

# Accommodation Issues in Professional Regulation

1

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# Before we begin...

2

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# Human Rights

3

- The Ontario *Human Rights Code* protects Ontarians from discrimination on the ground of “disability” in five social areas, including when joining or belonging to a self-governing profession
- (*Code* also protects from discrimination on the basis of religion and other grounds but disability is probably most common area of concern for regulators)

# Human Rights

- “Disability” defined in *Code* as:
  - A) Any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limitation the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide or other animal or on a wheelchair or other remedial appliance or device.

# Disability

5

- B) a condition of mental impairment or developmental disability,
- C) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- D) a mental disorder, or
- E) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*

# Human Rights

6

- Direct discrimination is easy to spot: e.g., “we do not register anyone with a hearing impairment” – obviously contravenes *Code*
- Constructive discrimination is harder to spot
  - Section 11 of the *Human Rights Code* provides that a right protected under Part 1 of the *Code* is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a person (who is for example, hearing impaired) except where the requirement, qualification or factor is reasonable and bona fide in the circumstances or the *Code* says it is not discrimination.

# Human Rights

7

- Section 11 goes on to say that a court or the Human Rights Tribunal shall NOT find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

# Human Rights

- Regulators will be able to rely on “health and safety” requirements of the public (i.e., potential clients of the licensee/member) as a factor in determining what accommodation can be provided
- The Tribunal has clearly held that the cost of accommodation cannot be the primary factor in determining whether accommodation should be provided
- Section 11 also says that the court or Tribunal shall consider any prescribed standards for assessing what is undue hardship [there are none but the Tribunal has given guidance]



# Human Rights and RHPA

- How regulatory colleges (as distinct from employers, for example) address human rights issues and accommodation has been addressed before – *CNO v Trozzi*, 2011 ONSC 4614
- CNO Registration Committee imposed TCLs on Ms. T's certificate in relation to a physical or mental condition or disorder; HPARB upheld the TCLs finding that CNO had discharged its duty to accommodate her on account of her disability
- Meanwhile she also complained to HRTO
- HRTO found that HPARB had NOT appropriately dealt with the substance of her human rights arguments

# Human Rights and RHPA

10

- Divisional Court disagreed with HRTO, finding that HRTO failed to take into account HPARB's specialized expertise and public protection mandate
- Court found that the RHPA has a comprehensive regime for addressing incapacity of applicants so as to accommodate disability in a manner consistent with the health and safety of the public

# Human Rights and RHPA

- Court said that the expertise of HRTO becomes disengaged when “reasonable accommodation consistent with public protection in health care” replaces the Tribunal’s standard of “reasonable accommodation up to the point of undue hardship”
- So essentially, that is the standard to which RHPA colleges, including Registration Committees, must accommodate: “Reasonable accommodation consistent with public protection in health care”

# Timing

12

- When can accommodation requests arise?
  - Before registration process
  - During registration process
  - After registration process

# Before and During Registration Process

13

- Education/training/exam/registration process
  - ✦ Applicant may request accommodation during their training program (and then regulator may learn about the accommodation and the reason for it)
  - ✦ Applicant may request accommodation during the entry-to-practice examination
  - ✦ Applicant may request assistance filling out application forms because of cognitive issues, vision impairment or other disability

# Registration Process

14

- ✦ Applicant's criminal record check may show multiple impaired driving or drug possession convictions and transcript of criminal court sentencing shows applicant's lawyer referring to addiction issues
- ✦ What does regulator do with the information about the condition or disorder (in terms of the applicant meeting the registration requirements)?

# What can you do with the information?

15

- What you do with the information is to some extent dependent on your registration requirements
- General “good character” provision not same as a requirement that applicant “not be suffering from a mental or physical condition or disorder that may affect their ability to practise safely”
- Latter provision gives more authority to make inquiries and do something with information at the entry-to-practise stage
- Former provision may mean you must register and then start health inquiry process

# After Registration

16

- Fitness to Practise arguably the ultimate accommodation process because conduct that might otherwise be addressed in discipline forum is instead (usually) addressed through a closed, remedial process
- FTPC has different objectives compared to discipline
- However *Wright v Alberta Nurses*, 2012 ABCA 267, stands for principle that conduct can still be addressed in discipline realm; regulator need not choose Fitness to Practise process
- Most regulators have a head of misconduct making it misconduct to practise the profession while impaired



# Fitness to Practise

17

- What is the standard of “accommodation” to be provided through the FTPC process?
- *Iacovelli v CNO*, 2014 ONSC 7267 – screening committee required registrant to submit to IME; he suggested that his own physician could provide report and that to require additional assessment was onerous and contravention of his *Charter* rights
- Court said “the words “least onerous and restrictive” occur nowhere in the RHPA and form no part of the legislature’s intention in drafting s. 59(2). They are plainly unsuitable to the functions of the health profession College, whose overarching duty is not to pose the least restrictions on its members, but rather to protect the public.”

# Complaints and Discipline

18

- Accommodation of complainant or registrant
  - ✦ Articulating complaint/responding to a complaint
  - ✦ Testifying at hearing
- Obligations under *Human Rights Code* will apply here as well; when accommodation of complainant needed that may cause tension with fairness obligations to registrant
- When accommodation of registrant needed that may cause concerns about their capacity (and cause a new health inquiry, or where permissible, such as Law Society or OCT, redirection of existing allegations to FTPC)

# Balancing Registrant and Client Rights

19

- Regulators sometimes get calls from registrants whose religious beliefs prohibit them from treating members of the opposite sex
- What guidance can regulator give them?
- See *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393

# Questions

20



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21

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