to assist disadvantaged groups in achieving equal opportunity in the organization
- requiring an organization to provide human rights and anti-discrimination training for all employees, to develop comprehensive policies to eliminate discrimination and prevent harassment, or to undertake other similar remedies



"The courts ruled that we had to open it up to all stuffed animals."

Kanags Premakumar v. Air Canada (2000), C.H.R.C.

Kanags Premakumar, originally from Sri Lanka, applied for a baggage-handler position with Canadian Airlines at Pearson Airport in March 1998. Although Premakumar had worked at other airlines in Canada and Sri Lanka, he was not successful in obtaining a job (despite the fact that people with no experience in the airline industry were hired).

Premakumar filed his complaint with the Canadian Human Rights Commission, alleging that he had not been hired because of his race, colour, and national or ethnic origin. He was able to show evidence of a prima facie case of discrimination. Since Canadian Airlines and the employees who conducted the interview were not able to provide a reasonable explanation for their actions, the Canadian Human Rights Commission found that discrimination had occurred. The Commission ordered the following remedies:

- Premakumar was awarded compensation for lost wages and employment benefits.
- Air Canada (the company that had subsequently taken over Canadian Airlines) had to pay Premakumar an additional amount to cover the income-tax liability that he incurred as a result of the monetary award.
- Air Canada was to provide a written apology to Premakumar, signed by one of the two employees who conducted the interview.
- Air Canada had to pay an additional \$4000 to Premakumar for the pain and suffering he endured after being refused a position.

Building Your Understanding

1. Who are the complainant and the respondent in a human rights case? Give an example to illustrate your answer.
2. List the governmental bodies involved in a human rights complaint and define their roles.
3. What must be proven to establish a prima facie case of discrimination?
4. Under what circumstances can a complaint be dismissed?
5. Which remedies do you think would be appropriate in each of the following human rights cases?
 - a) A new alcohol- and drug-testing program came into effect in Avi's company. Avi disclosed that a few years ago he had had an alcohol problem. As a result, he was moved to another job and subjected to rigorous management supervision. The Commission ruled that the program discriminated against persons on the basis of their disabilities or "perceived disabilities."
 - b) Fowzia claimed discrimination at work based on her race and colour. She was subjected to racial slurs, held up to ridicule, and deprived of a scheduled salary increase. The Commission found that Fowzia had been discriminated against because of her race and colour. However, evidence showed that her job performance did not meet expectations.
 - c) Sam Nang was dismissed from her position as counter help at a coffee bar. She said her employer, Roger, claimed that her hearing impairment interfered with her ability to carry out her job. Roger denied this statement and claimed that Sam Nang was fired for poor job performance. The Commission found that the evidence did not support the respondent's claim.

CASE

1. Why was this case heard by the Canadian Human Rights Commission?
2. Define the term "prima facie." How does it apply in this case?
3. Do you think these remedies were adequate? If not, what other remedies would have been appropriate?

GROUNDS OF DISCRIMINATION

Now that you have seen how the complaint process works, you will examine the activities protected by human rights legislation. You will also learn that although certain actions may *appear* discriminatory, they are actually considered exceptions under the law.

Where grounds do exist, the cases that follow will clarify how human rights codes can assist Canadians who face discrimination.

Employment

Everyone has a right to “equal treatment with respect to employment” in the job application process as well as in training, transfers, promotions, apprenticeship, dismissal, and layoffs. Those who feel they have been discriminated against in these areas of employment may file a human rights complaint.

Exceptions Under the Law

Before exploring the various grounds of discrimination, it is important to note that certain actions are not considered discriminatory if they are “reasonable and justifiable” under the circumstances. One example of a reasonable and justifiable action would be the higher insurance fees charged for young drivers. Statistics show that young drivers tend to file more claims than older drivers do; since insurance premiums are based on claim rates, fees for young drivers are higher.

In some cases, specific skills are necessary to do the job. For instance, a transport company would require all persons hired as drivers to have a valid driver’s licence. Because such a requirement is essential to the job, it is a **bona fide occupational requirement** and is, therefore, not considered discriminatory. (The words *bona fide* come from the Latin, meaning “in good faith.”)

Affirmative action is also allowed under human rights legislation. **Affirmative action** gives advantages to groups who have been discriminated against in the past. For instance, where there are two equally qualified candidates applying for a job, priority *will* or *may* be given to the applicant who is a member of a historically disadvantaged group. Affirmative action is often practised in organizations that serve a particular community and may wish to limit employment to that community. For example, a female candidate might be chosen over a male candidate for the position of security guard at a women’s shelter, even though his work experience might be more extensive than hers.

Constructive and Direct Discrimination

Sometimes seemingly neutral requirements for employment might lead to what is called **constructive discrimination**—employment policies that inadvertently exclude certain individuals. For example, in the past, police departments had a minimum height requirement that effectively excluded most women and many minority groups. This type of constructive discrimination has been struck down by the court.

Legal Link

According to the *Employment Equity Act*, women, Aboriginal peoples, members of visible minorities, and people with disabilities must have fair access to jobs and promotions. To learn the details of this legislation, visit www.pearsoned.ca/law.

bona fide occupational requirement: a qualification that would normally be considered discriminatory but is necessary for proper or efficient job performance

affirmative action: giving advantages to groups who have been discriminated against in the past

Law in Your Life

In a job interview, you cannot be asked discriminatory questions.

However, for some positions, such as security guard, not having a criminal record may be a bona fide job requirement.

constructive discrimination: employment policies that inadvertently exclude certain individuals, resulting in discrimination

British Columbia (P.S.E.R.C.) v. B.C.G.S.E.U., [1999] 3 S.C.R. 3

The British Columbia government established minimum physical fitness standards for its forest firefighters, which were measured by a series of four standardized tests. One of the tests was an aerobic standard that required the firefighter to run 2.5 km in 11 minutes. Tawney Meiorin, a female firefighter who had in the past performed her work satisfactorily, failed to meet the aerobic standard. After four attempts, her best time was 49.4 seconds over the minimum allowed. She was laid off as a result of failing to meet the physical fitness standard.

An arbitrator found that Meiorin had established that she was a victim of constructive discrimination. This ruling was based on the fact that because of physiological differences, in general, women have a lower aerobic capacity than men. Also, unlike most men, most women cannot sufficiently increase their aerobic capacity through training to meet the aerobic standard. Furthermore, the government had failed to demonstrate that achieving this standard was necessary to perform the work of a forest firefighter safely and efficiently. In other words, the government had not demonstrated that passing this test was a bona fide occupational requirement.

The arbitrator ordered that Meiorin be reinstated and that she receive compensation for lost wages and benefits. This decision was appealed to the Court of Appeal for British Columbia. The Court overturned the arbitrator's decision because it held that provided the standard was necessary to ensure safe and efficient performance, and as long as it was applied throughout *all* individual testing, no discrimination existed. This ruling was appealed to the Supreme Court of Canada.

The Supreme Court of Canada allowed the appeal and restored the arbitrator's ruling. The Court found, as the arbitrator had, that passing the physical fitness test was not a bona fide occupational requirement.



Figure 5.5 It took Tawney Meiorin five years to get back her job as a forest firefighter.

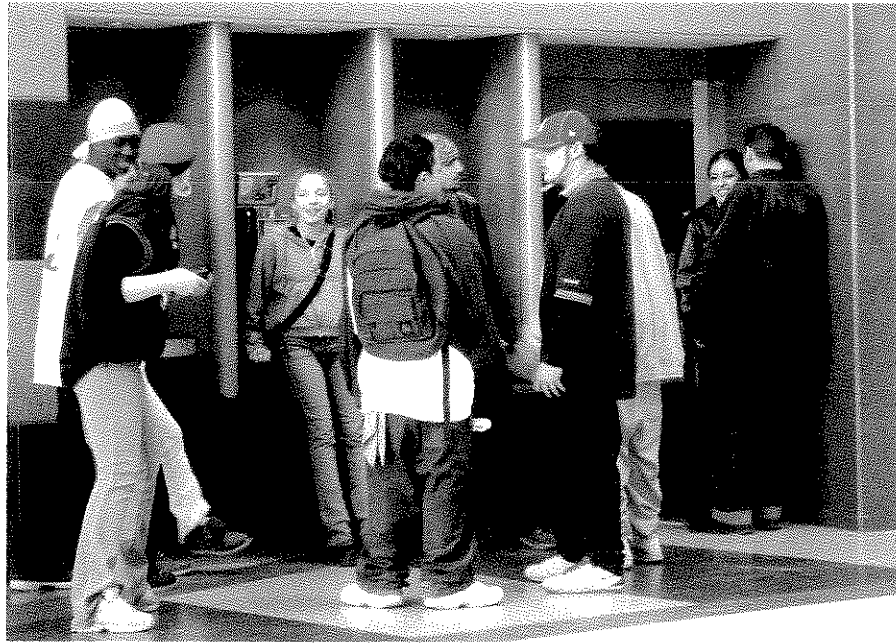
Constructive discrimination may be more difficult to detect than direct discrimination. **Direct discrimination** refers to discrimination that is practised openly, such as refusing service or employment to someone simply because of his or her membership in a particular group.

direct discrimination: an overt act of discrimination

CASE

1. Explain how the terms “constructive discrimination” and “bona fide occupational requirement” apply in this case.
2. The Supreme Court's ruling contradicted a claim made in the Court of Appeal's decision. What was this claim?
3. Why is the Supreme Court's decision significant? Discuss whether you agree with this ruling.

Figure 5.6 Suppose you are meeting a group of friends in a shopping mall. A security guard approaches your group and tells you to “stop loitering.” This occurs regularly at the mall, but only with teens. Would this practice be considered discriminatory by a human rights tribunal? Why or why not?



accommodate: eliminate or adjust requirements or conditions to enable a person to carry out the essential duties of an activity or job

undue hardship: the result of a change that would affect the economic viability of an enterprise or produce a substantial health and safety risk that outweighs the benefit of the accommodation

harassment: persistent behaviour that violates the human rights of the victim

sexual harassment: unwelcome sexual contact, remarks, leering, demands for dates, requests for sexual favours, and displays of sexually offensive pictures or graffiti

Duty to Accommodate

The Supreme Court of Canada has ruled that an employer has a legal duty to **accommodate** an employee’s individual needs. This means that the employer must take reasonable measures to implement policies or working conditions to meet the special needs of an employee. For example, if an employee is unable to work on a particular day because of religious beliefs, the employer must try to resolve this conflict in a way that satisfies both parties.

The employer would not, however, be expected to suffer undue hardship in order to accommodate the employee. **Undue hardship** is the result of a change that would affect the economic viability of the enterprise or produce a substantial health and safety risk that outweighs the benefit of accommodating a particular group or individual worker. For example, suppose Emiko has a physical disability and is required to carry boxes up a flight of stairs. It would be considered an undue hardship to expect the employer to install an elevator just to accommodate Emiko. A reasonable solution might be to have someone else carry the boxes up the steps and have Emiko assume some of that employee’s duties in exchange. This arrangement accommodates Emiko, and her employer suffers no undue hardship. In such cases, the employer has the burden of proving that accommodating an employee would cause undue hardship for the business.

Harassment in the Workplace

Everyone has the right to be free from experiencing humiliating or annoying behaviour. Such behaviour, or **harassment**, can be based on one or more of the grounds found in provincial human rights codes. For example, racial, sexual, or religious slurs can be considered harassment if they are repeated or ongoing. Similarly, sexual harassment is not permitted. **Sexual harassment** includes unwelcome sexual contact, remarks, leering, demands for dates, requests for sexual favours, and displays of sexually offensive pictures or graffiti.

Central Alberta Dairy Pool v. Alberta Human Rights Commission, [1990] 2 S.C.R. 489

BACKGROUND Jim Christie was employed by the Central Alberta Dairy Pool. After he joined the World Wide Church of God, Christie worked the early shift on Friday to avoid a conflict with his observance of the Saturday Sabbath of his new faith. He also requested permission to take two unpaid leaves for religious reasons. Christie received approval to take the first day off, but was denied permission for Easter Monday. Mondays were extremely busy because all the milk that arrived on the weekend had to be canned to prevent spoilage. He was told that his employment would be terminated if he failed to report for work on Monday. Christie did not report for work on that day, and his employment was terminated.

The Board of Inquiry found that Christie had been discriminated against, but the Alberta Court of Queen's Bench overturned the decision. After the Alberta Court of Appeal upheld this ruling, the decision was appealed to the Supreme Court of Canada.

LEGAL QUESTION Did the employer attempt to accommodate the employee to the point of undue hardship?

DECISION The Supreme Court of Canada ruled against Central Alberta Dairy Pool. The Court found that the employer had not made a reasonable attempt to accommodate the employee. In the written ruling, the Court noted: "If the employer fails to provide an explanation as to why individual accommodation cannot be accomplished without undue hardship, the duty to accommodate has not been discharged...." Central Alberta Dairy Pool had not shown that it had encountered undue hardship because of Christie's request

and, in fact, provided no suitable explanation for the refusal.

SOCIAL SIGNIFICANCE This case has become an important precedent in establishing an employer's duty to accommodate the individual needs of its staff. Unless an employer can demonstrate that a substantial financial loss would result from accommodating the special needs of an employee, the employer has a duty to accommodate those needs.

ANALYSIS

1. How might the Central Alberta Dairy Pool have dealt adequately with Christie's request for the day off?
2. What circumstances might have resulted in the employer suffering "undue hardship"?
3. Do you agree with the decision in this case? Why or why not?



CASE

1. Complete a flow chart to outline the steps in this case, starting with March 1998. Use symbols or illustrations if you wish.
2. What could the respondent have done to prevent such incidents from happening?
3. Is it fair to hold an employer liable for the actions of an employee? Why or why not?

Chartrand v. Vanderwell Contractors Limited (2001), Alta. H.R.C.

Jean Chartrand, a 38-year-old mother of two, was employed at Vanderwell Contractors Limited at Mitsue Lake Industrial Park near Slave Lake, Alberta, from 1995 to 1998. On August 4, 1998, Chartrand terminated her employment because she felt that her shift supervisor, Maurice Conrad, was sexually harassing her. Chartrand brought a complaint to the Alberta Human Rights Commission and sought compensation for monetary losses and other damages.

Chartrand testified that Conrad had, on various occasions, used sexually inviting language and had physically touched her and rubbed his body against hers. Furthermore, she had brought these allegations to Ken Vanderwell, one of the owners, in March 1998, and had asked to be transferred to a different shift. In response to her complaint, Vanderwell spoke to Conrad and told him that the “horseplay” had to end. At this time, Chartrand sought advice from the Human Rights Commission and was advised to keep a record of any future incidents. She recorded further incidents until she finally quit her job in August 1998.

Conrad denied that he sexually harassed Chartrand but did admit that he grabbed her “around the wrist more than once, that he had grabbed her around the chest, that her necklace was torn off her neck in one of these encounters, and that he had promised to get it fixed.” There was testimony from other Vanderwell employees that supported Chartrand’s allegations that she was being sexually harassed by Conrad.

So far, the complainant had established a *prima facie* case of discrimination. The onus then shifted to the respondent to establish a justification for the discrimination. Vanderwell Contractors was not able to justify such inappropriate behaviour by one of its employees. The Commission found that Chartrand had been sexually harassed and that she had quit her job because of this harassment. The remedy imposed was financial compensation—six months’ wages, damages for humiliation and hurt feelings (\$5000), and the reimbursement of legal fees—all to be paid to Chartrand jointly by Vanderwell Contracting and Maurice Conrad.

Consider This

A friend confides in you that he is constantly the butt of insulting jokes and comments from his co-workers. He is clearly upset but does not want to leave his part-time job. What advice would you give him?

Employers are responsible for ensuring that the conduct of their employees does not constitute harassment. This principle was established by the Supreme Court of Canada in the case of *Robichaud v. Canada (Treasury Board)*, [1987]: “An employer can be held responsible for the unauthorized discriminatory acts of its employees, in the course of their employment.”

Poisoned Environment

The case of Jean Chartrand is clearly one of sexual harassment. However, such harassment is not the only type of disturbing or difficult situation peo-



Figure 5.7 Under the law, no one should have to put up with sexual harassment in the workplace. Do you think that a pin-up of a scantily clad model, posted in a conspicuous location, constitutes sexual harassment? Explain.

ple face. When a person or group of people is continually subjected to actions or comments that create an uncomfortable atmosphere, this atmosphere is called a **poisoned environment**. A poisoned environment can occur when comments or actions create real or perceived inequality. For instance, a female employee might be subjected to a poisoned environment if she constantly hears disparaging comments from her male co-workers such as, “Women just aren’t as capable as men.” As with harassment, it is the responsibility of the employer to ensure that a poisoned environment does not exist in the workplace.

poisoned environment: an uncomfortable or disturbing atmosphere created by the negative comments or behaviour of others

A Poisoned Environment Causes Pain

Joe was excited about getting his first job as a mechanic after he had served his apprenticeship. He had been rated at the top of his class and was confident of his abilities. On the first day of work, Joe was met with some hostility from his co-workers. Comments about his race, his lunch, and the colour of his skin were frequent and hurtful. Still Joe said nothing, thinking that his co-workers would soon recognize he was a hard worker and a nice guy.

However, the atmosphere did not change over time. Although some colleagues did warm up to him and were friendlier, the hurtful comments and not-so-funny practical jokes continued. Joe finally spoke to his boss, who told him not to be so sensitive since everyone in an all-male workplace is usually subjected to this kind of treatment. Joe became depressed, and his work began to suffer. Finally, in frustration, he quit his job and filed a complaint for harassment.

LAW IN ACTION

1. Why does this situation constitute a poisoned environment?
2. Other workers also experienced the same kind of behaviour. Does this fact make any difference to Joe’s claim or the employer’s defence? Explain.

accommodation: the place where people live or want to live

Fast Fact

In Ontario, teenagers under the age of 18 have the right to equal treatment with respect to occupancy and contracting for accommodation.

Accommodation and Facilities

In this context, **accommodation** refers to the place where people live or want to live. Accommodation may be long term (e.g., purchasing or renting a home) or temporary (e.g., staying at a hotel or college residence). In her speech at the beginning of this chapter, Chief Justice Beverley McLachlin referred to the restrictive covenants that once prohibited the sale of property to certain groups, such as Jews. Quite clearly, such discrimination would not be allowed under today's human rights laws.

All people have the right to equal treatment in accommodation, and this right is protected by provincial human rights codes. For example, in a 2001 settlement, a Saskatchewan woman of Aboriginal ancestry complained to the Human Rights Commission that the manager of an apartment building refused to rent an apartment to her because of her race. When she asked the superintendent about the vacancy, she was told that the suite was no longer available, but when she asked a friend to inquire, the friend was told that the suite was available. The woman was awarded \$550 in compensation, and the owner of the apartment building agreed to post an anti-discrimination policy in the building.

Protection in this area includes the right to be free from discrimination based on age, marital status, or source of income. Many cases have been documented regarding unmarried women with children who are on social

CASE

Mattern v. Spruce Bay Resort (2000), Alta. H.R.C.

1. Explain how Mattern and Russell were able to establish a prima facie case of discrimination.
2. The panel ruled that the resort's actions were "reasonable and justifiable based on sound business practices." Explain what this means and how it affected the outcome of this case.
3. Do you agree with the Court's ruling to uphold the panel's decision? Why or why not?

Mattern and Russell each filed a complaint with the Alberta Human Rights Commission, alleging discrimination on the basis of family status. Mattern and Russell attempted to rent a campsite at Spruce Bay Resort, which advertises itself as a family campground. They were to be joined by some friends and their brothers later that night. The resort manager testified that it was unclear whether Mattern and Russell wanted to have the spot for one night or two and that the resort had a policy of booking sites for a minimum of two nights on weekends. It was also unclear how many people would actually be staying at the campsite. The manager explained that he was concerned that the group would stay up late and make noise that would bother other campers.

Mattern and Russell claimed that Spruce Bay Resort refused to rent them a campsite because of their single status. The human rights panel hearing this case did find a prima facie case of discrimination. However, the panel decided that the decision of Spruce Bay Resort not to rent a campsite to the complainants was reasonable and justifiable based on sound business practices. Therefore, the complaint was dismissed. This decision was appealed to the Alberta Court of Queen's Bench, where the decision of the panel was upheld.

assistance and have been refused rental accommodation. A property manager who has a policy of not renting to “welfare moms” is, in fact, guilty of discrimination.

Facilities refer to areas or buildings designated for public use. Examples include parks, concert halls, or hockey rinks. Discrimination can sometimes occur in the provision of facilities. Suppose a rink attendant jeers at a women’s hockey team and gives the team less than its allotted ice time. The players complain to the manager, who does nothing. In this case, the rink attendant and the manager have violated the women’s rights. Human rights legislation states that “every person has a right to equal treatment with respect to services, goods and facilities without discrimination because of ... sex.” First of all, by not receiving allotted ice time, the women’s team is not being treated equally. Secondly, the attendant’s jeering and the manager’s refusal to act, taken as a whole, has created a poisoned environment that is threatening and demeaning to women. This environment robs the women of their rights to use the facility without discrimination.

Meeting Special Needs

Most provincial human rights codes prohibit discrimination on the basis of disability and require employers to accommodate the needs of workers with psychological, emotional, or physical disabilities. Suffering from an addiction to drugs or alcohol is also likely to be considered a disability protected under human rights legislation.

Under the Ontario *Human Rights Code*, for example, persons with disabilities have the right to full integration and participation in society. Employers, landlords, service providers, and others have a duty to consider special needs. Buildings, programs, procedures, and services must be designed to include all persons equally and fully. Where it is impossible to remove barriers without undue hardship, special arrangements must be made so that persons with disabilities can participate.

As mentioned previously, any limits to the duty to accommodate fall under the category of undue hardship. To prove undue hardship, three factors are considered: cost, outside sources of funding, and health and safety. Depending on the nature of the job or activity and the extent of the disability, an employer, landlord, or service provider may be able to plead undue hardship.

facilities: areas or buildings designated for public use

After 25 years of struggle, people with disabilities are still a long way from the ‘equal benefit and protection of the law’ guaranteed in our ... Charter.”

— Laurie Beachell,
national co-ordinator, Council of
Canadians with Disabilities



Figure 5.8 This automated bank machine in Ottawa, Ontario, equipped with a Braille keypad and headphones, issues instructions by voice to assist customers who are visually impaired. What other obstacles face people with visual disabilities?

LAW IN ACTION

1. Apply the consideration of undue hardship in this situation.
2. Do you think the outcome of these events was a triumph or a defeat for people who use wheelchairs? Explain your position.



Barbara Turnbull

The Final Curtain

In 2001, five complainants—Barbara Turnbull, Marilyn Chapman, Domenic Fragale, Ing Wong-Ward, and Steven Macaulay—brought a case to the Ontario Human Rights Commission against Famous Players Theatres. Their complaint alleged discrimination on the basis of disability. Three of the movie chain's Toronto theatres—the Uptown (which was a prime venue for the Toronto International Film Festival), the Backstage, and the Eglinton—were inaccessible to people in wheelchairs. A fourth theatre was included but was dropped from the case since Famous Players was not renewing its lease on this property.

The Board of Inquiry ruled that Famous Players had to make the theatres accessible to people who use wheelchairs. The decision stated: "Persons using wheelchairs [have] just as much right to be granted admittance to a Famous Players theatre and watch a movie as able-bodied patrons." Famous Players was also ordered to pay damages of \$8000 each to Turnbull and Chapman, \$10 000 each to Wong-Ward and Macaulay, and \$12 000 to Fragale, who suffered mental anguish over the ordeal. The movie chain was given one year to comply with this order for the Backstage theatre and two years for the Uptown and Eglinton theatres.

During the public hearing into this complaint, Famous Players refused to provide any financial data. The company argued that its ability to pay for the renovations was not an issue. Yet, in January 2002, Famous Players announced that it would close the three theatres before the deadlines imposed by the Board of Inquiry.

Keith Norton, chief commissioner of the Ontario Human Rights Commission said, "I am disappointed by this decision as it deprives local moviegoers from accessing services at these theatres. Clearly the closings are based on economic reasons and [are] not related to the decision of the Board."

In response to Famous Player's announcement, Barbara Turnbull commented: "I find it unfortunate that they [Famous Players] are trying to blame the closings of historical and popular theatres on us simply because we want the same options as people who don't use wheelchairs. That's all this has been about—giving us equal access."

Goods and Services

goods: merchandise that can be purchased

services: ways of meeting consumer needs that do not involve the purchase of tangible goods

The term "goods and services" applies to a wide area of activities. **Goods** generally refer to merchandise that can be purchased, such as books, clothing, CDs, or computer equipment. **Services** provide a way to meet consumer needs that do not involve the purchase of tangible goods, such as banking, dry cleaning, taking a bus, staying in a hotel, or using club memberships. Under human rights legislation, everyone has a right to equal access to goods and services.

Anderson v. YMCA (of Barrie) (2000), Board of Inquiry (O.H.R.C.)

Anderson and O'Neill brought a complaint to the Ontario Human Rights Commission because women were unable to buy premium memberships at the Barrie YMCA (Young Men's Christian Association). Men who belonged to the premium membership category were entitled to use a separate change facility that had many amenities not available to regular members. No comparable facility with similar amenities were available to women.

After examining the evidence, the Board of Inquiry found that the facilities at the Barrie YMCA constituted an infringement of the complainant's rights to be free from discrimination on the basis of sex for provision of services. The Board ordered the Barrie YMCA to build a women's premium facility comparable in size and amenities to its men's premium membership facilities. In addition, the Barrie YMCA was required to post copies of the Board's decision around the facility and place a synopsis of the decision in the women's change room.

CASE

1. Suppose services had been available for an extra fee to women but not to men. Would this constitute discrimination on the basis of sex? Discuss.
2. If some self-defence courses were offered to women only, would this be considered discriminatory? Why or why not?

Building Your Understanding

1. a) Define "bona fide occupational requirement," providing an example from three different professions.
b) Why is a bona fide occupational requirement not considered discriminatory?
2. How would you justify hiring someone with equal or fewer qualifications on the basis of affirmative action?
3. Using examples, distinguish between constructive discrimination and direct discrimination.
4. Explain the term "accommodate" as it applies to employers and employees.
5. What can an employer do to ensure that the conduct of employees does not constitute harassment of a co-worker?
6. What three factors are considered when trying to determine if undue hardship exists in accommodating the needs of persons with disabilities?
7. How does undue hardship affect the employer's duty to accommodate?
8. Provide examples of facilities or programs that are available in public schools to help accommodate the needs of students with physical or learning disabilities.

LOOKING BACK

Reviewing Your Vocabulary

accommodate p. 122	discrimination p. 111	poisoned environment p. 125
accommodation p. 126	facilities p. 127	prejudice p. 112
affirmative action p. 120	goods p. 128	prima facie p. 115
bona fide occupational requirement p. 120	gravamen p. 115	respondent p. 117
complainant p. 115	harassment p. 122	services p. 128
conciliation p. 117	human rights p. 111	sexual harassment p. 122
constructive discrimination p. 120	human rights codes p. 111	stereotyping p. 112
direct discrimination p. 121	mediation p. 117	undue hardship p. 122

Quick Quiz

- I. Match the vocabulary terms above with these clues:
 - a) humiliating or annoying behaviour that violates a person's human rights
 - b) gives priority to members of groups who have been historically disadvantaged
 - c) occurs when comments or actions of others create an uncomfortable atmosphere
 - d) limits the employer's legal duty to accommodate an employee's individual needs
 - e) legally convincing unless disproved by contrary evidence
 - f) the qualification deemed necessary to ensure safe, efficient job performance
 - g) policies that set job requirements that inadvertently result in discrimination
 - h) intervention between conflicting parties, promoting compromise and settlement
 - i) prejudging an individual based on an oversimplified characterization of a particular group
 - j) unfair treatment of an individual because he or she is a member of a certain group

Checking Your Knowledge

2. Discuss how the following laws protect the human rights of Canadians: *Canadian Charter of Rights and Freedoms*, *Canadian Human Rights Act*, and provincial human rights codes.
3. Use examples to explain how stereotyping and prejudice can lead to discrimination.
4. Outline the procedure for lodging and resolving human rights complaints.
5. What duty do employers and landlords have to accommodate persons with disabilities?
6. Explain how the concept of "undue hardship" applies to human rights cases.

Developing Your Thinking and Inquiry Skills

7. a) Complete a comparison organizer for **two** of the following documents: the *Universal Declaration of Human Rights*, the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act*, and your provincial human rights code.
b) Referring to your organizer, write a paragraph summarizing the documents' similarities and differences.