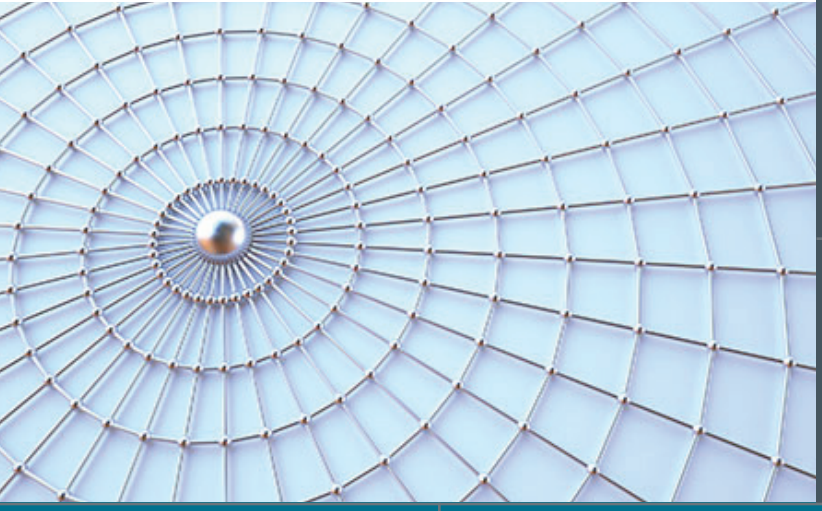

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LATEST WORD ON ONTARIO *HUMAN RIGHTS CODE* — CLIENT ALERT

OCTOBER 2015

Two Important Cases for Regulatory Bodies on the Ontario *Human Rights Code*

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Background

The recent Divisional Court decision of *Ontario (Ministry of Community Safety and Correctional Services) v. De Lottinville*[1] considered the authority of the Human Rights Tribunal of Ontario ("Tribunal") to dismiss a human rights application where the applicant has also brought a complaint, arising out of the same facts, to a professional regulatory body. In *De Lottinville*, the Divisional Court heard together two applications for judicial review, one from a police officer and the other from a doctor, in a "test case" representing an important development in the Tribunal's jurisprudence.

S. 45.1 of the *Human Rights Code*[2] gives the Tribunal the authority to dismiss a human rights application, in whole or in part, where its substance has been appropriately dealt with in another proceeding. The Divisional Court recognized that the common law principles of finality, judicial economy and consistency are "important ingredients of a fair legal system."[3] However, the Court found that these principles must be balanced with "the need to ensure that justice is done in a particular case."[4]

Summary of Ontario (Ministry of Safety and Correctional Services) v. De Lottinville

Dean De Lottinville brought an application to the Tribunal alleging racial discrimination by Ontario Provincial Police ("OPP") officers arising out of events that occurred in Elliott Lake. He had previously brought a complaint under the *Police Services Act*[5] , based on the same interaction with OPP officers. In response, review bodies within the OPP investigated, found that Mr. De Lottinville's complaints were unsubstantiated, and decided to take no further action. The Ontario Civilian Police Commission reviewed and confirmed the OPP's decision, and no disciplinary hearing was held.

1 *Ontario (Ministry of Community Safety and Correctional Services) v. De Lottinville*, 2015 ONSC 3085 ("*De Lottinville*")
2 *Human Rights Code*, R.S.O. 1990, c. H.19.
3 *De Lottinville* at para. 2.
4 *De Lottinville* at para. 2.
5 *Police Services Act*, R.S.O. 1990, c. P. 15, as amended.

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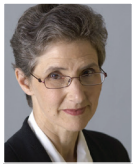

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In response to Mr. De Lottinville's application to the Tribunal, the OPP and officer in question requested that the Tribunal dismiss Mr. De Lottinville's human rights complaint pursuant to s. 45.1 of the *Human Rights Code* on the basis that the issue had already been decided under the *Police Services Act.* The Tribunal declined to dismiss Mr. De Lottinville's human rights complaint, finding that it would be unfair to do so.

The second case involved K.M., a female to male transgendered person, who alleged that Dr. Ron Kodama, an urologist, made remarks in the course of providing medical services that were discriminatory on the bases of disability and gender identity. Before applying to the Tribunal alleging discrimination by Dr. Kodama, K.M. had filed a complaint with the College of Physicians and Surgeons of Ontario ("CPSO") under the *Regulated Health Professions Act, 1991* ("*RHPA*")[6]. The CPSO's Inquiries, Complaints and Reports Committee ("ICRC") investigated K.M.'s complaint but did not refer the matter on for a hearing. The ICRC found "no independent information" that Dr. Kodama "intentionally treated [K.M.] in a discriminatory manner," but did caution Dr. Kodama regarding the quality of his communications with K.M. K.M. did not pursue a review of the ICRC's decision at the Health Professions Appeal and Review Board. Instead, K.M. brought a human rights application against Dr. Kodama to the Tribunal. In response to K.M.'s application to the Tribunal, Dr. Kodama requested dismissal of the human rights complaint pursuant to s. 45.1 of the *Human Rights Code*.

The Tribunal declined to dismiss K.M.'s application for two main reasons. First, the Tribunal found that s. 36(3) of the *RHPA* prevents Dr. Kodama from relying on the ICRC decision in support of his request to dismiss. Section 36(3) of the *RHPA* creates an absolute bar against the admission in civil proceedings of any documents, including decisions, prepared in the context of the CPSO's proceedings. The legislative purpose of s. 36(3) of the *RHPA* is to encourage members of the public to make complaints of professional misconduct against members of the health profession. The Tribunal found that the ICRC decision was privileged and inadmissible before it.

In the alternative, the Tribunal determined that the ICRC proceeding had not dealt with the human rights issue that was before the Tribunal. Although the ICRC found that Dr. Kodama did not intentionally discriminate against K.M, a determination of discrimination under the *Human Rights Code* does not require intent.

In finding the Tribunal's decisions reasonable, the Divisional Court emphasized the importance of finality, judicial economy and consistency in maintaining a fair legal system. However, the Divisional Court also explained that s. 45.1 of the *Human Rights Code* requires that the Tribunal ensure that a decision to dismiss an application does not work an injustice.

In striking this balance, the Divisional Court considered two Supreme Court of Canada decisions. In *British Columbia (Workers' Compensation Board) v. Figliola*[7] , the Supreme Court considered s. 27(1) of the *British Columbia Human Rights Code*[8] ("*BC Code*"), which is equivalent to s. 45.1 of the *Human Rights Code*. After the Workers' Compensation Appeals Tribunal found against three workers alleging that a policy fixing compensation discriminated in contravention of the *BC Code*, the workers brought their complaint to the British Columbia Human Rights Tribunal ("BC Tribunal"). The Supreme Court of Canada found that it was patently unreasonable for the BC Tribunal to hear the workers' complaint. Section 27(1) of the *BC Code* exists to prevent unfairness by ensuring the finality of decisions, promoting judicial economy, and preventing parties from circumventing the judicial review process by asking one administrative decision-maker to review another administrative decision.

In *Penner v. Niagara (Regional Police Services Board)*[9], an individual brought both a civil complaint and a complaint under the *Police Services Act* against two police officers. The Supreme Court of Canada found that even if the pre-conditions of issue estoppel are met, "the court retains discretion to not apply issue estoppel when its application would work an injustice."[10] In finding that it would be unfair to dismiss the civil action, the Supreme Court of Canada considered factors like the availability of damages and the purpose of a disciplinary proceeding as compared to a civil action.

In light of *Penner and Figliola*, the Divisional Court found that, even where the substance of a human rights application may have been dealt with in another proceeding, the Tribunal may nevertheless use its residual discretion to hear the case on its merits in the interest of fairness. For example, it may be unfair to deny an applicant the opportunity to be heard at the Tribunal when personal remedies for

6 *Regulated Helath Professions Act*, 1991, S.O. 1991, c.18.

7 *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 ("Figliola")

8 *British Columbia Human Rights Code*, R.S.B.C. 1996, c.210

9 *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 ("Penner")

10 *Penner* at para. 29.

discriminatory conduct are not (and cannot be) awarded by committees of health regulatory Colleges in matters arising from the same facts.

The Divisional Court emphasized that "the goal of professional disciplinary proceedings is different from that of a human rights tribunal" and "it is clearly in the public interest that people be encouraged, rather than discouraged, to let regulatory bodies know when the members of those bodies have engaged in discriminatory conduct."[11] This is particularly so given that victims of discrimination often come from marginalized communities and lack legal support in making their claims.

Lessons Learned

In accordance with *Tranchemontagne v. Ontario (Director, Disability Support Program)*[12] , regulatory bodies continue to have the right and obligation to decide human rights issues where they arise. *De Lottinville* affirms that professional regulatory tribunals have an obligation to "exercise their mandate in a diligent and responsible way."[13] By doing so, they maintain public confidence in the services being regulated.

It is clear from *De Lottinville* that a professional disciplinary proceeding might arise out of the same alleged discrimination as a human rights application, but the regulator's decision may not address discrimination as understood in the *Human Rights Code*. Notwithstanding Dr. Kodama's submissions, the Divisional Court denied that the Tribunal's decision constituted the type of technical review by one administrative body of another that was prohibited by the Supreme Court of Canada in *Figliola*. The Divisional Court was clear that the difference between "intentional discrimination" and "discrimination" is not "a technical one" and the Tribunal was reasonable to find that the ICRC's decision had not decided the issue of discrimination pursuant to the *Human Rights Code*.[14]

Further proceedings will be much less likely if the human rights issue is decided squarely and in a fair way. Where the human rights issue need not or cannot be decided, the Tribunal will be more inclined to take the case on, pursuant to *Penner* and *De Lottinville*.

However, even where the human rights issue has been decided squarely and in a fair way, the effect of *De Lottinville* is that the Tribunal may revisit the issue on the basis that the objectives of the proceedings are different. Even if the proceeding of the regulator was fair, it may still be unfair to dismiss a complaint made against the regulated professional under the *Human Rights Code*.[15]

Although the Divisional Court found it unnecessary to address on review, the Tribunal's decision in *Kodama* also confirms that a regulated health professional cannot rely on a College committee's decision to move for dismissal of a related human rights proceeding under s. 45.1 of the *Human Rights Code*. As previously confirmed by the Ontario Court of Appeal, s. 36(3) of the *RHPA* creates an absolute bar against the admission of decisions of College committees in civil proceedings.[16]

11 *De Lottinville* at para. 85.
12 *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14.
13 *De Lottinville* at para. 86.
14 *De Lottinville* at para. 96.
15 *Penner.*
16 *M.F. v. Sutherland* (2000), 188 D.L.R. (4th) 296.

Please join the WeirFoulds Professional Self-Regulatory Bodies Practice Group on Friday, October 16, 2015 for two panel sessions on current topics where we will discuss Human Rights & Privacy Issues for Regulators. For further information, please click here.

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