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ONTARIO'S NEW HUMAN RIGHTS SYSTEM: WHAT YOU NEED TO KNOW BEGINNING JULY 1, 2008

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As of July 1, 2008, Bill 107, the *Human Rights Code Amendment Act, 2006* will come into force and provide for extensive changes to the Human Rights regime currently in force in Ontario.

The most significant change resulting from the amendments will be the introduction of a new "direct access" model. Currently, complaints are made to the Ontario Human Rights Commission which is required to "investigate a complaint and endeavour to effect a settlement." If a settlement is not reached, the matter is referred to the Human Rights Tribunal for a hearing between the parties. This two-tiered approach has been one of the reasons for the backlog of nearly 4000 cases currently waiting to be dealt with at the Commission.

As of July 1, 2008, the Commission will no longer process complaints, rather individuals will make their complaints directly to the Tribunal. The Commission will continue to have a role in public education, preparing policies on human rights, and investigation of systemic discrimination. The Commission will also have the opportunity to intervene in cases before the Tribunal.

Under the new direct access model, the process will be much more streamlined with the Tribunal afforded powers that will allow it to focus on the most important issues very quickly. Depending on the use the Tribunal makes of these new powers, hearings may take more of an inquisitorial rather than adversarial approach. For example, the Tribunal will be able to define or narrow the issues, determine the order of proceedings, examine witnesses, require statements or evidence and/or appoint a person to conduct an inquiry.

A Potential Increase in Claims Affecting Healthcare Providers

One of the most significant changes from the healthcare provider's perspective is that the current s. 34 will be replaced with s. 45.1 in the amended Code. Currently, s. 34 provides the Commission with the discretion to decide not to deal with a complaint where "the complaint is one that could or should be more appropriately dealt with under [another] Act." Therefore, under the present system, a respondent to a complaint has the opportunity to explain to the Commission why it should decide not to deal with the complaint on the basis of a jurisdictional question, that it is a matter dealt with under other legislation. In the hospital context, for example, complaints regarding human rights violations that might otherwise have been brought by unionized employees or credentialed physicians were unlikely because s. 34 provides for the argument that the matter is more properly dealt with at the Board level under the Public Hospital Act or through arbitration under the collective agreement.

With the introduction of s. 45.1, the Tribunal will not necessarily have to concede the matter to another board or process on the basis of jurisdiction. It will instead have the opportunity to look at the previous decision and determine for itself whether the human rights issues have been sufficiently dealt with.

The language of s. 45.1 provides that the Tribunal will be able to dismiss an application only if "another proceeding has appropriately dealt with the substance of the application." This language differs significantly from the previous provision since it arguably invites the Tribunal to look into the merits of both the substance and procedure in a prior proceeding and determine for itself whether the human rights issue has been "appropriately" dealt with. This is, in fact, how a similar provision has been interpreted in British Columbia where the Human Rights Tribunal operates under similar language.

Finally, if another proceeding is currently in progress, the Tribunal will have the power to defer its consideration of the application until such time as it can determine whether the substance of the human rights application has been dealt with.

In summary, s. 45.1 has the potential to allow more complainants to proceed with their matter before the Tribunal. The Tribunal has broad powers to provide a remedy. Potential remedies include monetary compensation, restitution other than monetary compensation (for example, reinstatement), and "an order directing any party to the application to do anything that, in the opinion of the Tribunal, the part ought to do to promote compliance with this Act."

Civil Claims for Damages Resulting from Human Rights Violations

Another very significant change is the introduction of the ability to include a claim for violation of the Human Rights Code in an action for damages in the civil courts. Previously, it had been decided by the Supreme Court of Canada that the Code provides for a complete system for dealing with alleged human rights violations and therefore such claims may not be addressed or compensated in the civil justice system.

Under the amended Code, plaintiffs will be permitted to specifically plead that the defendants have violated their rights under the Code and thus seek damages for injury to their dignity, feelings and self-respect. However, it must be noted that the new provisions do not allow such a claim to be commenced solely on an infringement of a right under the Code, it may only supplement a claim that is otherwise based on another cause of action, for example personal injury, wrongful dismissal or medical malpractice.

For example, in the realm of medical malpractice, a plaintiff's claim for damages resulting from alleged mistreatment while an inpatient may be augmented by a claim that the malpractice stemmed from discrimination on the part of the hospital or its employee on the basis of one of the prohibited grounds identified in the Code, such as age or disability.

It must also be noted that an individual is not permitted to bring an application to the Tribunal if a civil proceeding has been commenced regarding the alleged violation or a court has finally determined the issue. The development of case law over time will be important as potential applicants or plaintiffs are more likely to take their complaint to whichever forum is more likely to provide a more desirable remedy.

The importance of this new claim for damages stems from the fact that it is currently unknown how the courts will value an injury to dignity, feelings or self-respect and, further, how such an injury will be proven. Currently, the opinion of a medical expert is required to prove both damages and liability in civil cases; such expert evidence is not required to prove that the plaintiff's dignity or self-respect has been injured.

Preparing for the New Human Rights System

Over the next six months, the amended Act provides for a transition period as the Commission winds down its carriage of matters and applications are made directly to the Tribunal for the first time. Below are a few of the most important things that health industry clients will need to know during those first few months:

1. New applications brought to the Tribunal will move forward on a timeline that is much quicker than under the previous regime. Responses to applications are required within 35 days and the new provisions provide for penalties if a response is not received. It will therefore be very important to quickly engage counsel or the appropriate staff in order to prepare and submit the required forms.

2. Under the previous provision, the presumptive limitation period for a complaint to the Commission was six months. With the amendments, this period will now be one year. It will therefore be necessary to retain relevant documents for a longer period of time.

3. A response to the Tribunal regarding an application must include both whether an investigation was conducted and whether the Respondent has a human rights policy. Since these items will be relevant considerations at a Tribunal hearing, additional incentive is provided to facilities and organizations to have up to date policies in place and to act upon them appropriately.

Our Health Industry Practice Group would be pleased to assist you with the complaint process and/or to assist you with policy development. Please feel free to contact us at your convenience to discuss.

About the Author

Jennifer Hunter is a lawyer practising in our Health Industry Practice Group in our advocacy group.