

# HUMAN RIGHTS IN THE HOSPITALITY INDUSTRY

## HUMAN RIGHTS GUIDE

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This guide is produced by the Alberta Human Rights Commission (the Commission) and will help readers to understand their rights and responsibilities under Alberta human rights law.

If you have questions related to this guide, please contact the Commission.

**This guide does not provide legal advice. Should you require legal advice, please consult legal counsel.**

## Introduction

The tourism and hospitality industry serves Albertans and visitors from around the world. Among their legal responsibilities, service providers have a responsibility to provide services free from discrimination. By meeting this legal obligation, hospitality operators protect both their customers' dignity and their own business interests.

Discrimination means the person experienced adverse (negative) treatment within a protected area and that a protected ground was a factor in that treatment.<sup>1</sup> One of the protected areas in the *Alberta Human Rights Act* (the *Act*) is "goods, services, accommodation or facilities that are customarily available to the public."<sup>2</sup> In this guide, we refer to these categories collectively as "services." The protected area of services generally covers the hospitality industry in relation to services or amenities provided to customers, clients, and guests.

Read the Commission's human right guide *Duty to accommodate* for information regarding employers' duty to accommodate their employees in the hospitality industry.

## Rights and responsibilities under the Alberta Human Rights Act

Section 4 of the *Act* states:

No person shall:

- a) deny to any person or class of persons any goods, services, accommodation or facilities that are customarily available to the public, or
- b) discriminate against any person or class of persons with respect to any goods, services, accommodation or facilities that are customarily available to the public, because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or class of persons or of any other person or class of persons.

This section recognizes that all people are equal in dignity, rights, and responsibilities. It prohibits discrimination within a protected area based on one or more of these protected

<sup>1</sup> *Moore v British Columbia (Education)*, 2012 SCC 61, at para 33.

<sup>2</sup> *Act*, s 4(a).

grounds, unless there is a reasonable and justifiable rationale.<sup>3</sup> For example, to deny a person a hotel room because they were born in a different country may be discriminatory treatment based on place of origin.

A policy or practice may appear neutral by applying equally to everyone; however, if its application has a negative effect on a person or group due to a protected ground, it is likely discriminatory. For example, a hotel policy that requires all guests to provide a valid driver's licence appears neutral, but there are many reasons why a person may not be able or want to provide a driver's licence. These reasons may include being unable to obtain a driver's licence due to a physical disability or having a driver's licence that has a gender marker that does not match the person's gender identity or gender expression. A driver's licence contains personal information about an individual's age or disability. This could lead to the classification of guests as members of a group identified by a prohibited ground of discrimination.

Where there is discrimination, the business is required to accommodate a person with a disability to the point of undue hardship (for example, an alternate form of identification or verifying identity through other information received in the booking process). Undue hardship is a high threshold and could include intolerable financial costs, serious disruption to business, or objective health and safety impacts.<sup>4</sup>

## Determining if services are customarily available to the public

In the context of tourism and hospitality, services customarily available to the public usually means any service offered to anyone. It is often the public at large, but the "public" could be a subset of people who share the same characteristic or a group that has been selected using eligibility criteria, including membership rewards groups or preferred customers. Every service has its own "public" and that group may be large or small. For example, graduate students at a university were considered the "public" in the context of providing access to university facilities.<sup>5</sup> These students were selected to be part of this "public" through an admissions process (that is, using eligibility criteria) and were able to access the university's educational courses, even though that service was not available to the general public.

<sup>3</sup> For more on reasonable and justifiable reasons that provide a legal defence to discriminatory actions, see the human rights guide titled *Defences to human rights complaints*.

<sup>4</sup> *Central Alberta Dairy Pool v Alberta (HRC)*, 1990 CanLII 76 (SCC).

<sup>5</sup> *University of British Columbia v Berg*, 1993 CanLII 89 (SCC), [1993] 2 SCR 353.

## Accommodation aims to create equitable access to services

Accommodating customers' or clients' protected characteristics helps service providers offer their services in a way that does not discriminate. The goal of accommodation is to enable individuals and groups to have equitable access to services.

In accommodating customers or clients, a service provider may need to make changes to its service(s), policies, or physical environment in order to eliminate or reduce the negative impact that a person or group faces because of a characteristic that falls within a protected ground or grounds. For example, customers wearing head coverings for religious reasons should not be requested to remove these even if the restaurant has a dress code prohibiting the wearing of hats or other head coverings.

Service providers are legally obligated to accommodate their customers or clients to the point of undue hardship. Undue hardship means that accommodating a person would impose an undue or unreasonable burden on the service provider. The duty to accommodate requires accommodation to the point that the service provider can demonstrate that it could not have done anything else reasonable or practical to avoid the negative impact on the individual.<sup>6</sup>

People who require accommodation must also help, if they can, to facilitate the accommodation process. This might include:

- ◆ Bringing the need for accommodation to the service provider's attention
- ◆ Supporting a request for accommodation with medical or other related documentation, if necessary
- ◆ Suggesting appropriate accommodation measures
- ◆ Giving a service provider a reasonable amount of time to respond to the request for accommodation
- ◆ Listening to and considering any reasonable accommodation options that the service provider proposes—a person seeking accommodation generally must accept a reasonable accommodation even if it is not the one that the person suggested or prefers.

In providing discrimination-free services, employers, business owners, and at times franchisors bear the responsibility for the actions of their employees and contracted staff. For example, if a bouncer refuses to allow a person to enter a nightclub based on the person's race, colour, ancestry, or place of origin, the person may claim that the nightclub is responsible for the discrimination.

For more information on accommodation, specifically the duty to accommodate to the point of undue hardship and the rights and responsibilities of people seeking accommodation, see the Commission's human rights guide *Duty to accommodate*.

<sup>6</sup> *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v Caron*, 2018 SCC 3 (CanLII), [2018] 1 SCR 35 at paras 25 – 27; *Moore v British Columbia (Education)*, 2012 SCC 61 (CanLII), [2012] 3 S.C.R. 360, at para. 49; *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, 1990 CanLII 76 (SCC), [1990] 2 S.C.R. 489, at pp. 518-19; *Council of Canadians with Disabilities v VIA Rail Canada Inc.*, 2007 SCC 15 (CanLII), [2007] 1 S.C.R. 650 at para 130.

## Defences to human rights complaints

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The *Act* recognizes that certain limitations on individual rights are not a contravention of the law. Section 11 states:

A contravention of this *Act* shall be deemed not to have occurred if the person who is alleged to have contravened the *Act* shows that the alleged contravention was reasonable and justifiable in the circumstances.<sup>7</sup>

This section applies to the entire *Act* and allows a person or organization responding to a human rights complaint to argue that their particular services, policies, or facilities do not amount to discrimination under the *Act*.

In human rights statutes across Canada, a variety of terms describe the “reasonable and justifiable” exemption. In the area of services, this exemption is referred to as a **bona fide and reasonable justification**. It usually means that the service provider accommodated to the point of undue hardship.

In *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, the Supreme Court of Canada developed a test that can be used to determine whether a service provider’s actions or policies that allegedly contravene the *Act* are reasonable and justifiable in the circumstances.<sup>8</sup>

The Supreme Court stated:

Once the plaintiff establishes that the standard is *prima facie* discriminatory, the onus shifts to the defendant to prove on a balance of probabilities that the discriminatory standard is a Bona Fide Occupational Requirement (BFOR) or has a bona fide and reasonable justification. In order to establish this justification, the defendant must prove that:

- (1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
- (2) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
- (3) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.<sup>9</sup>

For more information on defences and the application of the bona fide and reasonable justification test, see the Commission’s human rights guide *Defences to human rights complaints*.

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<sup>7</sup> *Act*, s 11.

<sup>8</sup> *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868, 181 DLR (4th) 385 [Grismer].

<sup>9</sup> *Grismer* at para 20.

## Duty to accommodate people with service animals and emotional support animals

In Alberta, a service animal typically refers to a service dog, which is defined in the *Service Dogs Act* as “a dog trained as a guide for a disabled person and having the qualifications prescribed by the regulations.”<sup>10</sup> In general, service dogs assist individuals with specific tasks relating to either visible or non-visible disabilities, such as epilepsy, Post-traumatic Stress Disorder, diabetes, or mobility limitations.

The Tribunal has accepted that discrimination on the basis of using a service dog was discrimination. For example, in *Fitzhenry v Schemenauer*,<sup>11</sup> the Tribunal concluded that a landlord’s refusal to show an apartment to a potential tenant because of his service dog was discrimination related to the tenant’s physical disability.

In addition to the benefits and protections under the *Service Dogs Act*, there is a duty to accommodate service animals under human rights legislation to the point of undue hardship.

An example of where undue hardship was met is in the British Columbia Court of Appeal decision *McCreath v Victoria Taxi (1987) Ltd.*,<sup>12</sup> in which the court held that a taxi driver who was allergic to dogs did not discriminate against a blind man when he refused the man and his service dog. The BC Court of Appeal upheld the BC Human Rights Tribunal’s decision and found that Victoria Taxi had a duty to accommodate drivers who have disabilities, as well as their clients.<sup>13</sup>

There is no standard definition for emotional support animal, but it generally refers to an animal that provides its handler with emotional comfort and support that offers some type of medical benefit. For example, an emotional support animal may help a person to control anxiety to minimize the occurrence of panic attacks.

Service providers might have a duty to accommodate individuals with other types of assistance and support animals. Whether there is a duty to accommodate depends on the situation and reliable medical information confirming the person’s disability and the objective need for the animal.

In *Heinrich v Condo Corporation 0514146 and KayVee Management Inc.*,<sup>14</sup> the Chief of the Commission and Tribunals left open the possibility that a person could prove that an emotional support animal serves a disability-related purpose using a means other than certification and receive the protections of anti-discrimination law.

<sup>10</sup> *Service Dogs Act*, Statutes of Alberta, 2007 C S-7.5, s 1(c).

<sup>11</sup> *Fitzhenry v Schemenauer*, 2008 AHRC 8. Given the date of the decision, the amount of the damages award should be used with caution.

<sup>12</sup> *McCreath v Victoria Taxi (1987) Ltd.*, 2017 BCCA 342 (CanLII) [McCreath], Application for leave to appeal dismissed *Graeme McCreath v Victoria Taxi (1987) Ltd., et al.*, 2018 CanLII 63144 (SCC).

<sup>13</sup> *McCreath* at para 28.

<sup>14</sup> *Heinrich v Condo Corporation 0514146 and KayVee Management Inc.*, 2020 AHRC 57 (CanLII).

# Prohibited discrimination in the hospitality industry

## Lack of access for persons with mental or physical disabilities in restaurants and hotels

1. The most common form of discrimination in the hospitality industry is lack of physical access for persons with mobility-related disabilities, for example, people who use wheelchairs. Common barriers that diminish accessibility to the public include: the absence of a ramp to the building entrance, entrances that are too narrow, doors that are hard to open, counters that are too high, seating that does not include room for a wheelchair, and washrooms that do not have large, accessible stalls. Even if a building met or meets applicable building standards, a service provider has a duty to accommodate to the point of undue hardship and should be proactive in making its spaces accessible to everyone.
2. Common issues for individuals with hearing impairment include: restaurant background music loud enough to interfere with hearing aids, cash registers that do not provide a visual display, and the absence of a printed menu board.
3. Some of the obstacles to accessibility for people with visual impairments include: poorly lit signage, printing in menus or brochures that is small and difficult to read, and the absence of Braille or raised lettering on washroom doors and elevators.
4. Common examples of barriers for persons with service animals include: being refused service, told that there are no tables or rooms available when in fact some are available, or placed in an inferior seat or room when better ones are available.
5. Barriers to accessibility for a person with a mental disability include: stereotypes, refusal of service, placing a person at the back of the restaurant, or asking them to only stay for a set period of time when this is not a demand of all customers.

Where a restaurant operator is concerned that any person is causing a serious disruption, they must ensure that their belief is reasonable and not based on an assumption about a person with a mental or physical disability. The operator must also show that they tried to accommodate the person but could not do so or continue to do so without incurring undue hardship.

## Refusing to rent hotel rooms based on protected characteristics

In the hotel industry, it is discriminatory for hotel operators to refuse to rent rooms to certain individuals based on any characteristic that is protected under the *Act*. For example, a hotel operator might discriminate by:

- ◆ Refusing to rent a room based on the pretext that the hotel is fully occupied
- ◆ Requiring hotel guests, based on their protected characteristics (such as race, colour, ancestry, or place of origin), to pay a higher deposit than other guests
- ◆ Quoting a higher room rate based on the guest's protected characteristics



- ◆ Refusing to rent to a prospective guest because of that person's source of income—for example, refusing to rent to a person who receives social assistance
- ◆ Requiring a guest to vacate a hotel room on the assumption that they were responsible for a disturbance in the hotel based on a protected characteristic

Hotel operators can refuse to rent rooms to persons in order to maintain the safety of their customers and staff, as well as to protect hotel property from damage. However, there has to be a reasonable, objective support for that type of conclusion.

## **Refusing services to, discriminating against, or harassing a person based on their sexual orientation, gender, gender identity, or gender expression**

Sexual orientation, gender, gender identity, or gender expression are all protected grounds under the *Act*. Service providers like hotels, restaurants, bars, and nightclubs must not deny services or give substandard service to customers due to these characteristics. The most common examples of this type of discrimination are:

- ◆ Denying hotel, motel, or bed and breakfast room or vacation property rental based on these grounds
- ◆ Giving substandard service to a person who is presumed to be gay, lesbian, bisexual, non-binary, or transgender
- ◆ Refusing entry to a bar for a person who is dressed outside of their assigned gender
- ◆ Allowing other customers to harass someone based on their sexual orientation, gender, gender identity, or gender expression
- ◆ Failing to provide washrooms that are single stall, all-gender, or otherwise accessible to a person, regardless of their self-identified gender

## **Denying entrance to nightclubs and bars based on a protected ground**

Nightclub and bar operators cannot deny entrance to customers based on a protected ground, such as race, colour, or religious belief. The most common examples of this type of discrimination are:

- ◆ Only admitting one group of clientele—for example, only admitting persons who appear to be a specific race or colour
- ◆ Effectively excluding some customers by asking for additional identification—for example, asking only some customers, based on their race, for multiple pieces of identification. This can often occur because of racial profiling. For more information regarding racial profiling and the *Act*, read the Commission's Information Sheet *Racial profiling*
- ◆ Explicitly excluding particular groups—for example, refusing entry to people wearing religious head coverings or groups of persons from specific parts of the world
- ◆ Enforcing a dress code based on membership in one group, while not enforcing the code for other customers—for example, applying a “no jeans” rule to customers of a specific cultural background but not to others



Nightclub and bar operators have a responsibility to protect their staff and customers from harassment and violence. They also have the right to protect their premises and equipment from being damaged. In maintaining a safe environment and meeting other legal obligations, nightclub and bar owners must have an objectively reasonable belief that these patrons pose a threat to staff, other customers, or property, or that they are significantly intoxicated.

The decision not to serve certain people cannot take into account a protected characteristic or a person's perceived relationship to another person or group (such as other people from the same part of the world). For example, a nightclub owner could refuse entry to someone that directs racist comments toward another person in line but cannot refuse someone because the owner makes assumptions about a particular racial group being violent. That is called racial profiling.

## Service providers' responsibilities in the hospitality industry

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Owners, managers, and employees in the hospitality industry have a responsibility to take steps to make their establishments discrimination-free and deal fairly with human rights concerns that customers, clients, and guests raise.

The following strategies are options to consider.

### Preventive strategies

It is important for a business to have good policies, procedures, and training in place to help prevent discrimination from occurring. Some options include:

- ◆ Educating all staff about how Alberta's human rights legislation prohibits discrimination and make them aware of their obligations
- ◆ Promoting corporate pride in providing accessible services to a diverse clientele
- ◆ Designating a manager or staff member to be the contact for issues related to human rights and advise staff to direct human rights issues to that person
- ◆ Surveying your business's human rights performance by reviewing the physical accessibility to your facilities and identifying policies that restrict service, for example, identifying rules and restrictions related to serving a person with a service dog
- ◆ Making your business accessible and barrier-free for people with physical and mental disabilities
- ◆ Seeking expert input about accessibility from persons with disabilities or organizations that represent persons with disabilities
- ◆ Considering the benefits of hiring a qualified and diverse staff, particularly in positions that deal with the public
- ◆ Providing staff with conflict resolution training
- ◆ Watching the Commission's [\*webinars and videos\*](#) about human rights in the workplace or attending a public workshop

## Customer complaint strategy

Even when preventive strategies are in place, problems may arise. The following strategies provide ideas for dealing with customer complaints:

- ◆ Designate a qualified manager or staff person to deal with problems promptly. The designated person should be available to meet with the customer, in a private setting if possible.
- ◆ In the absence of an immediate verbal resolution, ask the customer to write a description of the issue and make an appointment to speak or meet with a manager as soon as possible.
- ◆ Investigate the customer's complaint.
- ◆ Attempt to resolve the complaint with the customer.

## Customers' responses to discrimination in the hospitality industry

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Customers, clients, and guests can look for constructive ways to respond to issues related to discrimination and accommodation if they encounter them in hospitality industry establishments. Some options include:

- ◆ Take immediate action by seeking out a supervisor and explaining the issue. If accommodation is needed, provide clear details about your needs.
- ◆ If taking immediate action is not appropriate or possible, write a detailed description of the issue and make an appointment to speak to or meet with a manager as soon as possible.
- ◆ Visit the Commission website for more information, [albertahumanrights.ab.ca](https://albertahumanrights.ab.ca).

## Public health requirements and discrimination in the hospitality industry

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Service providers in the hospitality industry can make policies to support the health and safety of their customers or staff. However, they still need to accommodate individuals who cannot comply with such policies for any reason related to a protected ground. Visit the **Commission's website** for more information.

## Related resources

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### Commission human rights guides

- ◆ *Duty to accommodate*
- ◆ *Defences to human rights complaints*

### Commission information sheets

- ◆ *Protected areas and grounds under the Alberta Human Rights Act*
- ◆ *Mental or physical disabilities and discrimination*
- ◆ *Family status and marital status*
- ◆ *Sexual orientation*
- ◆ *Racial profiling*
- ◆ *Religious beliefs*

### Other Commission resources

You can access Commission human rights guides and information sheets, as well as other resources, online at **[albertahumanrights.ab.ca/resources](https://albertahumanrights.ab.ca/resources)**.

### Other resources

- ◆ Government of Alberta, *Accessibility Design Guide 2024*
- ◆ Government of Alberta, *Supports for People with Disabilities*
- ◆ Government of Alberta, *Service Dogs in Alberta*
- ◆ Office of the Information and Privacy Commissioner of Alberta, **[oipc.ab.ca](https://oipc.ab.ca)**

## Appendix: Cases on sexual orientation, race and ancestry, service dogs, physical disability, family status, and religion

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### Alberta cases

#### Race, colour, ancestry, place of origin

##### *Cunningham v Bims Car Wash,*

2022 AHRC 131

##### **Indigenous woman – racial slur**

An Indigenous woman launched a complaint, alleging discrimination on the grounds of race, colour, ancestry, place of origin, and gender. At a car wash, the complainant was dissatisfied with the job done on her car and, after speaking with staff, was approached by the manager. The situation with the manager escalated to the point where he swore at the woman, telling her to get off his property, and then referring to her using a racist slur.

The Tribunal Chair found that the slur was derogatory and referred to the Indigenous woman in an offensive way. The Tribunal found no reasonable justification in the evidence for the respondent's discriminatory conduct, thus the Tribunal found that the respondent had discriminated against the complainant. The complainant was awarded general damages for emotional trauma and injury to dignity.

##### *Simpson v Oil City Hospitality Inc,*

2012 AHRC 8 (Alberta Human Rights Tribunal)

##### **Discrimination based on race – racial profiling – person denied entry due to race**

The complainant alleged that a nightclub in Edmonton had refused to admit him due to racial profiling. While in line for the nightclub, the complainant witnessed three Asian men being turned away by the club's doorman. The complainant's friend asked the doorman if her group, including the complainant, would get into the club. The doorman indicated that she and her other friend (who was not Asian) would be admitted, but the complainant would not. This friend also overheard the doorman saying that the club was not admitting Asians because it had heard a tip that Asian gangs were out that night.

The Tribunal accepted the evidence that the complainant and other people who appeared to be of Asian descent were not admitted to the nightclub that night because of their race, which established prima facie discrimination. The burden then shifted to the respondent to establish that discrimination did not occur or the reason for the discriminatory action was reasonable and justifiable. The Tribunal rejected the respondent's evidence that the complainant was refused entry because he or another member of his group was rude, aggressive, and disruptive. It also found that the presence of alleged gang members in the area did not justify this discrimination. The nightclub was found to have discriminated against the complainant due to his race.

## Religion

### ***Singh v Royal Canadian Legion, Jasper Place (Alta),***

Branch No 255, 1990 CanLII 12453 (Alberta Board of Inquiry)

### **Head covering not allowed on club premises - private clubs as services customarily available to the public - Sikh wearing turban prevented from attending social function**

The complainant was a member of the Sikh faith and wore a turban as a requirement of his religion. The complainant planned to attend a Christmas party at the Jasper Place Legion in Edmonton, Alberta, but was informed ahead of time that he would not be allowed to wear his turban because the Legion had a dress code that prohibited headwear. As a result, the complainant did not attend the party. He filed a human rights complaint that claimed that he had been discriminated against in the area of services and facilities customarily available to the public on the basis of religious beliefs. The Legion argued that it was a private club and, consequently, its services and facilities were not customarily available to the public within the meaning of human rights legislation.<sup>15</sup>

The Alberta Board of Inquiry<sup>16</sup> stated that it must look at the service provided, not the service provider, to determine whether the service was customarily available to the public.<sup>17</sup> The Tribunal determined that, in relation to special events bookings, the Legion was not a private social club. It entered the public sphere by offering the club to be booked for these events. In addition, the Legion did not consistently require attendees to sign in as guests of a member of the Legion. In fact, a member of the Legion was not always present at each special event. Given the number of special events and the way in which the Legion conducted them, the Tribunal held that the special events bookings constituted services and facilities customarily available to the public.

The Tribunal concluded that the respondent denied services or facilities to the complainant and discriminated against him on the basis of religious beliefs.

## Physical disability

### ***Haverluck v Burger Boy,***

2022 AHRC 75

### **Paralyzed arm – restaurant refuses to accommodate**

The complainant, a man with a paralyzed left arm, alleged discrimination on the basis of disability. He provided food delivery services through Skip the Dishes and requested that restaurants provide drink trays to make it possible for him to carry and deliver orders with his right arm. The respondent restaurant, Burger Boy, refused to provide the complainant with a drink tray, making it impossible for him to pick up deliveries from that establishment. The respondent did not dispute that, in providing orders to the complainant for pick up, it was providing a service customarily available to the public. Several times, the complainant had

<sup>15</sup> Then called the *Individual Rights Protection Act*.

<sup>16</sup> Became the Alberta Human Rights Tribunal.

<sup>17</sup> The current definition of a service is the Supreme Court of Canada decision: *University of British Columbia v Berg*, 1993 CanLII 89 (SCC), [1993] 2 SCR 353.

logged this issue with deliveries in his Skip the Dishes profile, prior to filing the complaint. The Tribunal found the complainant had suffered an adverse impact, in which his disability was a factor, from the decreased rate of compensation he experienced being unable to pick up orders from the restaurant to his frustration and embarrassment at being denied accommodation. No reasonable justification was found, and the complainant was awarded general damages for injury to dignity.

## Related cases in other jurisdictions

### Race, colour, ancestry, place of origin

***Wickham v Hong Shing Chinese Restaurant*,**  
2018 HRTO 500

#### **Racial profiling - restaurant**

The applicant was a Black man who alleged discrimination on the basis of race, colour, and ethnic origin. He and his three friends, also Black individuals, were asked by the respondent restaurant to pay for their food in advance of receiving their meals, and they were the only patrons required to do so at the time. The respondent was absent from the hearing, which continued, nevertheless.

As a Black Afro-Caribbean man, the complainant was a member of protected group under the Ontario *Human Rights Code*, he was subject to adverse treatment (being asked to pay in advance inferred that the restaurant's employees had made negative assumptions about the applicant), and the adverse treatment was directly tied to the protected characteristic (as the restaurant had racially profiled the applicant). Furthermore, the respondent, having chosen not to participate in the hearing, did not offer a reasonable justification for the conduct, either at the time of the incident or during the hearing. Thus, the applicant was successful and awarded compensation for the rights infringement and injury to his dignity, feelings, and self-respect. Furthermore, the respondent was ordered to place an Ontario *Human Rights Commission Code* card in a prominent place in the restaurant.

### Services customarily available to the public

***University of British Columbia v Berg*,**  
1993 CanLII 89 (SCC), [1993] 2 SCR 353

#### **Definition of services customarily available to the public**

The appellant, a student, alleged discrimination against her by the University of British Columbia with respect to a service customarily available to the public on the ground of mental disability. She had a history of controllable depression but experienced an episode in 1981 during which she wrote "I am dead" on the mirror in the school's washroom and jumped through a plate glass window after being frightened.

When the appellant applied to an internship, one of the school's instructors refused to complete a form to be included with the appellant's application on the basis of the instructor's knowledge of the appellant's mental health history. The appellant was denied entry to the internship. In another instance, the appellant was denied a key to facilitate after-hours

building access, which was customarily granted to all the students in her program. She was issued a key a year after her initial request when a physician assured there was no risk.

The issue in the appeal was whether the above services were “customarily available to the public.” The Court found that the word “public,” as it is used in the BC *Human Rights Code*, cannot be required to include every member of a community, defining “public” in relational terms, not in terms of quantity. Thus, the Court granted that services either create private or public relationships and had to determine in this case which had been established. The Court found the relationships created and contravened between the appellant and the school were public because nothing separated the students from the general public, other than an admissions process that could not be discriminatory. The school exercised public functions: providing accommodations, services, or facilities to students that would further education and social activities relating to the school. The key and rating sheet were incidents of the public relationship and were customarily available to the school’s public. Even though the professor had discretion to refuse completing the form, there had never been previous instances of this refusal for other students, and the Court found that it only could have occurred because of the student’s disability. The Court found that the school had discriminated against the appellant.

## Service dogs

*Hill v Bani-Ahmed,*

2014 HRTO 937 (Human Rights Tribunal of Ontario)

**Discrimination based on physical disability – duty to accommodate individuals with service dogs – individuals have the right to bring service dogs into establishments that otherwise prohibit dogs**

The complainant made a human rights complaint alleging that he had been denied a service customarily available to the public because of his physical disability. The complainant entered the respondent’s restaurant with his service dog. After entering the restaurant, a staff member told him that he would have to leave because dogs were not allowed in restaurants due to health regulations.

The complainant told the staff member that his dog was a service dog that assisted him because he was blind and offered both his and his dog’s identification documents. After calling the owner, the staff member told the complainant that he could serve the complainant, but that his dog must be left outside. The complainant told the staff member that requiring his service dog to wait outside was a violation of his human rights, but the staff member insisted. The complainant then left the restaurant.

The respondent testified that he knows his obligations regarding service animals. He further indicated that the situation arose due to a misunderstanding on the part of the staff member, that he was very sorry this happened to the complainant, and that he had circulated a letter to all his franchise locations to clarify their responsibilities in relation to service animals. Given this evidence, the Tribunal ruled that the respondent had discriminated against the complainant.



## Physical disability

### *FT v Hamilton (City),*

2018 HRTO 165

#### **Discrimination based on physical disability – allowing products containing peanuts in facility not discrimination**

The applicant, a young girl with a peanut allergy, alleged discrimination on the grounds of disability by the City of Hamilton. Her Litigation Guardian was her father, who argued that because the City had failed to accede to his request to ban the sale of products containing peanuts in recreational facilities, it had discriminated against his daughter by not accommodating her, ostensibly preventing her from taking part in activities at their facilities.

The Tribunal found that a claim of discrimination was not made out, as neither party took the position that facilities must be “zero risk,” and the risk the applicant faced was purely hypothetical. Furthermore, the Tribunal found that any risk the applicant faced could be mitigated by taking proper avoidance measures and carrying her EpiPen, and that these actions would prevent her exclusion or restriction for participating in events at recreational facilities. The Tribunal also found that there was no requirement for the accommodation sought by the applicant, as there was not enough scientific support, she was able to attend other places where nuts were present, and the request for accommodation was overly broad and would impose undue hardship on the respondent. The respondent also already had alternate, reasonable accommodation options in place for attendance at city facilities for individuals with allergies. The complaint was dismissed.

### *Butler-Henderson v 2363647 Ontario Inc. o/a Pentagon Bar & Grill,*

2020 HRTO 686 (Human Rights Tribunal of Ontario)

#### **Prima facie case of discrimination based on physical disability – restaurant had a duty to accommodate the customer who used forearm crutches in order to access their washroom**

The applicant was born with a physical disability that affected her nerve pathways. She used forearm crutches to assist her with mobility. The applicant claimed that she was refused access to the respondent’s washroom because of her disability.

The applicant attended the respondent’s restaurant and asked the server if she could use the washroom, which was located downstairs. The server refused, stating that she did not want to be held liable if the applicant fell down the stairs. When the applicant tried to go to the washroom, the server blocked her way and announced to everyone in the restaurant that they would be witness to the fact that the applicant was advised not to use the washroom and that the applicant had indicated that the server would not be held liable if an accident took place. The server then moved out of the way and the applicant went downstairs without any difficulty.<sup>18</sup>

The applicant stated that, as a person with a physical disability, she has to carefully plan where to “shop, work, and socialize around access to restrooms,” and that the server’s denial caused her “extreme physical and mental discomfort.”<sup>19</sup>

<sup>18</sup> At paras 9-10.

<sup>19</sup> At para 11.

The Tribunal found that the applicant experienced adverse treatment when she was repeatedly refused use of the washroom facilities at the restaurant and was publicly humiliated. The Tribunal also found that the applicant's disability was a factor in the server's adverse treatment of her. The server "was acting in a paternalistic manner and did not extend the applicant the benefit of the doubt and simple decency as a person with a disability."<sup>20</sup>

The Tribunal concluded that the applicant had established a prima facie case of discrimination and that the respondent's behaviour was clearly discriminatory. "Instead of asking the applicant if she needed any accommodation or assistance to use the facilities, the server made a spectacle of the applicant in front of its other patrons, which was discriminatory. She was eventually allowed to use the facilities, but only with conditions."<sup>21</sup>

***Homits v Adamsons BBQ,***

2021 HRTO 303 (Human Rights Tribunal of Ontario)

**Refusal of service based on physical disability – restaurant ordered to pay damages**

The applicant alleged that he and an acquaintance drove to the respondent's business and parked in a no parking zone, as permitted by his accessible parking permit due his mobility limitations.

The applicant claimed that he was told by an employee of the respondent that he needed to move his car in order to be served. The applicant then asked to speak to the respondent's owner or manager and was directed inside to speak with the owner. When the applicant informed the owner that he had a legal right to park there, the owner told him in front of a long line of people "I don't care. I can refuse service to anyone I choose to."<sup>22</sup> Consequently, the applicant and his acquaintance left the restaurant.

The applicant stated that "it is frustrating enough to deal with mobility issues, without having to endure the disrespect and blatant disregard for the law that was exhibited that day."<sup>23</sup>

The Tribunal stated that the applicant was subjected to adverse treatment at the respondent's restaurant due to his disability. The Tribunal found that "the respondent's owner and employee behaved in a way that was disrespectful in front of the restaurant's customers. The applicant was forced to explain his needs in front of a busy restaurant, and the owner did not even step out from behind the counter or stop his work to address the applicant. No attempts to accommodate or even understand the applicant's code-related entitlements were made." The Tribunal added that "the owner and his employees have an obligation to familiarize themselves with the code and to abide by it in their dealings with customers."<sup>24</sup>

To read additional cases related to human rights in the hospitality industry, visit [\*\*CanLII\*\*](https://canlii.org/), the Canadian Legal Information Institute.

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<sup>20</sup> At para 23.

<sup>21</sup> At para 28.

<sup>22</sup> At para 11.

<sup>23</sup> At para 12.

<sup>24</sup> At para 25.

## Contact us

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