

SCREENING PROSPECTIVE TENANTS AND HUMAN RIGHTS CODE CONSIDERATIONS FOR RESIDENTIAL LANDLORDS

In the current increasingly competitive rental environment in which landlords find attracting the right customer to fill vacancies increasingly difficult, it is tempting to accept the first person with a pulse and first and last month's rent as a tenant. However, given that it is widely anticipated that the provisions of the new legislation which will come into force in January, 2007 will make evicting tenants more difficult than is currently the case, a carefully thought out screening process becomes more important than ever for landlords and property managers.

Often, screening prospective tenants, showing rental units and taking rental applications is left to staff members with little or no training with respect to carrying out this important step in the rental process. Problems for landlords arising from complaints to the Ontario Human Rights Tribunal usually arise as the result of actions done and statements made by staff members interacting with prospective tenants. Staff should also be made aware that even once a person becomes a tenant, continuing compliance with the Code is necessary.

This paper will address what is required of landlords and their staff in screening prospective tenants and in interacting with existing tenants to help them ensure their compliance with the Ontario Human Rights Code and avoid the time consuming and costly results of even inadvertent non-compliance.

The Ontario Human Rights Code is legislation in force in the province of Ontario. It provides that whenever other provincial legislation (including the Tenant Protection Act and soon the Residential Tenancies Act) conflicts with the Code, the provisions of the Code prevail. Section 47 provides as follows:

47. (1) This Act binds the Crown and every agency of the Crown.

Act has primacy over other Acts

(2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, **this Act applies and prevails** unless the Act or regulation specifically provides that it is to apply despite this Act.

Subsection 3(4) of the Residential Tenancies Act provides: If a provision of this Act conflicts with a provision of another Act, other than the *Human Rights Code*, the provisions of this Act apply.

Therefore, the Human Rights Code applies to residential rental accommodation and prevails over any provision in the Residential Tenancies Act which might be interpreted to conflict with the Code. The Code contains specific reference to rental accommodation.

The relevant sections are in Part 1 of the Code and are set out in full below:

The Ontario Human Rights Code

Preamble

Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

And Whereas it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of 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 able to contribute fully to the development and well-being of the community and the Province;

And Whereas these principles have been confirmed in Ontario by a number of enactments of the Legislature and it is desirable to revise and extend the protection of human rights in Ontario;

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

PART I

FREEDOM FROM DISCRIMINATION

Services

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.

Accommodation

2. (1) Every person has a right to equal treatment with respect to the **occupancy of accommodation**, without discrimination because of **race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, disability or the receipt of public assistance.** (*emphasis added*)

Harassment in accommodation

(2) Every person who occupies accommodation has a right to freedom from **harassment by the landlord or agent of the landlord or by an occupant of the same building** because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, marital status, family status, disability or the receipt of public assistance. (*emphasis added*)

Contracts

3. Every person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.

Accommodation of person under eighteen

4. (1) Every sixteen or seventeen year old person who has withdrawn from parental control has a right to equal treatment with respect to **occupancy of and contracting for accommodation** without discrimination because the person is less than eighteen years old.

(2) A contract for accommodation entered into by a sixteen or seventeen year old person who has withdrawn from parental control is enforceable against that person as if the person were eighteen years old.

Employment

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.

Harassment in employment

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability.

Vocational associations

6. Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.

Sexual harassment

Harassment because of sex in accommodation

7. (1) Every person who occupies accommodation has a right to **freedom from harassment because of sex by the landlord or agent of the landlord or by an occupant of the same building.** (*emphasis added*)

Harassment because of sex in workplaces

(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

Sexual solicitation by a person in position to confer benefit, etc.

(3) Every person has a right to be free from,
 (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
 (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

Reprisals

8. Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

Infringement prohibited

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

Section 2 of the Ontario Human Rights Code forbids discrimination with respect to **"occupancy of accommodation"** on the basis of **race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status, disability or the receipt of public assistance.**

If a landlord does not accept a prospective tenant because of one of these prohibited grounds, they may face a complaint from the prospective tenant to the Ontario Human Rights Commission. The complaint process is a long and unwieldy one and the Commission has significant powers, including the power to fine a person in breach of the Code. It is always advisable not to indicate to a prospective tenant why they have not been accepted. There is no legal requirement for a landlord to tell a prospective tenant why they were not accepted. The landlord should simply say that the person was not the successful applicant. No further reasons should be given.

Some of the prohibited grounds of discrimination are obvious. Others are less so.

Citizenship is construed by the Commission to include a person's citizenship status in the country (i.e. if they are legal or illegal immigrants). In other words, a landlord is prohibited from discriminating against a potential tenant on the basis that the applicant is not legally in Canada (i.e. an illegal immigrant). Therefore, landlords are advised not to ask a prospective tenant about his or her citizenship status in Canada. Asking such a question could be construed as discrimination contrary to the Human Rights Code on the basis of "citizenship" and "place of origin".

Family status & marital status refers to whether a person is single, married, in a common-law relationship, has children etc. The Code defines "marital status" to mean the status of being married, single, widowed, divorced or separated and includes the status of living with a person in a conjugal relationship outside marriage. This is a complex area of the code as "seniors only" buildings are allowed. However, in general, a landlord cannot maintain that it will only accept a person whose "family status" falls within a certain family composition (i.e. a single, a couple, adults only, etc.) Advertisements for accommodation should never read: "...suitable for a single lady..." or "perfect for empty nesters" etc.

Disability & the "duty to accommodate": The duty not to discriminate on the basis of disability is potentially problematic. What does a landlord do if a disabled person applies and the rental unit cannot accommodate the applicant's needs (i.e. is not wheelchair accessible)? The Commission will tell you that a landlord has a "duty to accommodate" such applicants. (The word "accommodate" should not be construed as having the meaning of "provide accommodation", but as the duty to make changes or provisions, which would allow the person to occupy that unit.) This duty is an onerous one. The landlord must accommodate this person short of "**undue hardship**". The landlord is expected to make changes necessary for such persons even if such changes entail considerable cost. The Commission uses phrases like "The dignity of the person must be respected", and we must "maximize the persons continued integration into the community". Critics of this policy see landlords being held to an unduly high standard, the expense of which is borne solely by the landlord. Short of causing the landlord bankruptcy, the Commission may find a refusal to spend considerable sums to make the accommodation useable by a disabled person a breach of the Act.

Age: Age is defined in the Code as follows: "age" means an age that is eighteen years or more. (There is currently an exception with discrimination in employment where "age" means an age that is eighteen years or more and less than sixty-five years, but this is scheduled to be repealed effective December 12, 2006, and the definition of "age" throughout the Code will be: "age" means an age that is 18 years or more.)

Despite this definition, there is an express exception made for persons 16 and 17 years of age with respect to **occupancy and contracting for accommodation**. You may not discriminate against persons who are 16 or 17 on the basis of their age. No comments should be made about their age, such as "How old are you?" The Code also provides that persons who enter into a contract for rental housing are legally bound by that contract, despite the fact that they have not reached the age of majority. Property managers need to be especially careful with persons who are 16 and 17 because they are also likely to be in receipt of public assistance and their family status may be unconventional as well.

Most rental applications ask applicants for their date of birth to allow a credit check to be done. Applications also often contain a space for the name and age of prospective occupants. Q: Could these sections on an application be considered “prima facie” evidence of discrimination on the basis of age?

Receipt of public assistance: Landlords cannot discriminate against prospective tenants who are in receipt of public assistance. This is the case even if the monthly rent is set at a level that would make it extremely unlikely, if not impossible, for the prospective tenant to pay the rent. Landlords must be extremely careful to avoid conversations or questions to prospective tenants about how they could possibly afford the rent when they only receive a certain amount in the form of social assistance. Such questions may be construed by the Ontario Human Rights Tribunal as evidence of discrimination on the basis that a prospective tenant is in receipt of public assistance.

The Ontario Human Rights Commission Decision in *Kearney* on the issue of the Landlord’s Use of **Income Criteria** in Screening Prospective Tenants

Landlords may recall the decision of the Ontario Human Rights Commission in *Kearney* with respect to the use of income criteria by landlords and whether that practice constituted discrimination contrary to the Human Rights Code. In *Kearney* a practice of many landlords of applying income to rent ratios was challenged. Landlords used an income to rent ratio of 30% in reviewing prospective tenants applications. In other words, if the monthly rent represented more than 30% of a prospective tenants total monthly income, the landlord would refuse to rent to that person on the basis that they couldn’t afford the unit and were therefore a bad risk.

The Commission found that this was **constructive discrimination** against people in receipt of public assistance because most people in receipt of public assistance could not find housing that cost less than 30% of their monthly income. Therefore, applying income to rent ratios constituted discrimination against all prospective tenants in receipt of public assistance contrary to the Code.

The provincial government, in response to pressure from landlord and tenant groups included some guidance in the T.P.A. and its Regulations with respect to the issue of human rights and landlord’s practices in screening tenants. Section 38 of the T.P.A. and section 10 of the RTA read as follows:

“In selecting prospective tenants, landlords may use, in the manner prescribed in the regulations made under the *Human Rights Code*, income information, credit checks, credit references, rental history, guarantees, or other similar business practices as prescribed in the regulations made under the *Human Rights Code*.”

The Ontario government then passed a Regulation under the Human Rights Code (O.Reg. 290-98) setting out the clear conditions under which landlords may request and employ credit and income information. It does not specifically refer to or allow the use of income to rent ratios. (*Ontario Regulation #290-98 reads as follows:*)

Human Rights Code

ONTARIO REGULATION 290/98

Amended to O. Reg. 646/00

BUSINESS PRACTICES PERMISSIBLE TO LANDLORDS IN SELECTING PROSPECTIVE TENANTS FOR RESIDENTIAL ACCOMMODATION

This is the English version of a bilingual regulation.

1. (1) A landlord may request credit references and rental history information, or either of them, from a prospective tenant and may request from a prospective tenant authorization to conduct credit checks on the prospective tenant. O. Reg. 290/98, s. 1 (1).

(2) A landlord may consider credit references, rental history information and credit checks obtained pursuant to requests under subsection (1), alone or in any combination, in order to assess the prospective tenant and the landlord may select or refuse the prospective tenant accordingly. O. Reg. 290/98, s. 1 (2).

(3) A landlord may request income information from a prospective tenant only if the landlord also requests information listed in subsection (1). O. Reg. 290/98, s. 1 (3).

(4) A landlord may consider income information about a prospective tenant in order to assess the prospective tenant and the landlord may select or refuse the prospective tenant accordingly only if the landlord considers the income information together with all the other information that was obtained by the landlord pursuant to requests under subsection (1). O. Reg. 290/98, s. 1 (4).

(5) If, after requesting the information listed in subsections (1) and (3), a landlord only obtains income information about a prospective tenant, the landlord may consider the income information alone in order to assess the prospective tenant and the landlord may select or refuse the prospective tenant accordingly. O. Reg. 290/98, s. 1 (5).

2. (1) A landlord may require a prospective tenant to obtain a guarantee for the rent. O. Reg. 290/98, s. 2 (1).

(2) A landlord may require a prospective tenant to pay a security deposit in accordance with sections 117 and 118 of the *Tenant Protection Act, 1997*. O. Reg. 290/98, s. 2 (2).

3. In selecting a prospective tenant, a landlord of a rental unit described in paragraph 1, 1.1, 2 or 3 of subsection 5 (1) or subsection 6 (1) of the *Tenant Protection Act, 1997* may request and use income information about a prospective tenant in order to determine a prospective tenant's eligibility for rent in an amount geared-to-income and, when requesting and using the income information for that purpose only, the landlord is not bound by subsections 1 (3) and (4). O. Reg. 290/98, s. 3; O. Reg. 646/00, s. 1.

4. Nothing in this Regulation authorizes a landlord to refuse accommodation to any person because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status, handicap or the receipt of public assistance. O. Reg. 290/98, s. 4; O. Reg. 31/00, s. 1.

5. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 290/98, s. 5.

The decision in *Kearney* was a decision of the Ontario Human Rights Commission based on the legislation prior to the enactment of the Tenant Protection Act. However, nothing in the TPA or the RTA overrules O.Reg. #290-98 and this regulation does not specifically allow the use of income to rent ratios. Therefore, landlords should be duly cautious and not apply income to rent ratios for fear that, even in light of the new Regulation, that they be found to be “**constructive discrimination**” against prospective tenants in receipt of public assistance who are the most likely to fail to meet income to rent ratios, including the 30% ratio used by landlords in the *Kearney* case. Remember that the Human Rights Code prohibits discrimination against those in receipt of public assistance and the Regulation does not change that. A landlord does not want to become the “test case” as to whether or not income to rent ratios offend the new regulations, but should carefully avoid using them as a grounds for rejecting prospective tenants until we have clear guidance from the Human Rights Commission, which will most likely be a decision made pursuant to a tenant or prospective tenant’s complaint.

The Regulation allows landlords to “request income information from a prospective tenant ONLY if the landlord also requests information listed in subsection (1)”.

Subsection (1) allows a landlord to “request credit references and rental history information, or either of them, from a prospective tenant and may request from a prospective tenant authorization to conduct credit checks on the prospective tenant”, and to consider the information obtained, “alone or in combination, in order to assess the prospective tenant and the landlord may select or refuse the prospective tenant accordingly.”

Subsection (4) goes on to state that a landlord “may consider income information about a prospective tenant in order to assess the prospective tenant and the landlord may select or refuse the prospective tenant accordingly ONLY if the landlord considers the income information TOGETHER WITH all the other information that was obtained by the landlord pursuant to subsection (1).

Subsection (5) must also be considered. It states that “If, after requesting the information listed in subsections (1) and (3), a landlord only obtains income information about a prospective tenant, the landlord may consider the income information alone in order to assess the prospective tenant and the landlord may select or refuse the prospective tenant accordingly.”

Section 4 of the Regulation reminds us that nothing set out above allows a landlord to refuse accommodation to any person because of...“receipt of public assistance”.

Therefore, landlords should develop a series of questions that rental agents, superintendents, or anyone that deals directly with prospective tenants can ask. They should begin with questions pertaining to subsection 1(1) such as rental history questions, credit references (i.e. bank managers or other lenders), and request written permission to do credit checks. Only then may the landlord ask the tenant for income information.

Landlords may give prospective tenants an application form and ask them to fill it out completely and hand it in. The application should set out all of the questions required as a prerequisite to asking income information.

How should a landlord turn down a prospective tenant? A landlord should give a tenant an application form to return to the landlord, completed in full. The landlord may advise all prospective tenants that they have a policy of showing the unit to all prospective applicants and that they do not accept the first completed application that they receive, but that they review them all and then make a decision and that the successful applicant will be contacted and that if you are not contacted by the landlord, then you are not the successful applicant. You may provide prospective tenants with a time frame, i.e. “You will be notified within two weeks if you are the successful applicant”.

If the prospective tenant then calls and ask if they got the apartment and they haven’t, they should be advised that they were not the successful applicants. You do not have to elaborate nor should you provide information about the successful tenant or the reasons why they got the apartment. You don’t want to inadvertently suggest by comparison that you were discriminating against the unsuccessful applicant when you accepted the successful applicant. In addition, you have privacy obligations to your new tenants to keep their personal information confidential. If they decide to pursue the matter and make a complaint to the Human Rights Commission, you do not want to be prejudiced by your comments. You are not required by law to give a prospective tenant reasons for not accepting their application.

You can turn down a prospective tenant if their credit checks are not good or if their references don’t check out. (As set out above, you must follow the guideline with respect to your due diligence in choosing a tenant.) Refusing accommodation on the basis of a poor credit reference is not discrimination on the basis of a prohibited ground under the Code.

Likewise, you can discriminate against a prospective tenant on a grounds not prohibited by the Human Rights Code. For example, you could discriminate against a prospective tenant on the grounds that they are a smoker. However, if they are a smoker who also

suffers a disability, including one caused by the smoking, it may be inferred that you are actually discriminating on the basis of the disability, not the smoking habit itself. This would, of course, apply to people who have a licence to smoke medical marijuana. You may be found to have turned them down on the basis of their disability and not their pot smoking habit.

Similarly, you can turn down a prospective applicant on the basis that they have a dog or other pet, (subject to the obvious exception of guide dogs for blind or disabled persons). Pets or persons with pets are not protected groups under the Code.

Nonetheless, you must always be aware that turning someone down on a ground that is not prohibited may, in some situations, be interpreted as actual discrimination on a seemingly unrelated ground.

CONTINUING CODE OBLIGATIONS TOWARD EXISTING TENANTS

Once you have successfully gotten through the screening process and have chosen a new tenant, your obligations to comply with the Code continue. Along with the need to comply with all the other prohibited grounds of discrimination, the landlord is legally obligated to ensure that existing tenants do not suffer from **sexual harassment**.

The law of agency provides that a landlord will be responsible for the actions of its agents and employees if one of them breaches the sexual harassment prohibition or any other section of the Code. Even if the agent or employee is acting outside the scope of his/her employment or is "off duty" or has been expressly forbidden by the landlord from such behaviour, the case law is unforgiving of the employer of the wrongdoer, who is often held liable for the misdeeds complained of. This compounds the need for proper training of staff to ensure that tenants are not subjected to sexual harassment, however innocent it may seem or express or implied discrimination on any other ground prohibited by the Ontario Human Rights Code.

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