Grey Areas
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION
SML Steinecke Maciura LeBlanc Barristers & Solicitors

Collateral Proceedings before Human Rights Tribunals

by Richard Steinecke
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When the human rights system in Ontario was reformed in 2008, there were concerns from regulators that a new, alternative appeal for their decisions had just been created. Previously all complaints were screened by the Ontario Human Rights Commissions before any hearing. Often the Commission would decline to consider a human rights complaint against a regulator where there was an adequate alternative remedy available. Typically a complaint about a registration, complaints or disciplinary matter was diverted by the Commission back to the usual administrative law process. Under the new regime, the Ontario Human Rights Tribunal (the "Tribunal") had very limited statutory authority to decline to deal with a complaint.

The concerns of regulators were confirmed in a nursing case involving Ms. Trozzi. Ms. Trozzi had restrictions imposed on her certificate of registration because of a disability. Ms. Trozzi appealed that decision to the Health Professions Appeal and Review Board (the "Board"). The Board addressed Ms. Trozzi's human rights arguments, based on her disability, but upheld the decision of the College's Registration Committee. Ms. Trozzi complained to the Human Rights Tribunal in respect of both the decision of the Registration Committee and that of the Board. In 2010 the Tribunal asserted that it had jurisdiction to address the concerns. On judicial review, the Divisional Court determined that the Tribunal should not second guess the human rights determinations of the Registration Committee and the Board. The proper approach for Ms. Trozzi was to seek judicial review (to court) of those decisions and not make a collateral attack to the Tribunal.

The Divisional Court decision can be found at: *College of Nurses v. Trozzi*, 2011 ONSC 4614. The Supreme Court of Canada issued a very similar decision a few months later under the British Columbia human rights regime in: *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52.

The Tribunal soon began applying the *Trozzi* approach. For example, in *Jokstad v. Royal College of Dental Surgeons of Ontario*, 2012 HRTO 143 the Tribunal refused to permit an applicant for registration to pursue a complaint to the Tribunal rather than appealing the decision to the Board.

Similarly, in *Hamalengwa v. Law Society of Upper Canada*, 2012 HRTO 668 a lawyer facing discipline brought a complaint that the proceeding involved racial profiling and was retaliation against the lawyer raising human rights concerns. The Tribunal agreed to defer its process until the discipline process was completed because those issues could be raised there.

In two recent decisions the Ontario Human Rights Tribunal has gone even further than it did in *Hamalengwa* and confirmed that the *Human Rights Code* is not to be used as an alternative route to challenge many kinds of regulatory actions.

First, not everything a regulator does is subject to the *Human Rights Code.* In *Tesseris v. Amey*, 2014

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HRTO 102 an individual raising concerns about her employer's conduct towards her tried to bring a prosecutor of a regulator into the proceedings. Apparently the individual relied on a letter written by the prosecutor commenting on the individual's testimony as a defence witness in a discipline hearing as evidence of the regulator interfering with her employment. The Tribunal indicated that to be successful, a complainant must establish both that he or she was protected by the *Human Rights Code* (e.g., the person must be receiving a service from the regulator or the action must be related to membership in the regulator) and that any unfairness was based on a protected ground within the *Human Rights Code*. Simply being a member of a protected group and suffering unfairness is insufficient to base a successful complaint.

[NB The latter point is also made in *Abi-Mansour v. Ontario College of Teachers*, 2011 HRTO 601 where allegations of discrimination by College staff, committees and legal counsel were dismissed on the basis that "the applicant makes only bald allegations of racism and reprisal, and there is no reasonable prospect that they will succeed".]

In the other recent case, *Hanif v. College of Veterinarians of Ontario*, 2013 HRTO 1454, a veterinarian was facing discipline. He challenged the proceeding while it was still ongoing, at the Human Rights Tribunal on the basis that there was selective prosecution on the basis of race, colour, ethnicity and creed. The Tribunal dismissed the complaint on the grounds that the Discipline Committee enjoyed adjudicative immunity and on the grounds that the complaint to the Tribunal appeared to be a collateral attack on the disciplinary proceedings. The Tribunal said: "the significant line of cases ... stand for the proposition that the decisions and actions of adjudicators taken while performing an adjudicative function are beyond the jurisdiction of the Tribunal."

This is not to say that regulatory bodies are beyond the reach of the Tribunal. Actions by regulators unrelated to individual adjudications (e.g., making regulations, by-laws or issuing guidelines or standards) can sometimes be brought to the Tribunal. It is also possible that if a regulator simply ignores a human rights issue that has been raised, the Tribunal might intervene. However, it is reassuring that, despite the significant change in Ontario's human rights legislation in 2008, the more familiar administrative law processes remain the primary vehicle for appeals and review.

The cases discussed above can be found at: www.canlii.org.