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CHAPTER 2
THE CHANGING LEGAL EMPHASIS: COMPLIANCE AND IMPACT ON CANADIAN WORKPLACES

LEARNING OUTCOMES

EXPLAIN how employment-related issues are governed in Canada.
DISCUSS at least five prohibited grounds for discrimination under human rights legislation and **DESCRIBE** the requirements for reasonable accommodation.
DESCRIBE behaviour that could constitute harassment and **EXPLAIN** the employers' responsibilities regarding harassment.
DESCRIBE the role of minimums established in employment standards legislation and the enforcement process.

CHAPTER SUMMARY

This chapter focuses on the legal environment in Canada. It discusses the multiple overlapping pieces of legislation that attempt to balance employee and employer rights when it comes to human rights and freedoms, employment equity, employment standards, and privacy. The chapter shows the similarities and differences between organizations that are under federal jurisdiction versus provincial jurisdiction. It discusses the requirement to take steps to protect employees from harassment and discrimination, in order to reduce legal liability. Specific exceptions that allow discrimination on prohibited grounds, based on bona fide occupational requirements, are covered, but so is the requirement to offer reasonable accommodation. Legislation specific to the workplace is discussed. This includes the Employment Equity Legislation and Employment Standards. The chapter identifies the minimum terms and conditions contained in employment standards legislation and the complaint-based process for violations. Respecting employee privacy is emphasized. The chapter discusses how the Personal Information Protection and Electronic Documents Act (PIPEDA) is used to oversee the collection, use, and disclosure of employees' personal information.

LECTURE OUTLINE

I. The Legal Framework for Employment Law in Canada

Both HR professionals and front line managers/supervisors need up-to-date knowledge of the multiple layers of employment legislation and regulation that affect Canadian workplaces in order to reduce legal liability and protect against expensive lawsuits. Stare decisis and precedents are included. Figure 2.2 (p. 23) lists several key pieces of legislation that attempt to balance the rights of employers and employees including the Charter of Rights and Freedoms; human rights legislation; employment standards legislation; occupational health and safety laws; collective bargaining agreements; and employment contracts. The judicial system and special regulatory bodies, such as human rights commissions/tribunals, provide forums for resolving differences between employers and employees.

II. Legislation Protecting the General Population

Workplace practices are measured against general Canadian legislation that makes it illegal to discriminate, even unintentionally against members of various groups on prohibited grounds.

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1. *The Charter of Rights and Freedoms* – Far-reaching federal law, enacted in 1982, applies to the actions of all levels of government and to agencies under their jurisdiction. The Charter provides fundamental rights and freedoms to every Canadian, including the equality rights found in Section 15, that provide the basis for more specific human rights legislation.

2. *Human Rights Legislation* – Prohibits intentional and unintentional discrimination on prohibited grounds in employment situations and the delivery of goods and services. Human rights legislation takes its cue from Section 15 of the Charter, but differs in that it applies to every person residing in Canada and is jurisdiction specific; i.e., legislation can vary from province to province/territory. Human rights legislation cannot be superseded by employment contracts.

3. *Discrimination Defined* – Because discrimination nullifies or impairs human rights, both intentional (direct or indirect) and unintentional discrimination are illegal. Forms of intentional discrimination include differential or unequal treatment or discrimination because of association (friendship or other relationship with a member of a protected group). Unintentional/constructive discrimination, also known as systemic discrimination is often harder to detect as it is embedded in policies and practices that appear neutral

   Permissible Discrimination via Bona Fide Occupational Requirements – A bona fide occupational requirement (BFOR) is a justifiable reason for discrimination based on business necessity (that is, the discrimination is required for the safe and efficient operation of the organization) or a requirement that can be clearly defended as intrinsically required by the tasks an employee is expected to perform. Discrimination via a BFOR is permitted when reasonable accommodation through adjustment of employment policies or practices is not feasible.

   The three criteria for assessing the legality of a BFOR, as established by the Meiorin case (Supreme Court of Canada, 1999) are:
   - The discriminatory policy/procedure was based on a legitimate, work-related purpose
   - Decision makers/agents believed the requirement was necessary for the role
   - It was impossible to accommodate employees who could not meet the requirement without undue hardship on the employer.

4. *Human Rights Case Examples* - The three most common types of complaints (see Figure 2.3 (p. 26)) heard by the Canadian Human Rights Commission relate to discrimination and/or failure to accommodate based on:
   - Disability (roughly 60%) - for duty to accommodate disabilities
   - Race or ethnicity (roughly 15%)
   - National or ethnic origin (roughly 16%)

   Other human rights cases have involved complaints in regards to religion, sexual orientation, age and family status. Sound anti-harassment policies (see p. 34) when communicated to all employees and enforced fairly and consistently, can help to create a harassment free workplace. Legislative systems in Canada allow for multiple opportunities for appeal; if HR and managers take a proactive approach to ensuring that all programs and policies are legally defensible, then the risk of becoming involved in lengthy and expensive human rights proceedings can be mitigated.

5. *Enforcement* – Responsibility for enforcement of the human rights acts and providing a speedy and accessible mediation process for dispute resolution falls on the human rights commission/tribunal in each jurisdiction. These regulatory bodies are also responsible for bearing the costs of human rights complaints brought forward, to ensure financial resources are not an obstacle for potential complainants. Employers have a duty to investigate all claims of discrimination, starting with selection of a workplace investigator (see Figure 2.5, p. 36)

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Three other obligations of employers' include

- showing awareness of discrimination/harassment issues prior to the complaint
- taking prompt action after the complaint is filed
- demonstrating reasonable resolution and communication in regards to the complaint.

Two forms of remedies if discrimination is found by the commission/tribunal are systemic and restitutional.

III. Employment Equity Legislation

The Charter of Rights and Freedoms also permits proactive programs that go beyond human rights legislation, in order to remedy pervasive discrimination against four identifiable groups, and for whom the complaint-based reactive process was insufficient in changing patterns of discrimination over time. Employment equity programs are not affirmative action (quotas); their goal is to achieve a balanced representation of designated group members in the organization at all levels.

The Plight of the Four Designated Groups

- Women – issues include occupational segregation, glass ceiling (see Figure 2.6, p. 37) and equal pay for equal work
- Aboriginals – concentrated in low-skill, low paid jobs; unemployment rate is significantly higher and income significantly lower than non-Aboriginals **<u>NOTE</u>: Preferred word is ***Indigenous*** – not Aboriginal**
- People with Disabilities – employment opportunities are lower than non-disabled and employment income lags that of non-disabled
- Visible minorities – not to be confused with immigrant; visible minorities are defined as all non-Caucasian/non-white persons, other than Aboriginals. Key issue is underemployment relative to their knowledge, skills, and abilities.

IV. Employment/Labour Standards Legislation

Employment (labour) standards legislation covers all employers and most employees in Canada, both unionized and non-unionized. Employment standards acts set <u>minimum</u> terms and conditions, which can be exceeded by employers, but which cannot be waived by employers or employees. In the case of an employment contract/collective bargaining agreement that exceeds the ESA, the principle of greater benefit will apply i.e., employers cannot revert back to the ESA.

Enforcement - Complaints of violation of the ESA by employees against employers must be submitted to the Ministry of Labour within pre-set time limits; fines and restitution up to maximum limits. Employees cannot sue in civil court if they file a claim with the Ministry.

Teaching Tip: Students often find the multiple jurisdictions in Canada involved in HR to be quite confusing, it is often helpful if they know of differing regulations in different provinces regarding other aspects of life, such as drinking age as an analogy.

V. Respecting Employee Privacy

The Privacy Commissioner of Canada and the provincial Information and Privacy Commissioners seek to balance employees' rights to privacy with employers' rights to monitor employee activity and protect company resources. New legislation and guidelines continue to clarify what is and isn't acceptable.

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- The Personal Information Protection and Electronic Documents Act (PIPEDA) – governs collection, use, and disclosure of personal information. Employees must give consent for collection, use and dissemination of personal information.
- Video Surveillance – Companies must be able to show that reasonable alternatives to surveillance were not available.

Teaching Tips; Break up the material and shift to active learning by incorporating mini- discussions based on a combination of the Industry Viewpoint Box, Ethical Dilemmas, and Critical Thinking Questions for this chapter and using provincial human rights websites to look at current trends and cases. Ask students to bring in/share related news stories and/or experiences. Many students know someone who has experienced discrimination, despite legislation.

ETHICAL DILEMMAS

Your company president tells you not to hire any gay or lesbian employees to work as part of his office staff because it would make him uncomfortable. What would you do? (p. 35)

What you cannot do is follow this order because it is illegal to discriminate on the basis of sexual orientation. You need to educate the President on the law and the potential consequences of violating the law. Depending on your position you can address the President directly or obtain assistance from senior HR people as well as the Canadian and appropriate provincial Human Rights websites.

Is it ethical to use video surveillance of employees? Do you think employees need to be told of surveillance tools if they are used? (p. 42)

It is ethical if it is a business necessity and there is no other reasonable means available; such is the case with casinos. However, Canadian courts have typically decided that video surveillance is not reasonable in most workplaces and that other means of control could have been used. Employees must be made aware of how they are being monitored, and must give consent if there is any possibility that personal and private information might be collected as a result of monitoring.

KEY TERMS

bona fide occupational requirement (BFOR) A justifiable reason for discrimination based on business necessity (that is, the discrimination is required for the safe and efficient operation of the organization) or a requirement that can be clearly defended as intrinsically required by the tasks an employee is expected to perform (p. 28)

Charter of Rights and Freedoms Federal law enacted in 1982 that guarantees fundamental freedoms to all Canadians. (p. 25)

differential or unequal treatment Treating an individual differently in any aspect of terms and conditions of employment based on any of the prohibited grounds. (p. 28)

disability A protected ground in human rights legislation, including a wide range of conditions, some which are visible and some which are not. A disability may be present from birth, be caused by an accident, or develop over time (p. 30)

discrimination As used in the context of human rights in employment, a distinction, exclusion, or preference, based on one of the prohibited grounds, that has the effect of nullifying or impairing the right of a person to full and equal recognition and exercise of his or her human rights and freedoms. (p.

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27)

discrimination because of association Denial of rights because of friendship or other relationship with a protected group member. (p. 28)

employment (labour) standards legislation Laws present in every Canadian jurisdiction that establishes minimum employee entitlements and a limit on the maximum number of hours of work permitted per day and/or per week. (p. 39)

employment equity program A detailed plan designed to identify and correct existing discrimination, redress past discrimination, and achieve a balanced representation of designated group members in the organization. (p. 37)

equal pay for equal work An employer cannot pay male and female employees differently if they are performing the same or substantially similar work. (p. 38)

equality rights Section 15 of the Charter of Rights and Freedoms, which guarantees the right to equal protection and equal benefit of the law without discrimination. (p. 25)

glass ceiling An invisible barrier, caused by attitudinal or organizational bias, which limits the advancement opportunities of qualified designated group members. (p. 37)

harassment Unwelcome behaviour that demeans, humiliates, or embarrasses a person, and which a reasonable person should have known would be unwelcome. (p. 32)

human rights legislation Jurisdictions' specific legislation that prohibits intentional and unintentional discrimination in employment situations and in the delivery of goods and services (p. 26)

KSAs Knowledge, skills, and abilities. (p.39)

occupational segregation The existence of certain occupations that have traditionally been male-dominated and others that have been female-dominated. (p. 37)

precedent The decision or interpretation of a court of another jurisdiction can act as a persuasive authority regarding how legislation is to be interpreted and applied in other jurisdictions (p. 23)

reasonable accommodation The adjustment of employment policies and practices that an employer may be expected to make so that no individual is denied benefits, disadvantaged in employment, or prevented from carrying out the essential components of a job because of grounds prohibited in human rights legislation. (p. 29)

regulations Legally binding rules established by the special regulatory bodies created to enforce compliance with the law and aid in its interpretation. (p. 24)

restitutional remedies Monetary compensation for the complainant to put him or her back to the position he or she would be in if the discrimination had not occurred (this includes compensation for injury to dignity and self-respect), and may include an apology letter. (p.34)

sexual annoyance Sexually-related conduct that is hostile, intimidating, or offensive to the employee, but has no direct link to tangible job benefits or loss thereof. (p. 33)

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sexual coercion Harassment of a sexual nature that results in some direct consequence to the worker's employment status or some gain in or loss of tangible job benefits. (p. 33)

sexual harassment Offensive or humiliating behaviour that is related to a person's sex, as well as behaviour of a sexual nature that creates an intimidating, unwelcome, hostile, or offensive work environment, or that could reasonably be thought to put sexual conditions on a person's job or employment opportunities. (p. 33)

stare decisis Decisions of a higher court can act as the binding authority on a lower court decision within that same jurisdiction.

systemic remedies Forward looking solutions to discrimination that require respondents to take positive steps to ensure compliance with legislation, both in respect to the current complaint and any future practices. (p. 36)

tort law Primarily judge-based law, whereby the precedent and jurisprudences set by one judge through his or her assessment of a case establishes how similar cases will be interpreted, as either intentional torts or unintentional torts. (p. 24)

underemployment Being employed in a job that does not fully utilize one's knowledge, skills, and abilities (KSAs). (p. 39)

undue hardship The point to which employers are expected to accommodate under human rights legislative requirements. (p. 29)

unintentional/constructive/systemic discrimination Discrimination that is embedded in policies and practices that appear neutral on the surface, and are implemented impartially, but have adverse impact on specific groups of people for reasons that are not job related or required for the safe and efficient operation of the business. (p. 28)

REVIEW AND DISCUSSION QUESTIONS (p. 44)

1. Explain how the legal system in Canada is different than the legal system in the United States.

Three significant differences between Canadian employment legislation/regulation and the US National Labor Relations Act are:

- A higher acceptance by Canadians of government-mandated regulations for organizations
- "Employment at will" whereby the employer or the employee can break the employment relationship without notice does not exist in Canada. Employers must provide reasonable notice if terminating employees without cause and employees must comply with employment legislation if they quite, strike, or otherwise cease employment
- In contrast to the largely centralized employment legislation model in the USA, the primary responsibility for employment-related laws resides with the provinces and territories; provincial/territorial employment laws govern approximately 90% of Canadian workers

Teaching Tip: The comparison to the US legislation is not specifically given in the text but many students assume that the regulations are the same, or alternatively, that a US based employer is governed by US regulations in Canada. This question can be used to have students research some of the difference in

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legislation between Canada and the US.

2. Describe the impact of the Charter of Rights and Freedoms on HRM. (p.25)

Although the *Charter of Rights and Freedoms* (1982), applies directly only to the actions of all levels of government (federal, provincial/territorial, and municipal) and agencies under their jurisdiction, all Canadian legislation, including provincial legislation, must meet Charter standards in terms of ensuring equality of opportunity. Therefore the Charter impacts HR in all Canadian organizations through its influence on human rights legislation and employment- specific legislation, such as Employment Standards Acts, health and safety laws, union relations, and laws governing pensions and compensation.

In particular, Section 15 of the Charter – *Equality Rights* prohibits discrimination on the basis of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability provides the foundation for human rights legislation. Human rights legislation has extended this protection to other grounds, such as sexual orientation, family status and marital status.

***3.* Differentiate between the following types of discrimination, and provide one example of each: direct, differential treatment, indirect, because of association, and systemic. (p. 27 – 28)**

Direct (intentional) discrimination involves an employer deliberately denying an individual or group fair treatment in any term, aspect, or condition of employment on the basis of one of the prohibited grounds. An example would be a company refusing to hire, train, or promote an individual based because they are female, or Chinese, or are in a wheelchair.

Differential treatment involves treating individuals or groups differently in any aspect, term, or condition of employment based on one of the prohibited grounds. For example, it is illegal for an employer to request that job applicants with an obvious physical disability undergo a pre-employment medical examination if those appearing able-bodied are not also asked to undergo such an exam, or to offer training to younger workers and not to older workers.

Indirect discrimination involves asking another party to discriminate on one's behalf. An example would be an employer requesting an employment agency to refer only female candidates for consideration as nurses, or instructing supervisors that female managers be excluded from consideration for international assignments.

Discrimination because of association is another possible type of intentional discrimination. It involves the denial of rights because of friendship or other relationship with a protected group member. An example would be the refusal of a firm to promote a highly-qualified male into senior management on the basis of the assumption that his wife, recently diagnosed with multiple sclerosis, will require too much of his time and attention, and that her needs may restrict his willingness to travel on company business.

Unintentional discrimination (also known as *constructive or systemic discrimination*) is the most difficult to detect and combat. Typically, it is embedded in policies and practices that, although appearing neutral on the surface, but, when implemented, have adverse impact on specific groups of people. The outcome is discrimination based on prohibited grounds. Many examples of systemic discrimination can be found in Figure 2.3 on p. 32.

4. Provide five examples of prohibited grounds of discrimination in employment in Canadian jurisdictions. (p. 26, 30 – 37)

Prohibited grounds of discrimination vary across jurisdictions. Race, colour, age, sex, marital/family

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status, religion/creed, physical and mental handicap, ethnic/national origin are prohibited grounds. Five of the grounds are described with examples.

Race/Colour – The British Columbia Human Rights tribunal found that two construction companies had discriminated against 38 Latin American temporary workers by paying them lower wages and providing inferior accommodation compared to European temporary workers on the same project.

Sexual Orientation – A lesbian employee alleged that she was harassed by a co-worker, due to her sexual orientation. She made a complaint with her supervisors but felt the complaint was not investigated properly. She alleged that she was given a poor performance review because of her complaint and that her request for a transfer to another work site was denied.

Religion – It is a violation of human rights legislation to prohibit Muslims from praying at work and/or wearing a *hijab* (the head-to-ankle covering that leaves only the face, hands, and feet visible in public.

Age – In an Ontario case two older foremen were laid off with retirement packages while two younger foremen were allowed to keep their jobs. This is a violation as human rights legislation does not permit discrimination by age, except for legally mandated minimum age requirements.

Family Status – Companies cannot favour individuals without parenting responsibilities over individuals without parenting responsibilities in hiring, promotion or access to training, and career development. At the same time, pay decisions cannot favour employees with dependents over those without dependents.

5. Explain the purpose of employment standards legislation, and the concept of "the greater good" when assessing these minimums. (p. 39 – 41)

Employment Standards Acts establish minimum terms and conditions for workplaces, covering such things as wages, paid holidays and vacations, maternity, paternity or adoption leave, bereavement leave, compassionate care leave, termination notice, and overtime pay. They also set the weekly and daily maximum hours of work before overtime pay is required. These standards ensure consistency and a minimum level of fair treatment across organizations. The concept of the *"greater good" or "greater benefit"* means that if an employment contract is more generous than the minimum term/condition in ESA, then the contract has to be honoured. The employer cannot revert back to the minimum.

6. Define "sexual harassment" and describe five types of behaviour that could constitute such behaviour. (p. 33)

Sexual harassment is offensive or humiliating behaviour that is related to a person's sex, as well as behaviour of a sexual nature that creates an intimidating, unwelcome, hostile, or offensive work environment, or that could reasonably be thought to put sexual conditions on a person's job or employment opportunities. Two types of sexual harassment are *sexual coercion*, which results in some direct consequence to the worker's employment status or some gain in or loss of tangible job benefits, and *sexual annoyance*, sexually-related conduct that is hostile, intimidating, or offensive to the employee, but has no direct link to tangible job benefits or loss.

Five types of behaviour that would fall under sexual harassment are:

- asking/requiring sexual favours in return for favourable performance ratings, pay, and job security (sexual coercion)
- unwanted touching (sexual coercion/sexual annoyance)
- making sexist comments (sexual annoyance)
- displaying pornographic material (sexual annoyance)

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- telling sexist jokes (sexual annoyance)

7. Define the concepts of occupational segregation, underemployment, and the glass ceiling. (p. 37, 39)

Occupational segregation – the existence of certain occupations that have traditionally been male-dominated and others that have been female-dominated, often due to sex-based discrimination

Underemployment - Being employed in a job that does not fully utilize one's knowledge, skills, and abilities (KSAs).

Glass ceiling – an invisible barrier, caused by attitudinal or organizational bias, which limits the advancement opportunities of a qualified designated group member. Applies not just to females but also to visible minorities, Aboriginals and the disabled

8. What is the test to define if a bona fide occupational requirement exists? What are the three elements of this test? (p. 28-29)

The three criteria for assessing the legality of a BFOR, as established by the Meiorin case (Supreme Court of Canada, 1999) are:

- The discriminatory policy/procedure was based on a legitimate, work-related purpose
- Decision makers/agents believed the requirement was necessary for the role
- It was impossible to accommodate employees who could not meet the requirement without undue hardship on the employer.

9. What is the role of privacy legislation in Canada? Describe the act that protects employee's privacy. (p. 41 – 42)

The Privacy Commissioner of Canada and the provincial Information and Privacy Commissioners seek to balance employees' rights to privacy with employers' rights to monitor employee activity and protect company resources. The *Personal Information Protection and Electronic Documents Act (PIPEDA)* – governs collection, use, and disclosure of personal information. Employees must give consent for collection, use and dissemination of personal information.

Critical Thinking Questions (p. 44)

1. Go to your provincial or territorial employment (labour) standards website and determine the following:

- **Minimum legal age to work in this jurisdiction**
- **Minimum hourly wages**
- **Maximum number of hours that can be worked in a week before overtime must be paid**

2. How does this information apply to you and your friends and family? Did you notice anything else that caught your interest that you were previously unaware of?

The information they obtain should tell them who in their social group should/should not be working and how much individuals of different ages should be paid. Typically there is a minimum wage rate for teenage workers and higher rate for adult workers. The information can tell them whether they are being paid fairly by their employer when it comes to overtime. Something they may not have realized is that age discrimination is permitted when it comes to wages – teenagers can be paid less than older workers doing the same job e.g., McDonalds, Tim Horton's in some jurisdictions.

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3. Prepare a report outlining legally acceptable questions that may be asked at a selection interview with a young female engineer applying for the job of engineering project manager at an oil field in rural northern Alberta with an otherwise all male group. (Refer to appendix 5.1 on page for help).

In their report they should not have any questions that they would not ask of a male engineer to avoid differential treatment and avoid any questions that bring prohibited grounds into play. This would exclude questions about being the only female in a male group, concerns about managing a group of men, or questions about pregnancy. Legally acceptable questions would include questions about eligibility to work in Canada, interest/experience living in a rural or northern setting, interest/experience as a project manager, and interest/experience in the oil field industry.

4. Working with a small group of classmates, use Statistics Canada to find updated information regarding labour market outcomes for one of the four protected groups in Canada. Based on your research, what inequities exist for the group you selected? What are some direct and indirection organizational decisions or actions that can possibly explain these inequities? What legislation(s) provides protection for people in your selected designated group?

There will be a very large variety of reports generated!!

5. The organization you are working for is relatively new and growing, and has no HR department. They have asked you to prepare a briefing about what can and cannot be asked during an employment interview. Given that it is a small organization, management usually conducts interviews. You notice a number of managers huffing about how the law doesn't apply to them and their actions can't result in a lawsuit. In addition to preparing a briefing about the types of question that can and cannot be asked in an interview, prepare a response to the perception that the law does not apply to the managers in this situation.

Their briefing about employment interview questions should draw on appendix 5.1 on page 141 and the discussions of prohibited grounds and protected groups. In response to the perception that the law does not apply they can reference the 1989 sexual harassment case where the Supreme Court held that employers are liable for the actions of their employees. Therefore, while employees may not sue managers directly, lawsuits can be filed by employees against the company based on the actions of these managers; if this occurs then the manager's employment and career prospects will certainly be affected. They should also be made aware that claims can also be filed through human rights commissions/tribunals and managers will be called to testify in regards to the complaint. In short, they are not untouchable. Looking up recent cases in which managers were demoted or lost their jobs because of discriminatory actions should get their attention.

Experiential Exercises (p. 45)

1. You are an HR manager at a women-only fitness centre. The owner has just informed you that he or she would like to only employ women trainers and staff, to accommodate the demands of clientele (some clients prefer this gym over a co-ed one for religious or personal comfort reasons). Do you think this is a BFOR? How would you handle men who apply for the position? How will you ensure a legally defensible position for this company? (p. 30 - 33)

In order to make sure any BFOR is legally defensible the owner needs to be advised of the 3 tests that any BFOR has to meet.

- The discriminatory policy/procedure was based on a legitimate, work-related purpose
- Decision makers/agents believed the requirement was necessary for the role

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- It was impossible to accommodate employees who could not meet the requirement without undue hardship on the employer.

As part of this discussion, attempts should be made, with external assistance if necessary to determine more precisely what the minimum strength requirement is rather than just set an arbitrary number. This can be done by weighing sample boxes and furniture and having current employees assess what minimum standard is reasonable, based on their past moving experience.

2. An employee who has been off for 2 months with a stress-related ailment has just contacted you, indicating that she would like to return to work next week but won't be able to work full time for another month or so. How would you handle this situation? (p. 30 – 32)

The organization's responsibility is to accommodate this individual, because medical disabilities are prohibited grounds for discrimination, and stress-related disabilities have been validated as medical disabilities. Their disability appears to already have been documented previously in order to support the two month leave, but an update from their doctor may be necessary in considering possible solutions. Reasonable accommodation requires that a range of possible options are discussed, not just the one that the employee would like to have. If the issue is travelling to and being in a busy setting full-time, then, depending on the nature of their job working part-time from home and part-time in the office might be the solution. If the issue is that they are not yet ready for full day work, regardless of location, then a reduced hour schedule can be negotiated, either a few hours every day or a couple of full-time days per week. Financial support can come from a combination of paid hours, partial sick-pay, and possible partial government assistance programs. The employee should not be financially disadvantaged by returning to work.

3. A supervisor has just approached you to indicate a concern she has with an employee. The supervisor indicates that the employee is often surfing the Internet while at work and fears that not only is this affecting productivity negatively, but is also a violation of the company's rules for Internet surfing using a company computer. The supervisor would like you to ask the IT team to investigate how many hours a day are logged to non-work – related activities for that employee and also ask for a list of websites that the employee visits. What is the role of privacy legislation from the employer and employee perspectives? What additional information would you need to make a decision about next steps? What recommendations can you make to the supervisor to deal with the situation in the short term?

Under privacy legislation the employer has the right to monitor employee activities, including the use of information technology, in order to run a successful business and prevent against abuse of company resources. On the other hand, employees have the right to privacy, possibly they are surfing only on their lunch break in which case company time is not being wasted and are not gaming but are looking up highly sensitive information on a medical or personal issue for themselves or family member, that is causing them to be distracted and their work to suffer as a result. They may also be using the Internet for work-related reasons e.g., using professional/technical online forums, so time spent on work-related is often difficult to pin down.

The IT team cannot be sent on "fishing" expeditions unless employees have given consent to be monitored because of the risk of personal information being collected directly or indirectly from websites visited. In order to be on solid ground the company policy should be reviewed to make sure it is specific and records should be checked to ensure that the employee was made aware of the company policy on use of company computers for Internet surfing, on a regular basis. This can be established by checking employment contracts, signed declarations from company handbooks and Code of Ethics, and finding out

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when the policy was last emailed to employees or discussed in an employee meeting.

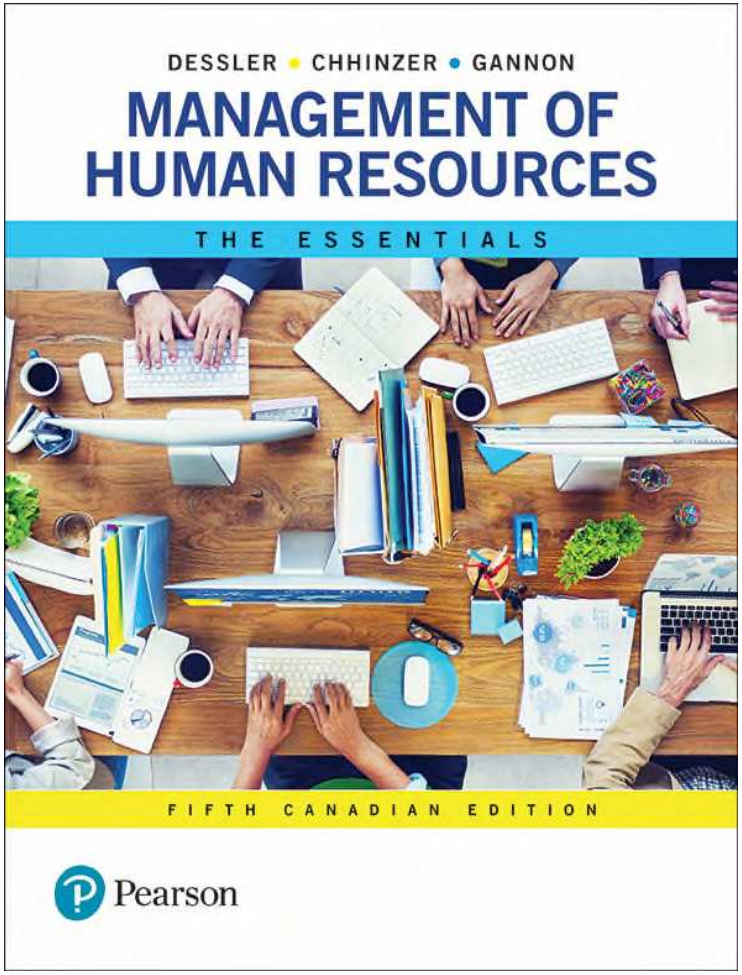
Last, but not least, the traditional approach of sitting down with the employee and asking them why their productivity seems to have dropped lately should definitely be pursued. Maybe they are wrestling with a personal issue or are bored with their job, or are feeling overwhelmed by the job demands but are reluctant to ask for assistance. Data obtained from electronic monitoring can help support a case for sanctions but cannot get to the root of why the employee is not working as expected. Having a meeting may cause an immediate change in employee behaviour without the need for electronic review.

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Chapter 2

The Changing Legal Emphasis Compliance and Impact on Canadian Workplaces

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Learning Outcomes (1 of 2)

- **EXPLAIN** how employment-related issues are governed in Canada.
- **DISCUSS** at least five prohibited grounds for discrimination under human rights legislation, and **DESCRIBE** the requirements for reasonable accommodation.

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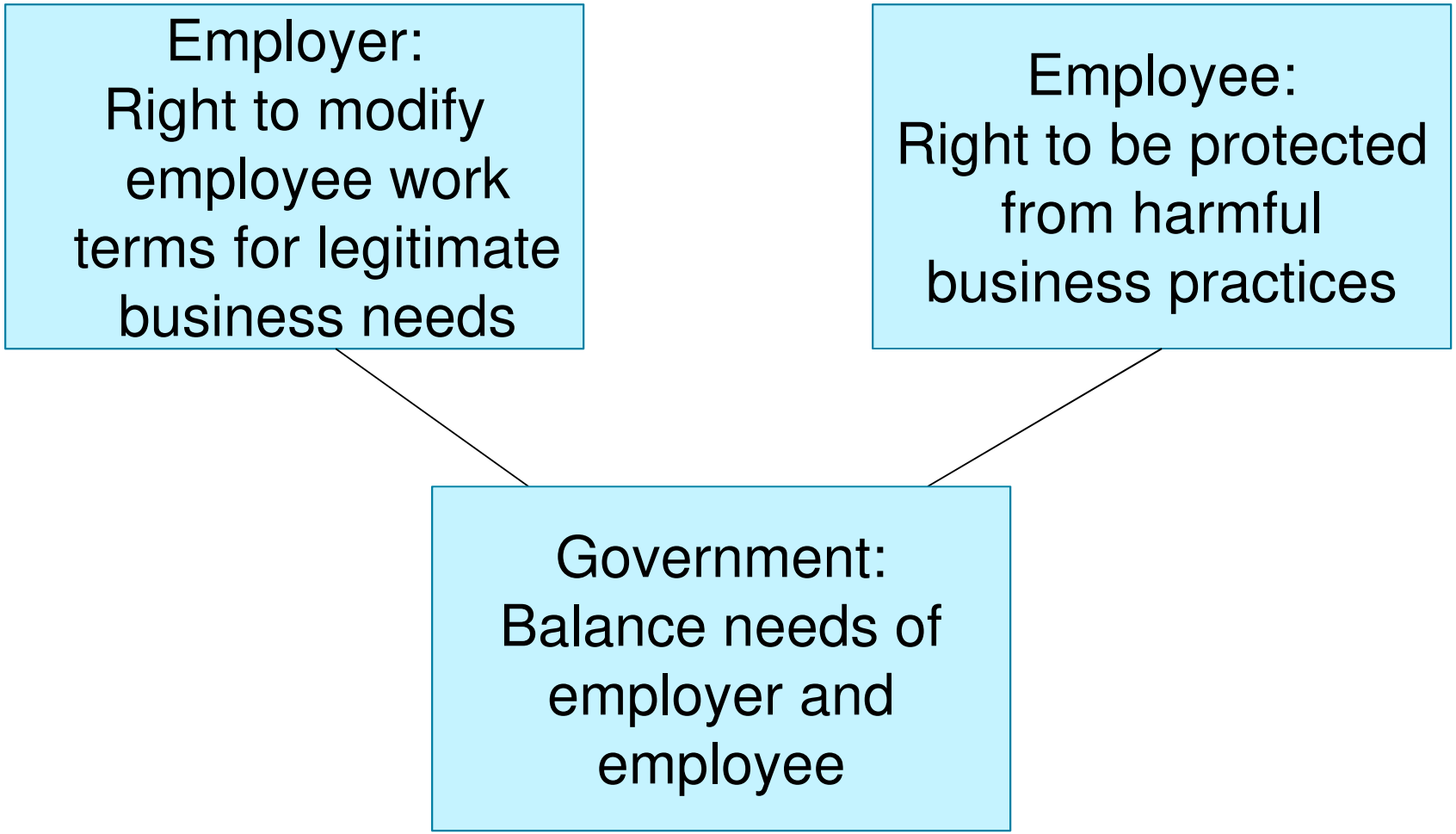
Learning Outcomes (2 of 2)

- **DESCRIBE** behaviour that could constitute harassment, and **EXPLAIN** the employers' responsibilities regarding harassment.
- **DESCRIBE** the roles of minimums established in employment standards legislation and the enforcement process.

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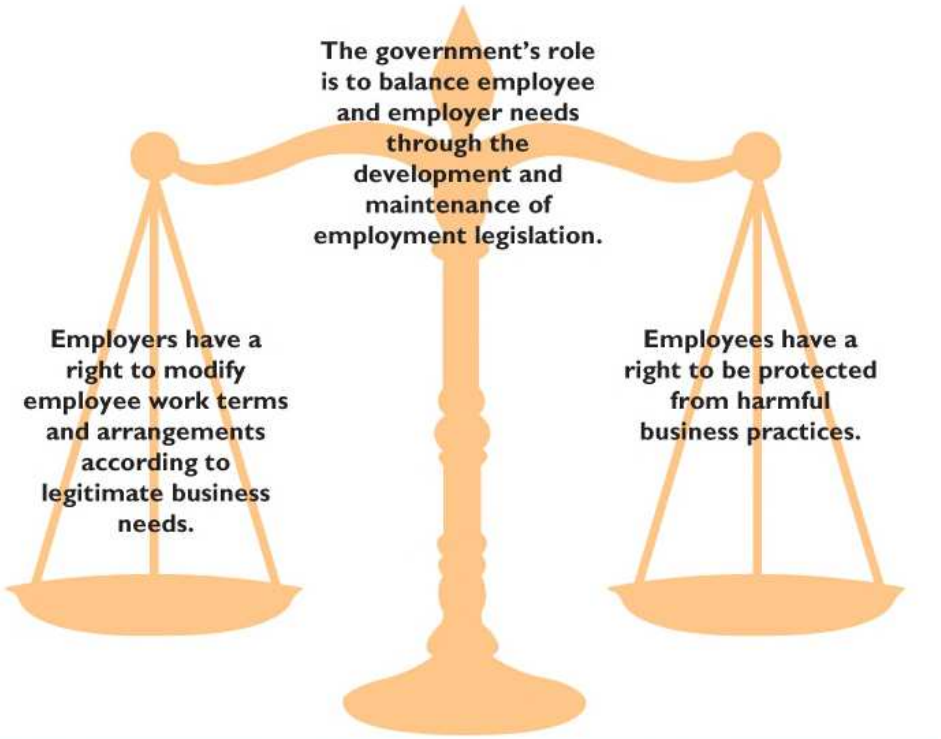
The Legal Framework for Employment In Canada



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It Is the Government's Role to Balance Employer and Employee Needs (1 of 2)

FIGURE 2.1 It Is the Government's Role to Balance Employer and Employee Needs



Source: Data from Gary Dessler and Nita Chhinzer, *Human Resources Mangement in Canada,* 13th Canadian ed. (Toronto, ON: Pearson, 2013), Chapter 2.

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Tort Law

Tort Law

- primarily judge based law, whereby precedent and jurisprudences set by one judge through his/her assessment of a case establishes how similar cases will be interpreted

Regulations

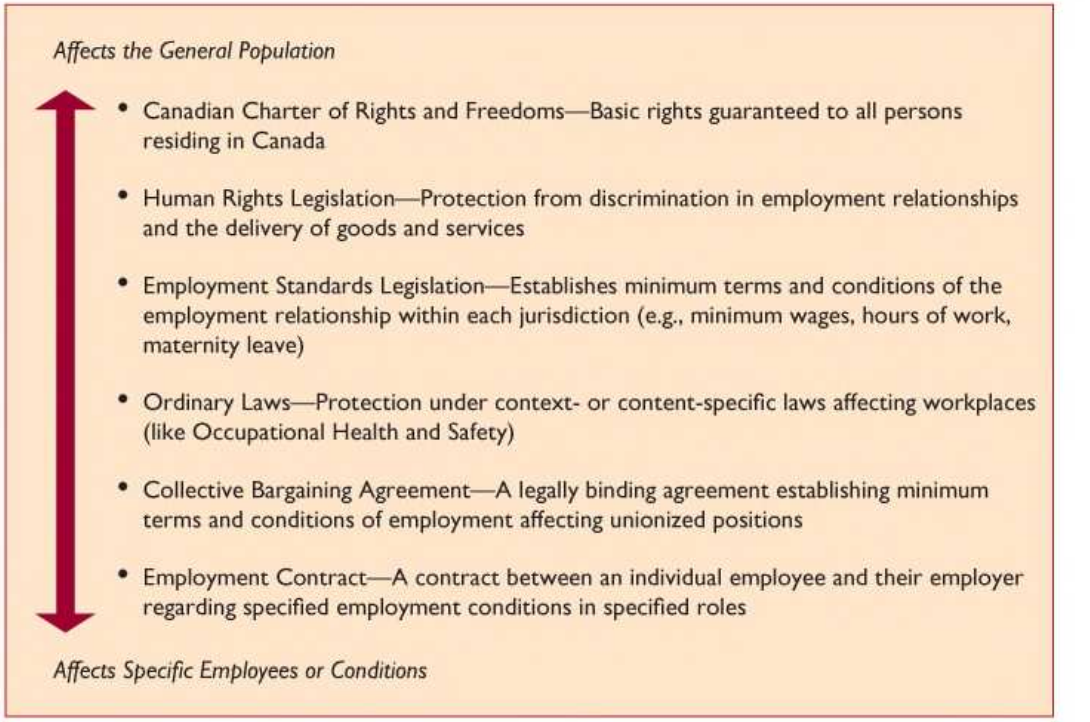
- legally binding rules established by special regulatory bodies created to enforce compliance with the law and aid in its interpretation

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It Is the Government's Role to Balance Employer and Employee Needs (2 of 2)

FIGURE 2.2 Multiple Layers of Canadian Legislation Affecting Workplace Practices



Source: Based on Nita Chhinzer (2011).

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Canadian Legislation (1 of 2)

- Canadian Charter of Rights and Freedoms
  - basic rights for all Canadians
- Human Rights Legislation
  - protection from discrimination
- Employment Standards Legislation
  - minimum terms and conditions of employment

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Canadian Legislation (2 of 2)

- Ordinary Laws
  - content or context specific
- Collective Bargaining Agreement
  - legally binding agreement establishing minimum terms/conditions affecting unionized positions
- Employment contract
  - contract between employee and employer specifying employment conditions.

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The Canadian Charter of Rights and Freedoms

Freedoms

- freedom of conscience and religion
- freedom of thought, belief, expression and opinion
- freedom of peaceful assembly
- freedom of association

Section 15 – Equality Rights

- right to equal protection and benefit of the law without discrimination

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Human Rights Legislation

Human rights legislation

- jurisdiction-specific legislation that prohibits intentional and unintentional discrimination in employment situations and in the delivery of goods and services.

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Discrimination Defined

"… *a distinction, exclusion or preference based on one of the prohibited grounds that has the effect of nullifying or impairing the right of a person to full and equal recognition and exercise of his or her human rights and freedoms*."

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Types of Discrimination

Intentional Discrimination

- direct
- differential or unequal treatment
- indirect (3rd party)
- by association

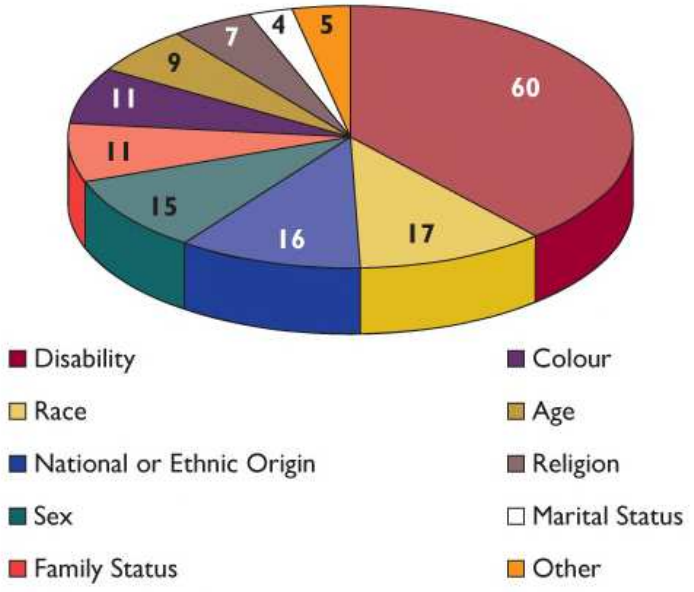
Unintentional Discrimination

- constructive or systemic discrimination
- embedded in policies with adverse impact on specific groups.

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Types of Complaints Received by the Canadian Human Rights Commission in 2016

FIGURE 2.3 Types of Complaints Received by the Canadian Human Rights Commission in 2016, by number of complaints



Source: Based on *People First: The Canadian Human Rights Commission's 2016 Annual Report to Parliament* (Ottawa, ON: CHRC, 2017), p. 57, figure 9, http://www.chrcreport.ca/assets/pdf/CHRC-Annual-2016-EN-web.pdf (accessed July 6, 2017).

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Unintentional Discrimination

Examples:

- maximum height/weight requirements
- limited accessibility to company premises
- job evaluation systems that are not gender-neutral
- lack of a harassment policy or guidelines

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Bona Fide Occupational Requirement (BFOR) (1 of 2)

- Three criteria used to assess if the discrimination qualifies as a BFOR:
  1. **Question of rationale:** Was the policy or procedure that resulted in the discrimination based on a legitimate, work-related purpose?
  2. **Question of good faith:** Did the decision makers or other agents of the organization honestly believe that the requirement was necessary to fulfill the requirements of the role?
  3. **Question of reasonable necessity:** Was it impossible to accommodate those who have been discriminated against without imposing undue hardship on the employer?

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Bona Fide Occupational Requirement (BFOR) (2 of 2)

- justifiable reason for discrimination
- based on business necessity (safe and efficient operations)
- e.g. vision standards for bus driver



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The Royal Canadian Mounted Police has a requirement that guards be of the same sex as prisoners being guarded; this is considered a bona fide occupational requirement.

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Reasonable Accommodation

Requirement for Reasonable Accommodation

- adjustment of employment policies/practices so that no individual is denied benefits or is disadvantaged
- based on prohibited grounds in human rights legislation
- e.g. work station redesign for wheelchair

Undue Hardship

- financial costs make accommodation impossible

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Disability

- **Basis determined by courts**
  - differential treatment
  - enumerated ground (protected by legislation)
  - substantive sense (is burden imposed or benefit withheld?)

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Canadian Human Rights Commission Key Metrics in 2016

Figure 2.4 Canadian Human Rights Commission Key Metrics in 2016

1 488 discrimination complaints received, of which 1 394 complaints included allegations that were employment related:

- 268 complaints settled
- 164 dismissed
- 47 referred to a tribunal

For 234 cases, the commission indicated one of the following outcomes:

- the complainant should pursue alternative processes for resolution
- the complaint was out of the tribunal's jurisdiction
- the incident occurred too long ago
- the incident was considered too trivial or vexatious to pursue

Complaints came from many regions:

- 41% of complaints originated from Ontario
- 16% from BC
- 11% from Quebec
- 10% from Alberta

Sources: Based on *People First: The Canadian Human Rights Commission's 2016 Annual Report to Parliament* (Ottawa, ON: CHRC, 2017), pp. 46–47, http://www.chrcreport.ca/assets/pdf/CHRC-Annual-2016-EN-web.pdf (accessed July 6, 2017); *Canadian Human Rights Commission, 2015–16, Departmental Performance Report* (Ottawa, ON: Minister of Justice, 2016).

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Duty to Accommodate

- **Duty to Accommodate**
  - respect dignity
  - discrimination must be legally defensible
  - most appropriate accommodation should be undertaken

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Harassment (1 of 2)

"Unwelcome behavior that demeans, humiliates or embarrasses a person and that a reasonable person should have known would be unwelcome."



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The Supreme Court of Canada has determined that sexual harassment at work is a form of sex discrimination (and is therefore illegal), and that employers are responsible for their employees' actions.

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A Checklist for Employers when Selecting a Workplace Investigator

Figure 2.5 A Checklist for Employers when Selecting a Workplace Investigator

- ○**Internal or external investigators:** Many employers select trained internal HR experts to conduct workplace investigations, while others rely on external investigators. Selection is dependent on the resources (*time and money*) of the firm, the complexities of the case (*potential conflicts of interest*), the expertise of the in-house staff, and the severity of the case.
- ○**One investigator or two:** The nature of the case may warrant the involvement of more than one investigator (*e.g., one male and one female in the case of a sexual harassment claim*).
- ○**Respecting the mandate:** Investigators should be able to maintain the role within the mandate of the task they have been assigned (*e.g., fact finder or adviser*) and not stray too far off track. Assigned investigators are perceived as agents of the organization; therefore, the organization can be held partially accountable for investigator actions.
- ○**Impartiality or neutrality:** Investigators should have no con.ict of interest vested in the conditions, persons, or context of the case they are handling.
- ○**Reliable, thorough, and professional:** Although these qualities should go without saying, an investigator is expected to be a competent, effective, and professional communicator throughout the investigation, and must be capable of making credible assessments.
- ○**Quality of the written report:** The details and word selection in the written report can become evidence in a case. Therefore, a high-quality report details "what happened" and assists counsel in their defence.
- ○**Respects confidentiality:** The investigator should discuss the investigation only when required and respect the confidentiality of all parties affected by the investigation.

Source: N. Chhinzer, summary from Module 4 at the HR Law Certificate Program at Osgoode Hall Law School, 2011.

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Think Pair Share

- Have you ever experienced harassment in the workplace?
- Describe the situation.
- How was the situation resolved?

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Harassment (2 of 2)

- **Employer Responsibility**
  - protect employees from harassment
  - includes harassment by clients or customers

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Sexual Harassment (1 of 2)

"Offensive or humiliating behaviour that is related to a person's sex, as well as behaviour of a sexual nature that creates an intimidating, unwelcome, hostile, or offensive work environment or that could reasonably be thought to put sexual conditions on a person's job or employment opportunities."

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Sexual Harassment (2 of 2)

Sexual Coercion

- "Harassment of a sexual nature that results in some direct consequence to the worker's employment status or some gain in or loss of tangible job benefits."

Sexual Annoyance

- "Sexually related conduct that is hostile, intimidating, or offensive to the employee but has no direct link to tangible job benefits or loss thereof."

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Harassment Policies (1 of 2)

To reduce liability, employers should:

- establish sound harassment policies
- communicate policies to all employees
- enforce policies in a fair and consistent manner
- take an active role in maintaining a working environment that is free of harassment

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Harassment Policies (2 of 2)

Effective harassment policies should include:

1. clear workplace anti-harassment policy statement
2. information for victims (definitions, examples)
3. employees' rights and responsibilities
4. employers' and managers' responsibilities
5. anti-harassment policy procedures
6. penalties for retaliation against a complainant
7. guidelines for appeals
8. other options such as union grievance procedures and human rights complaints
9. how the policy will be monitored and adjusted

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Discrimination - Other Human Rights Case Examples

- Race and Colour
  - illegal in every jurisdiction
- Religion
  - accommodate with time to pray and allow religious clothing
- Sexual Orientation
  - “common-law partners” includes same sex couples
- Age
  - mandatory retirement age eliminated in many jurisdictions

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Enforcement of Harassment

- responsibility lies with human rights commission in each jurisdiction
- costs are borne by the commission
- human rights tribunal resolves conflict through mediation
- remedies:
  - systemic
  - restitutional

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Employer's Obligations (1 of 2)

- awareness of the issues of discrimination or harassment
  - antidiscrimination/antiharassment policy
  - complaint mechanism
  - training available for employees
- fulfilling post-complaint actions
  - assessing the seriousness of the complaint,
  - launching an investigation promptly,
  - focusing on employee welfare,
  - taking actions based on the complaint

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Employer's Obligations (2 of 2)

- resolving the complaint
  - demonstrating reasonable resolution and communication

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Employment Equity Act

- based on Charter of Rights and Freedoms
- applies to federally regulated employers only
- promotes equality, removes employment barriers
- four designated groups: women, visible minorities, persons with disabilities, Aboriginal peoples

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The Plight of the Four Designated Groups

Women

- underrepresentation in certain fields
- glass ceiling

Aboriginals

- concentration in low skill, low pay jobs

People with Disabilities

- underrepresentation in all areas
- lower pay

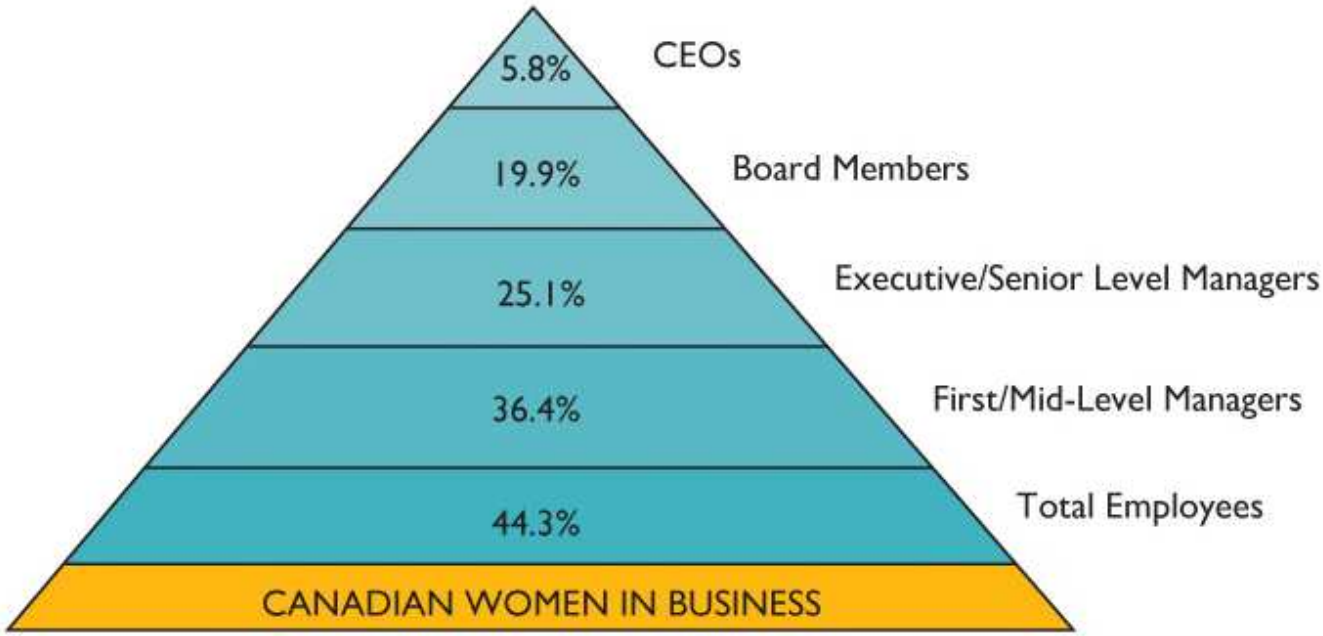
Visible Minorities

- underemployed

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The Catalyst Pyramid—Canadian Women in Business

FIGURE 2.6 The Catalyst Pyramid—Canadian Women in Business



Source: Catalyst, *Pyramid: Women in S&P 500 Companies* (New York, NY: Catalyst, June 14, 2017), http://www.catalyst.org/knowledge/women-sp-500-companies (accessed July 7, 2017).

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Employment Equity Program

Step 6: Monitoring, Evaluation, Revising

Step 5: Implementation

Step 4: Plan Development

Step 3: Employment Systems Review

Step 2: Data Collection and Analysis

Step 1: Senior Management Commitment & Support

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Employment Labour Standards Legislation

- laws present in every Canadian jurisdiction that establish minimum employee entitlements and set a limit on the maximum number of hours of work permitted per day a week

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Employment Standards Act

- federal and provincial/territorial versions
- establish minimum terms for:
  - wages, overtime pay
  - paid holidays and vacations
  - maternity/paternity leave
  - bereavement/compassionate care leave
  - termination notice
- employment contracts may exceed minimums
- principle of greater benefit applies

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Enforcement of Employment Standards Act

- complaints filed with ministry of labour or counterpart
- filed complaint is settled through the ministry, not civil court
- limitation periods for filing
- maximum claim limit for unpaid wages

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Respecting Employee Privacy

Challenges

- Employer has right to prevent liability to the company
  - eliminate time wasted on personal matters
  - prevent abuse of company resources
- Employees have right to:
  - control over information about themselves
  - freedom from interference in their personal life

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Sample Questions from the CBSA Integrity Questionnaire

Figure 2.7 Sample Questions from the CBSA Integrity Questionnaire

- Do you knowingly associate with anyone who uses illegal drugs?
- Have you ever been subjected to blackmail?
- Have you ever threatened the use of violence against your spouse, partner, parents, children, siblings, pets, etc.?
- Have you ever pointed a weapon such as a knife or firearm whether loaded or not, at yourself or another person?
- Have you ever viewed child pornography or bestiality?
- Have you ever associated with organized crime or a terrorist group?
- Have you ever hacked into a computer system?

Source: A. Silliker, "Border Guards Asked to Declare Drug Use, Unlawful Sexual Activity," *Canadian HR Reporter,* Nov 5, 2012, Vol. 25(19), p. 1.

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Internet and Email Usage Policy

- electronic surveillance is permitted
- employer should create written policy
- policy should be updated regularly to stay current with technology

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Video Surveillance

- used to prevent employee theft and vandalism
- employees must be made aware
- not advised if reasonable alternatives exist

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Think Pair Share

- Organizations have to prove that any information collected from applicants is legitimately linked to job requirements.
- How can an organization prove that electronic monitoring of email and internet usage, as well as video surveillance are acceptable workplace policies?
- Explain your answers.

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