

## **HUMAN RIGHTS REGIME CHANGE IN ONTARIO: WHAT CHARITIES SHOULD KNOW**

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### **A. INTRODUCTION**

In the face of Canada's changing demographics, one of its biggest challenges is to ensure the protection and administration of justice with respect to human rights. The Ontario government has attempted to address some of these obstacles by passing the Ontario *Human Rights Code Amendment Act*<sup>1</sup>, 2006 (also referred to as Bill 107), which came into effect on June 30, 2008. One of the most significant changes under the amended Ontario *Human Rights Code*<sup>2</sup> (*Code*) is that the Human Rights Tribunal of Ontario (HRTO) will now be processing human rights complaints instead of the Ontario Human Rights Commission (OHRC). Other changes involve the addition of an administrative branch, removing restrictions on damage awards for mental anguish, and permitting human rights violations pleadings in civil actions.

This *Charity Law Bulletin* provides a brief overview of how charities might be impacted by the new human rights system in Ontario and what they need to know about the changes to the *Code*.

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<sup>1</sup> S.O. 2006, c. 30.

<sup>2</sup> R.S.O. 1990, CHAPTER H. 19.

## B. WHY THE HUMAN RIGHTS REGIME CHANGE MATTERS TO CHARITIES: CHARITIES IN THE HUMAN RIGHTS PROCESS

### 1. Employment Practices

One of the legal practice areas that will undoubtedly experience the affects of the changes to the human rights process is labour and employment. Along with other organizations, corporations, and individuals, charities must also have and implement policies and practices for its employees and volunteers that comply with applicable human rights legislation. For instance, charities should ensure that they have a policy in place concerning accommodation for employees who are members of a disadvantaged group identified in the *Code*.<sup>3</sup>

It is also important to remember that many charities and non-profit organizations are involved in employment advertising to attract employees to carry out programs and activities. To this end, in addition to compliant policies and practices, charities must also be careful to avoid infringing human rights legislation and exposing themselves to human rights complaints in their efforts to hire appropriate employees.<sup>4</sup>

### 2. The Christian Horizons Case

*Heintz v. Christian Horizons*<sup>5</sup> is a recent example of how charities can become involved in the human rights process, especially with respect to potentially discriminatory employment practices. Christian Horizons is a charity that required one of its employees (Ms. Heintz) to sign a Lifestyle and Morality Statement, which (among other things) prohibited employees from engaging in homosexual relationships. Heintz identifies herself as a Christian who (during her employment with Christian Horizons) came to an understanding that she is also a lesbian.

Ms. Heintz eventually resigned from her position at Christian Horizons after an encounter with her supervisor who confronted her about her sexual orientation. Although she resigned,

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<sup>3</sup> For more information about legal risk management for charities, see *Legal Risk Management Checklist* dated September 2007, entitled "Legal Risk Management Checklist For Charities", available at <http://www.carters.ca/pub/checklist/charity.pdf>.

<sup>4</sup> For more information about employment advertising by charities and not-for-profits, see *Charity Law Bulletin* No. 65 dated February 25, 2005, entitled "Employment Advertising by Charities and Not-for-Profits: Issues in Human Rights Law", available at <http://www.carters.ca/pub/bulletinc/charity/2005/chylb65-05.pdf>.

<sup>5</sup> 2008 HRTO 22 [*Christian Horizons*].

representatives of Christian Horizons admitted that she would have been terminated had she not done so.

After her resignation, Ms. Heintz filed a human rights complaint with the HRTO. Reference to *Christian Horizons* in this Bulletin is made in order to demonstrate how charities might become involved in human rights litigation; for more details on the HRTO's ruling in this case, please see, Church Law Bulletin No. 22 dated May 28, 2008, entitled "The Christian Horizons Decision: A Case Comment", available at <http://www.carters.ca/pub/bulletin/church/2008/chchlb22.htm>.

Chief Commissioner Barbara Hall asserted what *Christian Horizons* means for charities' compliance with the *Code*. She says, "[the case] sets out that when faith-based and other organizations move beyond serving the interests of their particular community to serving the general public, the rights of others, including employees, must be respected".<sup>6</sup> Whether one agrees with her statements or not is open to debate; nevertheless, *Christian Horizons* highlights the need for charities to consider the human rights implications of their actions and policies.

### C. PROBLEMS COMMONLY COMPLAINED OF UNDER THE OLD REGIME

#### 1. Backlog and Delay: Commission as Gatekeeper

Under the old regime in Ontario, the OHRC assisted complainants in drafting a complaint and advancing the fact finding and investigation aspects of the complaints process. In the National Journal of Constitutional Law, Yavar Hameed and Niiti Simmonds contribute an article, which comments on various problems with the old (then current) human rights regime. They assert that "[t]he gate keeping function of human rights commissions has been variously criticized [...] as an impediment to access to justice – in contrast to the 'direct access model'".<sup>7</sup>

One of the most common criticisms of administrative tribunals is the delay and backlog of complaints. Hameed and Simmonds attribute this to underfunded and overburdened administrative

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<sup>6</sup> Ontario Human Rights Commission, "Tribunal Rules on Employee Lifestyle and Morality Statement," online Ontario Human Rights Commission <http://www.ohrc.on.ca/en/resources/news/heintzhorizons>.

<sup>7</sup> Yavar Hameed and Niiti Simmonds, "Social and Economic Rights Under the Charter: The Charter, Poverty Rights and the Space Between: Exploring Social Movements as a Forum for Advancing Social and Economic Rights in Canada" (2007) 23 Nat'l J. Const. L. 181 at 186.

human rights tribunals. Often, a complainant could expect a wait of approximately one to two years before a complaint was referred to the tribunal as measured from the beginning of the intake stage.<sup>8</sup> In many cases, the old system had the affect of either causing complainants to settle out of frustration with the system or just be deterred from filing complaints altogether.

## 2. Damages Cap

Another issue of concern under the old regime was the \$10,000 cap on damages awarded for mental anguish. Critics argued that the cap diluted the seriousness of human rights violations and that, in some cases, potential claimants would have to pay out more money in legal fees than what their damages might amount to in the event of a ruling in their favour.

## D. STRUCTURE AND OBJECTIVES OF THE NEW REGIME

### 1. Ontario Human Rights Commission

The new system consists of three bodies each designed to meet specific functions in the administration of justice with respect to human rights. The OHRC asserts that the new system is designed to resolve discrimination claims faster and help promote and advance human rights.<sup>9</sup>

Under the revised *Human Rights Code*, the role of the OHRC in preventing discrimination and promoting and advancing human rights in Ontario is no longer to process claims. Instead, the OHRC will focus on the following objectives:

- ◆ Expanding its work in promoting a culture of human rights in the province
- ◆ Conducting public inquiries
- ◆ Initiating its own applications (formerly called ‘complaints’)
- ◆ Intervening in proceedings at the HRTTO
- ◆ Focusing on engaging in proactive measures to prevent discrimination using public education, policy development<sup>10</sup>

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<sup>8</sup> *Ibid* at 186.

<sup>9</sup> Ontario Human Rights Commission, “Our Changing Mission: The New Mandate of the Ontario Human Rights Commission,” online: Ontario Human Rights Commission <http://www.ohrc.on.ca/en/commission/mission>.

<sup>10</sup> *Ibid*.

The OHRC will also undertake the review and development of public policy on human rights. The Commission asserts that “[t]he overall spirit of the new law is that the OHRC is one part of a system for human rights alongside the HRTO and Human Rights Legal Support Centre”.<sup>11</sup>

## 2. Human Rights Tribunal of Ontario

The HRTO will deal with all claims of discrimination filed under the *Code*. The Tribunal will resolve human rights applications through mediation or adjudication in a fair, open and timely manner. Applicants will now have direct access to the Tribunal.

The volume of applications per year to the Tribunal is expected to grow from 100-150 to approximately 3,000.<sup>12</sup> In light of the challenges that the changes under the revised *Code* present, the Tribunal intends to respond by ensuring that its members have expertise in both human rights and modern dispute resolution techniques.<sup>13</sup>

## 3. Human Rights Legal Support Centre

Along with the OHRC and HRTO, the Human Rights Legal Support Centre (“Legal Centre”) will fulfill unique objectives in the goal of administering human rights to Ontarians. The Legal Centre is an independent agency funded by the Ontario Government through the Ministry of the Attorney General and recently opened on June 30, 2008.<sup>14</sup> The objects of the Legal Centre are as follows:

- ♦ To establish and administer a cost-effective and efficient system for providing support services, including legal services, respecting applications to the Human rights tribunal of Ontario; and
- ♦ To establish policies and priorities for the provision of support services based on its financial resources.<sup>15</sup>

The Legal Centre holds itself out to provide legal advice and assistance to Ontarians; more specifically, it can help individuals:

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<sup>11</sup> *Ibid.*

<sup>12</sup> Human Rights Tribunal of Ontario, “The New Human Rights System and the Human Rights Tribunal of Ontario,” online: Human Rights Tribunal of Ontario <http://www.hrto.ca/NEW/pdf/TheNewHumanRightsSystem.pdf>.

<sup>13</sup> *Ibid.*

<sup>14</sup> Human Rights Legal Support Centre, “Human Rights Legal Support Centre: Objects and Mission,” online: Human Rights Legal Support Centre <http://www.hrlsc.on.ca/en/mission.htm>.

<sup>15</sup> *Ibid.*

- ◆ Resolve a dispute involving rights under the Code
- ◆ File an application to the HRTO if individuals want to ask the tribunal to consider and resolve the dispute through mediation or at a hearing
- ◆ Provide legal assistance when applications to the Tribunal are at mediation or at a hearing before the Tribunal
- ◆ Help enforce an Order of the Tribunal if the Tribunal finds that an individual has experienced discrimination.<sup>16</sup>

## **E. DAMAGES**

The HRTO no longer has to adhere to a prescribed limit for damages relating to mental anguish. In the context of employment law, employers will need to take this into consideration as damages are expected to get much larger. Furthermore, complainants will have more incentive to make claims, since their damage awards have the potential to more closely reflect the compensation they may be entitled to.

## **F. HUMAN RIGHTS PLEADINGS IN THE CIVIL LITIGATION CONTEXT**

Another major development in human rights law under the new regime is that individuals can not only make human rights claims before the HRTO, but can now also plead human rights violations in civil lawsuits. For instance, someone who pleads that his or her employer wrongfully dismissed him or her can also plead that his or her human rights were infringed. Where a civil court finds that a human rights violation has occurred, a civil court can now award damages to compensate wronged individuals. It will be important to pay attention to how the courts actually implement this increased power. Nonetheless, human rights violation pleadings in civil cases can be expected to increase as a result of the changes.

## **G. PROBLEMS THAT CONTINUE TO EXIST UNDER THE NEW REGIME**

Despite the possible advantages of the new direct access model of human rights administration, there is still the concern of limited resources available for the adjudication of complaints. In addition, the issue of access to justice for litigants who cannot afford legal representation is still of major concern under the new regime. Indeed, the consequence of the OHRC no longer assisting with applicants drafting or

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<sup>16</sup> Human Rights Legal Support Centre, “What Services Does the Centre Provide?”, online: Human Rights Legal Support Centre <http://www.hrlsc.on.ca/en/services.htm>.

advancing the fact finding and investigation aspects of the complaints process may have the affect of adding to the existing barriers for individuals.

## H. CONCLUDING COMMENTS

The OHRC promises a new system that is sure to be both faster and promote an increased sense of seriousness for the protection of individual human rights in Ontario with more remedial recourse for applicants. With only a few months of the new regime's implementation under way, it is difficult to measure whether its purpose is having the effect it aims to achieve.

Nonetheless, for individuals, corporations, and charities alike, the changes to the human rights system in Ontario will be very important. This is especially true for employers who must ensure that their employment practices comply with the *Human Rights Code*.

As *Christian Horizons* illustrates, charities with specific objectives that have the potential to be discriminatory are at risk of becoming involved in the human rights process. In light of this and the recent changes to the human rights regime in Ontario, it will be prudent for charities to work with their legal advisors to review and update existing human rights policies and implement proactive anti-discrimination practices.